



UNHCR comments on the Commission proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) COM 2013(197) final

1. Introduction

UNHCR mandate

Seaborne migrants and refugees are not a new phenomenon and people around the world have risked their lives in unseaworthy ships to find protection.¹

UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to refugee problems.² Paragraph 8 of UNHCR's Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,³ whereas Article 35 of the Convention Relating to the Status of Refugees (hereinafter 1951 Refugee Convention)⁴ and Article II of the 1967 Protocol relating to the Status of Refugees (hereinafter 1967 Protocol)⁵ oblige state parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Refugee Convention and 1967 Protocol, including its Article 33 which prohibits expulsions or returns (*refoulement*) of refugees.

UNHCR's supervisory responsibility extends to each EU Member State, all of whom are state parties to these instruments. UNHCR's supervisory responsibility is also reflected in European Union law, including pursuant to Article 78 (1) of the Treaty on the Functioning of the European Union,⁶ which stipulates that a common policy on asylum, subsidiary protection and temporary protection must be in accordance with the 1951 Refugee Convention. This role is reaffirmed in

¹ To address this recurring issue, UNHCR has issued together with the International Maritime Organization (IMO) a leaflet providing guidance on legal provisions and practical procedures to ensure the prompt disembarkation of persons intercepted and rescued at sea including measures to meet their specific needs particularly in the case of refugees: UNHCR, *Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees*, September 2006, available at: <http://www.refworld.org/docid/45b8d1e54.html>.

² UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), paragraph 8(a).

⁴ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁵ UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations Treaty Series No. 8791, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

⁶ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:115:0047:0199:EN:PDF>.

Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United Nations High Commissioner for Refugees...on matters relating to asylum policy.”⁷

Frontex's main tasks are to coordinate cooperation and to assist Member States in the management of their external borders. Following an amendment, the Frontex Regulation stipulates that these tasks should be carried out “in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union (“the Charter of Fundamental Rights”); the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 (“the Geneva Convention”); obligations related to access to international protection, in particular the principle of *non-refoulement*, and fundamental rights.”⁸

UNHCR therefore has a direct interest in and competence to advise Member States and EU institutions in relation to EU proposals that have an impact on its persons of concern and international protection, including those related to Frontex and its operations.

The relevance of Frontex's work to UNHCR and its persons of concern, and Frontex's interest in benefiting from UNHCR's authority and expertise on international protection matters, was recognized through the two organisations' working arrangement established in 2008 through an exchange of letters.⁹

EU legal framework

The EU has sought to address the legal framework for the surveillance of maritime borders in order to ensure that it respects the Law of the Sea and other international obligations, including with regard to Frontex operations. UNHCR participated in expert meetings together with Member States, IOM and Frontex aiming at producing guidelines on Frontex's maritime operations.

In 2010, the Council adopted a Council Decision aiming “to establish clear rules of engagement for joint patrolling and the disembarkation of intercepted or rescued persons in order to ensure the safety of those seeking international protection and to prevent loss of life at sea.”¹⁰

Following the adoption of the Council Decision, UNHCR welcomed the fact that it

⁷ Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities, 2 September 1997, *Declaration on Article 73k of the Treaty establishing the European Community* [OJ C 340, 10.11.1997] available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

⁸ European Union, *Regulation No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 25 October 2011, available at: http://frontex.europa.eu/assets/About_Frontex/frontex_amended_regulation_2011.pdf

⁹ Signed on 18 June 2008. This was based on Article 13 of the Frontex Regulation providing that Frontex “may cooperate with (...) the international organisations competent in matters covered by this Regulation in the framework of working arrangements (...).”

¹⁰ European Commission, *Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union*, COM(2013) 197 final, 12 April 2013, p. 1, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0197:FIN:EN:PDF>.

restated Member States' *non-refoulement* obligations and defined specific standards to ensure disembarkation in a safe place of persons intercepted or rescued at sea. UNHCR underlined that despite being a legally non-binding text, the Council decision was "the most detailed instrument adopted thus far at EU level on the disembarkation question" and welcomed its positive references to important international protection and Law of the Sea principles.¹¹

Following an action brought by the European Parliament, the Court of Justice of the European Union annulled the Council Decision but maintained its effect until replaced by new rules. UNHCR noted at the time of proceedings that the Decision was contested on procedural grounds and issue was not taken with its content. In particular, the protection guarantees were supported.¹² UNHCR therefore welcomes the present proposal for a regulation to bring legal clarity and certainty to the rules applicable to Frontex-coordinated sea operations regarding interception, rescue at sea and disembarkation.

