Comprehensive Approaches for Addressing Irregular Movements of People by Sea

Workshop Facilitation Guide
Acknowledgements

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<tr>
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<td>Assisted Voluntary Return and Re-integration</td>
</tr>
<tr>
<td>CAT</td>
<td>Committee Against Torture</td>
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<tr>
<td>CEDAW</td>
<td>The Convention on the Elimination of All Forms of Discrimination Against Women</td>
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<tr>
<td>COMMIT</td>
<td>Coordinated Mekong Ministerial Initiative Against Human Trafficking</td>
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<tr>
<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<tr>
<td>CRPD</td>
<td>Convention on the Rights or Persons with Disabilities</td>
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<tr>
<td>ECTHR</td>
<td>European Court of Human Rights</td>
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<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
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<tr>
<td>FAL</td>
<td>Convention on the Facilitation of Maritime Traffic</td>
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<tr>
<td>GMDSS</td>
<td>Global Maritime Distress and Safety System</td>
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<tr>
<td>IAMSAR</td>
<td>International Aeronautical and Maritime Search and Rescue</td>
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<tr>
<td>ICAO</td>
<td>International Civil Aviation Organization</td>
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<tr>
<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>IOM</td>
<td>International Organization for Migration</td>
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<td>IMO</td>
<td>International Maritime Organization</td>
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<td>JRCC</td>
<td>Joint Rescue Coordination Centre</td>
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<td>LEG</td>
<td>Legal Committee</td>
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<td>MAS</td>
<td>Maritime Assistance Services</td>
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<td>MEPC</td>
<td>Maritime Environment Protection Committee</td>
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<td>MSC</td>
<td>Maritime Safety Committee</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<td>OAU</td>
<td>Organization for African Unity</td>
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<tr>
<td>PIU</td>
<td>Port Intelligence Unit</td>
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<tr>
<td>PSC</td>
<td>Port State Control</td>
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<td>RCC</td>
<td>Rescue Coordination Centres</td>
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<tr>
<td>RCF</td>
<td>Regional Cooperation Framework</td>
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<tr>
<td>RFL</td>
<td>Restoring Family Links</td>
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<td>RSC</td>
<td>Rescue Sub Centre</td>
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<td>RSD</td>
<td>Refugee Status Determination</td>
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<td>RSO</td>
<td>Bali Process Regional Support Office</td>
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<tr>
<td>SAR</td>
<td>International Convention on Maritime Search and Rescue</td>
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<td>SOLAS</td>
<td>International Convention for the Safety of Life at Sea</td>
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<td>SOM</td>
<td>Protocol Against the Smuggling of Migrants</td>
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<td>SOP</td>
<td>Standard Operating Procedure</td>
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<td>SRR</td>
<td>Search and Rescue Region</td>
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<td>SRU</td>
<td>Search and Rescue Unit</td>
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<td>TCC</td>
<td>Technical Co-operation Committee</td>
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<td>TOC</td>
<td>Convention on Transnational Organized Crime</td>
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<td>TPSA</td>
<td>Temporary Protection or Stay Arrangements</td>
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<td>UASC</td>
<td>Unaccompanied Asylum Seeking Children</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UNCLOS</td>
<td>UN Convention on Law of the Sea</td>
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<td>UNHCR</td>
<td>Office of the UN High Commissioner for Refugees</td>
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<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
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<td>UNTOC</td>
<td>United Nations Convention on Transnational Organized Crime</td>
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<tr>
<td>VoT</td>
<td>Victim of Trafficking</td>
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BACKGROUND

The Bali Process and the work on mixed migration at sea

Following the 2013 Regional Roundtable on Irregular Movement by Sea, Bali Process\(^1\) member states recommended further exploration of practical ways in which affected States could strengthen cooperation in managing irregular maritime movements, including through the development of a protection-sensitive regional approach\(^2\). In this regard, the United States Department of State’s Bureau of Population, Refugees and Migration (PRM) provided funding to the International Organization for Migration (IOM) to organize a pilot training workshop on Comprehensive Approaches for Addressing Irregular Movements by Sea: International Obligations, Standards and Good Practices. The training was jointly organised on 19-22 January 2015 in Bangkok by IOM and the Office of the United Nations High Commissioner for Refugees (UNHCR), under the auspices of the RSO and was aimed towards Bali Process government officials.