2. Protection of fundamental rights and the principle of *non-refoulement* (Article 4)

Non-refoulement principle

UNHCR welcomes the inclusion, in a legally binding text, of an Article on the protection of fundamental rights and the principle of *non-refoulement*, reiterating Member States' obligations not to expel or return (*refouler*) a person to territories where his/her life or freedom would be threatened, as set out in Article 33 of the 1951 Refugee Convention. Article 33 (1) of the Convention prohibits states from expelling or returning (*refouler*) a refugee in any manner whatsoever to a territory where s/he would be at risk of persecution. The prohibition of *refoulement* applies to all refugees, including those who have not been formally recognized as such, and thus to asylum-seekers whose status has not yet been determined.

UNHCR has consistently called for European border and migration management policies and procedures to incorporate safeguards to guarantee that persons seeking international protection are identified and given access to EU territory, as well as to fair and effective asylum procedures.

With regard to the surveillance of sea borders and interceptions or rescue at sea in particular, UNHCR's Executive Committee has emphasized the fundamental importance of fully respecting the principle of *non-refoulement* enshrined in Article 33 of the 1951 Refugee Convention for people at sea, underlining that: "interception measures should not result in asylum-seekers and refugees being denied access to international protection, or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or

¹¹ UNHCR, *UNHCR's observations on the European Commission's proposal for a Regulation of the European Parliament and the Council amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX)*, COM(2010)61 final, p. 5, available at: <http://www.refworld.org/docid/4cb881a02.html>.

¹² Ibid, p. 5.

where the person has other grounds for protection based on international law.”¹³ This principle was in question in the case of *Hirsi and Others v. Italy*, in which UNHCR intervened as a third party to recall the scope and the extraterritorial applicability of the *non-refoulement* obligation under international refugee law.

Inclusion of the refugee definition

In order to bring the proposed Article fully into line with the obligations under the 1951 Convention and the EU asylum *acquis*, UNHCR suggests inserting in Article 4(1) the wording of the refugee definition of Article 1(A) of the 1951 Convention, reflected in Article 2 of the Qualification Directive: specifically, a reference to risks of persecution due to a well-founded fear of persecution based on one of the five grounds in addition to the risks of death penalty, torture, inhuman or degrading treatment.

Guarantees in th receiving country

UNHCR welcomes the inclusion of Article 4(2), which reflects the ruling of the European Court of Human Rights in the *Hirsi* judgment. The ECtHR concluded that the *non-refoulement* obligation under Article 3 ECHR requires the returning state to assess the treatment to which applicants for asylum would be exposed upon their return; and further requires the returning state to verify the compliance, in practice, of the receiving state with its international obligations in asylum matters. This provision is key, as the returning state’s responsibility can be engaged in the context of indirect *refoulement*. In carrying out any return, the state returning must ensure that the receiving country offers sufficient guarantees to prevent arbitrary removal to the country of origin.¹⁴

Identification of individual situation

Similarly, the inclusion in Article 4(3) of the obligation to identify and assess the circumstances of intercepted persons rightly reflects the ECtHR’s finding in its *Hirsi* judgment of a violation of Article 4 Protocol 4 to the ECHR (prohibition of collective expulsions) on account of the state’s failure to carry out an examination of each applicant’s individual situation by trained personnel assisted by interpreters and/or legal advisers. Examination of individual circumstances should be undertaken in the context of border control, interception, and rescue at sea. UNHCR stresses that, in line with the principle set out in Article 4 of Directive 2013/32/EU, this provision does not grant participating units the prerogative to examine a claim or to interview the applicant on the substance of an application at sea. Individual identification at sea should aim to establish individual circumstances and cannot result in a *de facto* admissibility procedure or substitute the asylum procedure. UNHCR would not be in favour of processing an application for international protection onboard a vessel. The scope of the recast Asylum Procedures Directive extends to territorial waters¹⁵ and its recital 26 has clarified that where persons are in territorial waters “they should be disembarked on land and have their applications examined in accordance with this Directive.”¹⁶ Appropriate referral mechanisms to the competent asylum authorities in charge of

¹³ UNHCR, *Conclusion on Protection Safeguards in Interception Measures*, 10 October 2003, No. 97 (LIV) – 2003, available at: <http://www.refworld.org/docid/3f93b2894.html>,

¹⁴ See UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <http://www.refworld.org/docid/51af82794.html>

¹⁵ European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L 180, June 2013, pp 60 – 94, Article 3(1), available at: <http://www.refworld.org/pdfid/51d29b224.pdf>.

¹⁶ *Ibid*, Recital 26.

assessing asylum claims must be in place upon disembarkation.

Right to obtain information

UNHCR also welcomes the obligation for participating units to provide intercepted persons with information on the place of disembarkation and give them the opportunity to express reasons against their disembarkation in that specific state. This provision is key for assessing the individual circumstances of each applicant. Although the “general situation” in a third country, following consideration under Article 3(2), might suggest that disembarkation is appropriate, an individual’s personal circumstances may prohibit his/her disembarkation in that country. The Court in *Hirsi* also confirmed its finding in the *M.S.S v Belgium and Greece* judgment that the right to obtain sufficient information is key to providing effective access to asylum procedures.

UNHCR therefore supports the inclusion of these guarantees under Article 4(3) but considers that, similarly to the wording of Article 4(2), the required steps should be taken “before deciding on disembarkation in a third country” in order to be made fully effective.

Training of border authorities

Border guards play an important role in international protection by identifying those in need of protection and admitting them to EU territory where sending them back could amount to or result in *refoulement*. An important aspect of ensuring protection-sensitive border management is providing appropriate training to border guards. UNHCR therefore welcomes the inclusion of a specific obligation to train border guards taking part in sea operations. UNHCR cooperates with Frontex in the delivery of training on international human rights and refugee law.¹⁷ UNHCR considers that a reference to Article 5 of the Frontex Regulation could be inserted to clarify that pre-deployment training should include “relevant Union and international law, including fundamental rights and access to international protection and guidelines for the purpose of identifying persons seeking protection and directing them towards the appropriate facilities”.¹⁸

Recommendations:

- ✓ UNHCR recommends that Article 4(1) is reworded to include the definition of “refugee” in Article 1(A) of the 1951 Refugee Convention which is reflected in Article 2 of the Qualification Directive:

“No person shall be disembarked in, or otherwise handed over to the authorities of a country where *his/her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion, pursuant to Article 2 paragraph (d) and (f) of the Directive 2011/95/EU or there is a serious risk that such person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment or from which there is a serious risk of expulsion, removal or extradition to*

¹⁷ See for example UNHCR, *Protection Training Manual for European Border and Entry Officials*, 1 April 2011, available at: <http://www.unhcr.org/4d948c736.html>.

¹⁸ European Union, *Regulation 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union*, 25 October 2011, available at: http://frontex.europa.eu/assets/Legal_basis/frontex_amended_regulation_2011.pdf

another country in contravention of the principle of non-refoulement.”

- ✓ UNHCR recommends that Article 4(3) is amended to replace the phrase “in case of disembarkation in a third country” with “before deciding on disembarkation in a third country”, similarly to the wording of Article 4(2), in order to ensure that individual circumstances are taken into account before disembarkation is decided upon.
- ✓ UNHCR recommends the inclusion of a reference to Article 5 of the Frontex Regulation on training in Article 4(5) in order to clarify that pre-deployment training should include: “relevant Union and international law, including fundamental rights and access to international protection and guidelines for the purpose of identifying persons seeking protection and directing them towards the appropriate facilities”.

3. Interception in territorial seas (Article 6)

Non-refoulement in territorial waters

The principle of *non-refoulement* applies wherever a state exercises its jurisdiction, including in territorial waters during interception or search-and-rescue operations at sea. It follows that Article 6 on interception in territorial seas should be expressly subject to Article 4 on the protection of fundamental rights and the principle of *non-refoulement*.

In particular, the *non-refoulement* principle applies to Article 6(1)(e) which provides for the possibility of ordering a ship to modify its course. It is unclear whether this provision is intended to allow for the possibility of diverting a vessel towards a third country, the country of origin, or to international waters. “Pushbacks” to international waters could lead to a risk of orbit, potential *refoulement*, and possible risks to safety UNHCR recommends this is clarified and references to Articles 3, 4 and 9 are inserted in order to ensure that the protection of fundamental rights and the principle of *non-refoulement* are respected when envisaging ordering a ship to modify its course. These principles should also apply to Article 6(3), which sets out the rules for authorization by coastal Member States of interception measures against stateless ships within their waters that are suspected of intending to circumvent borders or of smuggling; and to Article 8 concerning interceptions in the contiguous zone.