The workshop also provided an opportunity to identify key elements for the development of a standardized training curriculum that could be delivered on a regular basis in the region. The training was aimed towards mid- and senior-level government officials dealing with different aspects of irregular maritime movements, including border officials and naval police. Key stakeholders were invited to contribute to this initiative by acting as resource persons and delivering presentations, including representatives from IMO, UNODC and ICRC, as well as thematic experts from IOM and UNHCR.

The present “pilot” curriculum to be tested at an upcoming workshop was developed through a series of consultations among United Nations agencies and International Organizations. It is the intention of the RSO to make an evaluation of the pilot curriculum and to present findings at a broader Bali Process consultation among its Member States, with a view to launch an agreed curriculum that could be the standard training materials for capacity building on comprehensive approaches to irregular migration at Sea.

Finally, it can be noted that these efforts is RSO’s contribution to the call in the Co-Chairs’ statement from meeting of the Bali Process Task Force on Planning and Preparedness held in Bangkok, 27 January 2017 to take forward an update of the RSO Training Foundation for Operational Officials.

The key issues at hand

Maritime migration flows are often mixed, including ‘economic’ migrants, stateless people, and victims of human trafficking as well as individuals fleeing instability, persecution, or situations of armed conflict in their countries of origin. International law regulates the exercise of States’ actions at sea including a number of norms regarding persons found in distress. Given the rise of complex situations, often entailing loss of life, has underlined the need for international cooperation to implement the mentioned norms in a comprehensive manner. At the same time, transnational criminal networks have exploited the situation, developing ever more sophisticated systems of human trafficking and smuggling by sea, undermining states’ actions and putting at risk the life and safety of migrants and refugees. Several challenges arise in this context:

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\(^1\) The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime was established in 2002 is a voluntary forum for policy dialogue, information sharing and practical cooperation to help the region address these challenges. The Bali Process has 48 member states, as well as a number of observer countries and international agencies, including UNHCR, IOM and UNODC. The Regional Support Office was established by the Bali Process in 2012 to support and strengthen practical cooperation established within the framework of the Bali Process. [www.baliprocess.net](http://www.baliprocess.net)

\(^2\) Fifth Ministerial Conference of the Bali Process on People Smuggling, Trafficking in Persons and related Transnational Crime, Bali, Indonesia, 2 April 2013, Co-Chairs’ Statement, para. 6 [https://goo.gl/KvjsoE](https://goo.gl/KvjsoE)
i. Responding to irregular migration flows requires states to strike the right balance between sovereignty and national interest on the one hand, and their duties and responsibilities of providing assistance and protection on the other.

ii. Multiple State- and non-State actors are engaged in taking action against trafficking in persons, migrant smuggling and other forms of transnational organized crime. The actors concerned have, however, faced difficulties in agreeing on comprehensive multilateral arrangements, including action plans or regional standard operating procedures (SOPs), and distributing tasks and assigning duties in a rational manner.

iii. Maritime patrols for either interdiction or search and rescue purposes of controlling irregular flows, undertaking border surveillance, and enforcement of criminal law. At times, such patrols have extended beyond the territorial waters of the states concerned, covering also the high seas and the territorial waters of third countries. If such actions are taken extraterritorially actors will be entering into complex legal spheres.