Applicability of the Asylum Procedures Directive

Directive 2013/32/EU on common procedures for granting and withdrawing international protection (Asylum Procedures Directive) also applies to interception and search-and-rescue operations in territorial waters. The Directive’s scope specifies that it is applicable to all asylum applications made “in the territory, including at the border, **in the territorial waters** or in the transit zones of the Member States” [emphasis added].¹⁹ UNHCR therefore recommends that recital 5 of the proposed Regulation be amended to include a reference to the recast Asylum Procedures Directive, in particular the revised wording of its Article 3.

¹⁹ Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L 180/60, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:180:0060:0095:EN:PDF>.

Victims of trafficking

In the context of mixed migration movements, victims of trafficking may also be present together with smuggled persons on board ships. UNHCR would therefore recommend adding in Article 6(1) a reference to trafficking together with smuggling and requirements for appropriate protection through referrals for response to their needs as may be relevant

Recommendations:

- ✓ Recital 5 should be amended in order to make reference to the recast Asylum Procedures Directive, in particular its revised scope: “Member States and the Agency are bound by the provisions of the asylum *acquis*, and in particular **Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast)** with regards to applications for asylum made in the territory, including at the border, **in territorial waters**, or in the transit zones of the Member States.”
- ✓ UNHCR recommends amending Article 6(1) in order to include a reference to victims of trafficking: “or is engaged in the smuggling **and/or trafficking** of migrants by sea **in accordance with Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.**”
- ✓ UNHCR recommends the inclusion in Article 6(1)(e) of a reference to Article 4 on the principle of *non-refoulement*: “ordering the ship to modify its course outside or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby until the ship is heading on such course, **subject to Articles 3, 4, and 9, and to other applicable International and European law.**”

4. Interception on high seas (Article 7)

Extraterritoriality of non-refoulement

The territorial scope of Article 33 (1) of the 1951 Convention is not explicitly defined in the Convention. The meaning, purpose and intent of the provision demonstrate, in UNHCR’s view, its extraterritorial application including to interception on the high seas. Furthermore, the extraterritorial applicability of human rights obligations contained in various instruments supports this position.²⁰

In its submission to the ECtHR in the *Hirsi* case, UNHCR underlined that “the principle of *non-refoulement* applies whenever a state exercises jurisdiction. Jurisdiction can be based on *de jure* entitlements and/or *de facto* control. *De jure* jurisdiction on the high seas derives from the flag state jurisdiction. *De facto* jurisdiction on the high seas is established when a state exercises effective control over persons.”²¹

²⁰ UNHCR, *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, 29 March 2011, Application no. 27765/09, para 4.2., available at: <http://www.refworld.org/docid/4d92d2c22.html>.

²¹ *Ibid*, para 4.3.

The ECtHR confirmed in its judgment that the flag state has *de jure* jurisdiction over the acts committed on board its ships.²² It follows that where states exercise jurisdiction, state responsibilities under international human rights and refugee law are engaged, including for protection against *refoulement* and their obligation to ensure that asylum-seekers are able to access fair and effective asylum procedures.

UNHCR is therefore concerned that Article 7(1)(f) providing for the possibility to hand over persons to third countries may be contrary to the *Hirsi* judgment. In its submission, UNHCR had underlined that once jurisdiction is exercised “states are obliged, *inter alia*, not to hand over those concerned to the control of a state where they would be at risk of persecution (direct *refoulement*), or from which they would be returned to another country where such a risk exists (indirect *refoulement*).²³ The Court concluded in the *Hirsi* case that Italy had exercised *de facto* control over persons on board the ships in question, and that it had violated its obligations by handing those persons over to Libyan authorities without an assessment of whether each person concerned had access to an effective asylum procedure upon return and whether she would be subject to detention or living conditions contrary to Article 3 ECHR.²⁴ UNHCR considers that Article 7(1)(f) should be brought in line with the caselaw of the ECtHR through the inclusion of an explicit reference to Article 4 on the principle of *non-refoulement* in the introductory part of Article 7. The application of Article 4 is also of importance in the application of Article 7(1)(e) in order to ensure that persons are not pushed back or prevented from reaching territorial waters in circumstances where this could interfere with access to asylum, lead to a risk of *refoulement* or orbit, or endanger to safety at sea.