Why should States care about Mixed migration at Sea?

| • Guarantee safety of own citizens | • Ensure integrity of borders |
| • Meet international commitments | • Limit transnational crime |
| • Prevent need for complex victim assistance (in case of TiP) | • Improve dialogue with neighbouring states |
| • Increase regional stability | • Enhance inter-state intelligence networks |

Elements of a comprehensive approach

Against this background, the development of consultative strategies and collaborative efforts among all stakeholders is crucial. Multilateral schemes of regional and/or sub-regional cooperation within the stages of the migration cycle (pre-departure, entry, stay, return and reintegration) are essential for a comprehensive approach to irregular maritime movements. The following key elements are proposed:

A humanitarian approach – The main attention of any comprehensive approach should be directed towards the saving of lives and avoiding serious harm. It is only after successful salvage operations that positive and constructive further collaborative actions can take place.

An integrated approach to irregular maritime movements – Comprehensive migration management responses combines prevention, control, protection, durable solutions and multilateral partnerships. This entails exploring possible actions that prevent irregular maritime movements through information campaigns, exchange of intelligence, dialogue between countries of origin, transit and destination, while respecting the rights of migrants, refugees, and others on the move. It also entails control/law enforcement mechanisms that allow for border integrity and state sovereignty to be maintained, while promoting inter-state collaboration and coordination. It further implies setting up protection-sensitive schemes for the provision of adequate assistance to people arriving by sea, ensuring access to differentiated processes that provide for their specific rights and needs.

Multi-actor coordination and cooperation – This will entail the design and implementation of joint actions and concerted policy initiatives involving concerned states and their specialised authorities and agencies, as well as international organizations such as UNHCR, IOM, IMO, UNODC, as well as civil society organizations, e.g. to deliveri services to sea arrivals. The migrants, asylum seekers and refugees themselves
need to be consulted through adequate procedures in order to understand their specific needs.

*Multi-stage perspective* – The entire migration cycle should be considered, with push and pull factors analysed and understood as well as the notion of migrant/diaspora dynamics. Ideally, root causes of irregular and dangerous maritime movements (lack of access to safe and regular migration channels and sustainable economic alternatives) should be addressed. The incentives for traffickers and smugglers to select maritime routes, and the aspirations and expectations of sea arrivals, should be investigated for the purpose of developing evidence-based policy responses. Collaboration among all stakeholders will therefore be a key aspect of the comprehensive approach.

*The identification of common objectives for joint action* – For a comprehensive, multi-actor, multi-stage approach to irregular maritime movements to develop, spaces for exchange, consultation and mutual learning should be provided at regular intervals. These venues will offer opportunities for the recognition of common concerns and the identification of potential common objectives in a collaborative fashion. On the basis of a common understanding of challenges and objectives, stakeholders can seek to harmonise and coordinate policies and procedures to effectively respond to irregular sea movements.

**Over-all training objectives**

This training curriculum was designed with the overall goal of assisting Bali Process member states to develop comprehensive approaches to irregular maritime movements. It aims to support Bali Process member states in their efforts to enhance regional capacity-building, to provide knowledge-based tools to work towards a harmonization of response in the field, and to ensure challenges arising in the context of irregular migration by sea are addressed in compliance with international obligations and ‘best practice’ standards, guaranteeing states’ legitimate security interests while protecting those in need.

The key objectives of this training on implementing comprehensive approaches for addressing irregular movement by sea are:

1) To provide an informed overview of the current situation regarding irregular maritime movements, both globally and within the region, identifying trends through available statistical data and expert reports;

2) To introduce the legal instruments applicable to these situations, highlighting best practice standards for implementation, taking examples from within the region as well as cross-regionally from state practice in similar settings;

3) To facilitate the distinguishing between different groups of sea arrivals so as to identify their specific needs and rights under international law and corresponding state obligations in order to tailor appropriate responses according to domestic/regional rules and procedures;

4) To provide an opportunity to apply the relevant standards to case studies and other practical exercises that allow participants to consolidate knowledge through problem solving oriented techniques, pertinent to their daily activities in their respective positions within their national administrations;

5) To exchange experiences and share effective policies, so as to foster among participants the development of a common understanding of the issues at stake, the identification of common objectives for potential joint action, and discuss possibilities for harmonised policies and procedures to address irregular maritime movements within the region, in line with international legal rules and best practice standard

**Pedagogical aspects and course format**

This course includes lectures, case studies, and group exercises, incorporating interactive training methods.