Recommendation:

- ✓ Article 7 should be amended to include a reference to Article 4 on the principle of *non-refoulement* in particular in the context of Article 7(1)(f) regarding the possibility to conduct the vessel to a third country:

“On the high seas, the participating units shall take one or more of the following measures when there are reasonable grounds to suspect that a ship is engaged in the smuggling of migrants by sea subject to the authorisation of the flag State in accordance with the Protocol against the Smuggling of Migrants, **and subject to the application of Articles 3, 4 and 9;**”

²² *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, para 75, available at: <http://www.refworld.org/docid/4f4507942.html>.

²³ *UNHCR intervention before the European Court of Human Rights in the case of Hirsi and Others v. Italy*, para 4.3.4.

²⁴ See point 1 above.

5. Search and rescue at sea (Article 9)

International law of the sea establishes clear obligations for shipmasters to rescue those in distress at sea.²⁵ The UN Convention on the Law of the Sea (UNCLOS),²⁶ the International Convention for the Safety of Life at Sea (SOLAS Convention),²⁷ and the International Convention on Maritime Search and Rescue (SAR Convention)²⁸ require states, *inter alia*, to provide for search-and-rescue operations, to ensure arrangements for distress communications, and to provide assistance to any person in distress at sea regardless of nationality or status. Amendments to the SOLAS and SAR Conventions in particular require states to release shipmasters assisting persons in distress at sea from their obligations with minimum deviation, and that disembarkation should be arranged as soon as practicably possible.²⁹

As part of discussions on the European Commission's Task Force on the Mediterranean,³⁰ UNHCR has provided some inputs proposing possible actions within the EU including strengthening rescue at sea, disembarkation and responses to protection and other needs, which could be reflected in this proposal. UNHCR has suggested reinforcing SAR patrolling along Mediterranean routes; and that SAR activities should be initiated wherever there are indications that conditions of the ship or persons on board do not allow for safe travel including severe overcrowding, poor conditions of vessels, lack of necessary equipment and absence of professional personnel, and weather conditions.³¹ UNHCR therefore welcomes the inclusion in Article 9(6) of such elements when assessing the situation in the context of search and rescue.

Safety of persons intercepted or rescued

UNHCR welcomes the introduction in EU law of an obligation to render assistance to persons in distress at sea regardless of their status. This will contribute providing legal clarity on Member States' obligations to provide assistance to persons in distress at sea. To further strengthen this principle, UNHCR would recommend including an express reference to Article 3 thus recalling that Search and Rescue Operations should ensure the safety of persons intercepted or rescued.

²⁵ See also UNHCR, *Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees*, September 2006, available at: <http://www.refworld.org/docid/45b8d1e54.html>.

²⁶ UN General Assembly, *Convention on the Law of the Sea*, 10 December 1982, available at: <http://www.refworld.org/docid/3dd8fd1b4.html>.

²⁷ International Maritime Organization (IMO), *International Convention for the Safety of Life At Sea*, 1 November 1974, 1184 UNTS 3, available at: <http://www.refworld.org/docid/46920bf32.html>.

²⁸ International Maritime Organization (IMO), *International Convention on Maritime Search and Rescue*, 27 April 1979, 1403 UNTS, available at: <http://www.refworld.org/docid/469224c82.html>.

²⁹ International Maritime Organization (IMO), *Resolution MSC.155(78), Adoption of Amendments to the International Convention on Maritime Search and Rescue*, 1979, 20 May 2004, available at: <http://www.refworld.org/pdfid/432aca724.pdf>.

³⁰ European Commission, *Communication of the Commission to the European Parliament and the Council on the work of the Task Force on the Mediterranean*, 4 December 2013, COM (2013) 869 final, available at: http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204_communication_on_the_work_of_the_task_force_mediterranean_en.pdf.

³¹ UNHCR, *Proposal for a Central Mediterranean Sea Initiative: EU solidarity for rescue-at-sea, protection and comprehensive responses*, 16 October 2013, available at: <http://www.refworld.org/docid/52c172f84.html>.