The programme starts with a general introduction of overall aims and purposes of the workshop and the presentation of global and regional trends, setting the scene to concrete content-based and policy-driven
sessions. Subsequent substantive sessions cover key themes in the context of irregular movements by sea, comprising international legal obligations and ‘best practice’ standards formulated at the global and regional level. A number of practical and participatory sessions complement the curriculum, incorporating group exercises for participants to develop appropriate responses to case studies and scenarios drawing from real-life experiences of Bali Process members and countries from other regions of the world confronted with similar challenges. Their purpose is to help participants apply the knowledge acquired, and to foster exchanges of personal insights and ‘lessons learned’ from their own practices.

Methodology - Attention will be drawn to the relevant legal instruments, actors and institutions involved to share their experiences and insights on how movements of people by sea, including migrants, asylum-seekers and refugees, have been, and should be, addressed. Practical examples and best practices are introduced during the sessions, as relevant. To this end, IOM, UNHCR and partner organization specialists, as well as by independent experts and government officials with global, regional and national expertise on issues related to irregular maritime movements, will facilitate sessions. Group discussions and inter-active exercises should lead participants to debate and enhance their understanding of the phenomenon. This ‘integrated approach’ to the examination of irregular movements by sea, combining theory and practice with discussion and problem-solving exercises, will assist participants to improve their response to the phenomenon. The final goal is for participants to jointly analyse common challenges, identify or formulate possible solutions, and consider any outstanding problems, pointing the way ahead for the development of sustainable policy and capacity building in the region.

Target audience and length of training - The training will bring together a maximum of 30 participants for a period of five days. The workshop is designed for mid- and senior level officials working on different aspects of irregular maritime movements, including: border officials, naval police, port authorities, internal security, asylum services, among others, as well as legal actors and policy makers in the fields of maritime law, international protection and border management.
COURSE DAY: ONE

Part I: introduction

SESSION ONE: KEYNOTE ADDRESS

Comment: This session will be individualised to the particular geographical/thematic situation in which the training is taking place. Personalities from the country or region can be drawn upon to give an inspirational opening to the event.

SESSION TWO: WELCOME AND INTRODUCTION TO THE TRAINING

PURPOSE: Introduction of key objectives and organisation of workshop programme, presenting background, methodology, and final goals. Introduction of workshop participants and their experience with irregular maritime flows.

Introduction to the six-day training

- Activity: participant introductions
- RSO, IOM & UNHCR introductions
- Introduction of the training

Activity - Around the room introductions (20 minutes)
Key objectives of the workshop include supporting Bali Process member states in efforts to enhance regional capacity-building to develop a comprehensive approach to address irregular movements by sea,
and providing knowledge-based tools to work towards harmonization of responses to ensure challenges are addressed in compliance with international obligations and ‘best practice’ standards.

Furthermore, the need to strengthen regional collaboration remains essential to combating transnational criminal networks and to respond holistically to humanitarian challenges. Increased harmonization of laws, policies and practices within the region will enable a coordinated, comprehensive response by member States.

**Key Challenges**

- Mixed nature of maritime flows with different categories of migrants with different specific needs and rights
- Fragmentary nature of the law of the sea and challenges for the effective implementation of international obligations
- Exploitation of maritime victims by transnational criminal networks, putting their safety at risk
- Applicability of multiple legal systems
- Protecting national security and state sovereignty
- Multiplicity of actions involved - need for cooperation and coordination
- Search and rescue obligations remain unfulfilled

**Mixed migration.** Mixed maritime migration involves vulnerable persons, refugees, asylum seekers, trafficking victims, economic migrants and people fleeing armed conflict. Comprehensive post-embarkation arrangements are thus required to ensure that the specific rights and needs of these diverse persons are met in the assistance and protection provided.

**Legal fragmentation.** International law of the sea provides for the duty to rescue, but fails to clearly allocate post-rescue responsibility, and to identify the port of disembarkation. Another unresolved issue remains the scope of interdiction powers in jurisdictional maritime areas. Marine patrols for interdiction, rescue, surveillance of borders and the enforcement criminal law are carried out territorially and extraterritorially, including on the high seas and in the territorial waters of other states. This complicates legal responsibility in particular situations.

**Exploitation.** Transnational criminal networks are developing increasingly sophisticated systems, putting migrants’ lives and safety at risk.

**Multiple legal systems** apply to irregular maritime migration, namely: law of the sea, refugee law, migration law, human rights law, and international criminal law.

**National security.** Sophisticated criminal networks undermine maritime safety, border control, law enforcement and migration management that threaten national interests and state sovereignty.

**Multiple actors** have engaged in efforts to rescue those in distress at sea, to address human trafficking and migrant smuggling, to assist victims, to ensure international protection to those in need: states, NGOs, intergovernmental organizations and the private sector. Yet, difficulties remain in agreeing on comprehensive multilateral frameworks and the assignment of duties.
The development of an **effective comprehensive approach** to irregular maritime movements entails several components:

**Integrated approach.** A comprehensive migration management response combines: prevention, control, protection, durable solutions and multi-lateral partnerships.

**Multi-actor coordination in design and implementation of joint actions.** Actors include: states, specialized inter-governmental agencies (IOM, UNHCR, IMO, UNODC), civil society (NGOs, faith-based organizations, etc.) and migrants, asylum seekers and refugees. Multi-lateral coordination schemes at regional and sub-regional levels are necessary. Effective coordination constitutes one of the key challenges.

**Multi-stage perspective.** The schemes or agreements to address irregular maritime migration must operate at all levels of the migration cycle: pre-departure, entry, stay, and return and reintegration. Push and pull factors, as well as root cause, must be analysed. All existing concerns must be taken into account. Data collection and sharing are a necessary element of developing comprehensive arrangements.

**Identifying common objectives for joint action.** Opportunities for consultation and mutual learning at relevant intervals to develop a common understanding of the problem and to foster the identification of common objectives are necessary for developing and maintaining a coordinated and effective approach.

**Harmonization of policies and procedures.** Based on the common understanding of objectives, policies and procedures should be harmonized across stakeholders to ensure effective response. Harmonized policies are particularly important in the areas of search and rescue and disembarkation, interdiction and law enforcement, and reception and post-disembarkation arrangements.

**Humanitarian approach.** Cooperation among states and stakeholders is needed to address the loss of life, trauma and abuse affecting irregular migrants who fall victim to the criminal networks of smugglers and traffickers, including by addressing the drivers of dangerous sea journeys, and to ensure the victims' human rights and dignity post-disembarkation.
Global and regional trends. The workshop will provide an opportunity to present trends in irregular movements by sea, drawing on statistics and including a short film on the realities in different regions.

Law of the Sea A general introduction of the Law of the Sea Convention (UNCLOS) and its regulation of jurisdictional zones.

Migration law Discussion will be on state powers to administer migration flows and the rights of migrants, which function to limit state power.

Refugee law A general introduction to the 1951 Refugee Convention and the 1967 Protocol, the principle of non-refoulement and international protection will be presented. Collective expulsions and the practice of "push back" by some State will also be discussed.

Application of Conventions While this course speaks about international standards it refers in most often in general to such standards as they are expressed in United Nations Conventions. Among the Bali process countries there will naturally be divergencies countries the mentioned standards in according to the state of ratification and/or incorporation in the individual case.