Definition of a “place of safety” and termination of SAR operations

The International Maritime Organization (IMO) adopted Guidelines on the Treatment of Persons Rescued at Sea³² to provide guidance on how to implement states’ obligations under international maritime law, specifying in particular that the state responsible for the SAR area is responsible in the last instance for providing a place of safety.³³ The Guidelines also provide a definition of “place of safety” as a place where the rescued person’s life is no longer threatened, basic human needs can be met, and transportation arrangements can be made to next or final destination, having regard to the “[t]he need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened.

UNHCR has stated with regard to duties of shipmasters that the duty of rescue “ends when passengers have been disembarked at a place of safety”.³⁴ In order to provide clarity on search-and-rescue and disembarkation responsibilities (see also section 6 below), it is therefore also necessary to clarify when the search-and-rescue operations terminate and the related definition of a place of safety. UNHCR would therefore recommend the inclusion in Article 9 of a provision specifying that a SAR operation concludes when survivors are disembarked to a place of safety in accordance with Articles 2(11) and 10.

6. Disembarkation (Article 10)

In order to ensure effective rescue at sea, it is important to develop effective and predictable mechanisms for identifying without delay places of safety for the rapid disembarkation of rescued refugees and migrants. In practice, however, gaps remain regarding arrangements for disembarkation. UNHCR therefore welcomes the proposal to bring legal clarity to this issue in the context of Frontex-led operations.

Similarly, UNHCR welcomes the provisions in Article 10(2) which provide for disembarkation in the host Member State in case of interception in the territorial sea.

In the case of interception on the high seas, UNHCR welcomes the inclusion in Article 10(3) of a reference to the application of Article 4 on the principle of *non-refoulement* for disembarkation in a third country.

³² International Maritime Organization (IMO), *Resolution MSC.153(78), Adoption of Amendments to the International Convention for the Safety of Life at Sea*, 20 May 2004, available at: <http://www.refworld.org/docid/432acb464.html>.

³³ *Ibid*, paras 2.5. This obligation is also articulated in International Maritime Organization (IMO), *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea*, 22 January 2009, FAL.3/Circ.194, available at: <http://www.refworld.org/docid/524be8244.html>.

³⁴ UNHCR, *The treatment of persons rescued at sea : conclusions and recommendations from recent meetings and expert round tables convened by the Office of the United Nations High Commissioner for Refugees : report of the Office of the United Nations High Commissioner for Refugees*, 11 April 2008, A/AC.259/17, para 21, available at: <http://www.refworld.org/docid/49997aeb27.html>.

The IMO's Guidelines on the Treatment of Persons Rescued at Sea stipulate that disembarkation of asylum-seekers and refugees recovered at sea, in territories where their lives and freedoms would be threatened, should be avoided.³⁵

UNHCR has clarified that "... disembarkation of people rescued in the Search and Rescue (SAR) area of an EU Member State should take place either on the territory of the intercepting/rescuing state or on the territory of the state responsible for the SAR. This will ensure that any asylum-seekers among those intercepted or rescued are able to have access to fair and effective asylum procedures."³⁶

Article 10(4) provides for cooperation with the responsible RCC to secure disembarkation following a SAR operation, possibly to a third country.

Accordingly, UNHCR recommends that Article 10(4), specifies that a suitable port of safety for disembarkation following search-and-rescue situations is identified "subject to the application of Article 4".

UNHCR also welcomes the provision at Article 10(4) that disembarkation should be rapid and effective, thus seeking to avoid situations of uncertainty which may lead to rescued persons remaining at sea for long periods of time.

UNHCR has, in its contribution to the Task Force on the Mediterranean,³⁷ suggested that the identification of a place of disembarkation should take into account the availability of capacity to address immediate post-disembarkation needs.

In addition, UNHCR has also suggested that disembarkation could be used as a tool for solidarity between EU Member States. In order to ensure solidarity and responsibility-sharing between Member States, the modalities for disembarkation in the operational plan could specify that disembarkation does not necessarily imply sole responsibility of the state on whose territory persons rescued at sea are disembarked. An EU pilot could be put in place, with the support of the European Asylum Support Office (EASO) where support teams would be responsible for processing international protection claims of persons disembarked following rescue at sea. In addition, the operational plans should provide clarity in cases where, in the context of mixed migratory movements, some persons may be disembarked in a third country, while others, who may be in need of international protection, may not.

Recommendation:

- ✓ Article 10(4) should be amended to include a reference to Article 4 on the principle of *non-*

³⁵ International Maritime Organization (IMO), *Resolution MSC.167(78), Guidelines on the Treatment of Persons Rescued At Sea*, 20 May 2004, available at: <http://www.refworld.org/docid/432acb464.html>.

³⁶ UNHCR, *Letter of the High Commissioner for Refugees to the Czech Republic European Union Presidency*, 28 May 2009, <http://www.unhcr.org/refworld/docid/4ae9accd0.html>.

³⁷ UNHCR, *Proposal for a Central Mediterranean Sea Initiative: EU solidarity for rescue-at-sea, protection and comprehensive responses*, 16 October 2013.

refoulement:

“Without prejudice to the responsibility of the Rescue Coordination Centre, the host Member State and the participating Member States shall as soon as possible ensure that a port or place of safety is identified taking into account relevant factors, such as distances to the closest ports or places of safety, risks and the circumstances of the case, ***subject to the application of Article 4.***”

7. Conclusion

UNHCR notes that since the Commission proposal, EU institutions have reached agreement on amendments to the proposed Regulation which has received the support of the European Parliament’s Civil Liberties Committee and the Member States;³⁸ paving its way for final adoption in April 2014.

In this context, UNHCR would like to conclude with the following additional, non-exhaustive remarks.

UNHCR notes that the proposed new recital 1b further clarifies the limited scope of the Regulation to border surveillance operations carried out in the context of Frontex Operations. While UNHCR welcomes the adoption of the Regulation with a view of bringing clarity and certainty to the rules applicable to Frontex-coordinated sea operations regarding interception, rescue at sea and disembarkation, it notes that their scope will be limited to operations carried out within Frontex Mandate.

The proposed changes to recital 6 adding a reference to the Member States’ obligations under international and Union law in particular with respect to the principle of *non-refoulement* in the context of their cooperation with third countries are also welcomed. UNHCR would however recommend the deletion of the clause following this insertion that begins with the words “whenever they are aware...”, as international obligations may not be limited to only cases where Member States “are aware or ought to be aware [of] systemic deficiencies...” in a third country.

The inclusion of a reference to the protection of fundamental rights in compliance with the principle of *non-refoulement* in the definition of the place of safety at Article 2(11) is also welcome.

UNHCR takes note that the Operation Plan of each Frontex Joint Operation shall contain the detailed provisions with regard to search and rescue and disembarkation in accordance with international law and respect for fundamental rights. UNHCR therefore welcomes the clarification included in recital 9 that the operational plan should include reference to rules and procedures applicable to the identification of and assistance to persons with international protection needs, victims of trafficking and other vulnerable groups.

³⁸ See press release of the Council of the European Union, *New rules for the surveillance of the EU external sea borders*, available at: http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/141085.pdf.

UNHCR is also encouraged by the proposed changes to Article 4 on the protection of fundamental rights and the principle of *non-refoulement* that make clear that it applies not only in the context of disembarkation but also to interceptions (including pushbacks) and transfers which may lead to a risk of *refoulement*.

UNHCR welcomes in particular the inclusion in Article 4(1) of the full definition of refugee.³⁹

However, UNHCR regrets that while some reference is made to international law, specific reference is not made to Article 4 and the principle of *non-refoulement* in Articles 6, 7 and 8. UNHCR notes that the principle of *non-refoulement* is applicable to all states' in virtue of their international obligations. This has been recalled by a specific reference at Article 4(7) specifying that this Article applies to all measures taken in accordance with this Regulation.

With regard to disembarkation, while the inclusion of a reference to the application of international law and protection of fundamental rights under Article 10(1) is welcome, UNHCR is concerned that disembarkation is subject to Article 6(1a)(b) and Article 8(2). This apparently allows for the possibility of diverting a vessel towards a third country the country of origin, or to international waters. "Pushbacks" to international waters could lead to a risk of orbit, potential *refoulement*, and possible risks to safety.⁴⁰ Specific reference should therefore be made to the applicability of Article 4 in these cases.

Finally, UNHCR notes the inclusion of a specific provision stipulating that the proposed modalities for disembarkation do not have the effect of imposing obligations on Member States not participating in the Frontex-led joint operation.⁴¹ UNHCR underlines however that all Member States are nevertheless bound by their international obligations under international maritime law and other relevant international law, including the principle of *non-refoulement*.

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³⁹ See Section 2 above.

⁴⁰ See comments in Section 3 above.

⁴¹ At Article 10(1).