Transnational crime. UN Convention on Transnational Organized Crime (UNTOC) and the Palermo Protocols on human trafficking and migrant smuggling will be presented, paying particular attention to their relation to interdiction as set forth in the law of the sea, as well as protection standards for trafficking and smuggling victims.

Mixed migration. The different categories of persons in mixed flows, and the factual circumstances giving rise to specific needs and applicable rights.
*Group exercises.* Case studies on international standards and rescue at sea.

**Interception, search and rescue at sea.** The discussion will cover the powers of interdiction set forth in UNCLOS and the Migrant Smuggling Protocol, and the search and rescue regime set forth in the International Conventions on Search and Rescue (SAR) and the Safety of Life at Sea (SOLAS) and IMO best practice guidelines on search and rescue. A brief discussion on stowaways will be included.

**Law enforcement.** Discussion will cover strategies to counter migrant smuggling and trafficking, following the three "Ps" (prevention, prosecution and protection) and the three "Rs" (rescue, rehabilitation and reintegration). This component of the workshop will also involve either a field visit or a simulation exercise on investigation techniques.

**Disembarkation.** The international legal framework related to disembarkation will be presented, including the key issues covered at the Disembarkation Mapping Meeting held in Thailand in March 2014.

**Post-disembarkation.** Discussions will cover reception arrangements, protection and basic services to be provided to people arriving by sea, focusing on differentiated processes, referrals and tailored solutions.

**Durable solutions** for migrants at sea. These might include: temporary protection or stay arrangements for refugees, assisted voluntary return and re-integration (AVRR) for non-refugees and alternative migration options.

**Regional cooperation.** Collaborative schemes and fair responsibility sharing among states will be discussed and best practices on regional cooperation and coordination will be shared.

*Group exercises.* These will include one on testing disembarkation options in a real-life scenario; one to elucidate how best to identify people with specific needs and provide tailored responses according to their needs and entitlements; another on developing regional / sub-regional action plans and SOPs, taking into account key elements from other regional models.

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**SESSION THREE: OVERVIEW OF GLOBAL AND REGIONAL TRENDS OF IRREGULAR MIGRATION BY SEA**

**PURPOSE:** Setting the general background to the debate through a brief presentation and short films on key issues.

**CONTENT / LEARNING OBJECTIVES:**

- Overall presentation of trends in irregular movements of people by sea, drawing on available
Irregular maritime migration is only a small component of the overall phenomenon of international migration, but one that raises specific challenges. Although travel by sea accounts for a small proportion of refugees and migrants, it gets a disproportionate share of attention from policymakers, the media, and the public. Perhaps because it conjures up echoes of “invasion” to some people, and presents heart-rending images of suffering and death when boats founder.

Maritime migration is not only exceptionally dangerous; it is also extremely complex. Dizzying arrays of different actors are involved. At the base of the cast of characters are networks of migrants, their families, and communities in both destination and origin countries. Other actors include state structures like immigration and border protection agencies, private-sector interests such as fishing vessels and commercial shipping, international and humanitarian organizations like UNHCR, regional bodies like the European Union’s border control agency (Frontex), civil-society organizations that defend human dignity and human rights, and criminal syndicates that profit from the desperation of migrants. Each of these different actors views unauthorized maritime migration through a different lens—as primarily about humanitarian protection, law enforcement, national security, profit, or politics. Each respond to different laws, regulations, incentives, norms, and operational standards, making coherent policies difficult to achieve and implement.

Migration by sea is often met with crisis-driven responses, ranging from rescue to harsh deterrence, often rife with unintended consequences. Deterrence measures may leave refugees with no way to escape their persecutors. The interception of unauthorized boats by States has placed migrants increasingly in the hands
of professional smugglers, many of them part of ruthless criminal networks. Maritime rescue operations may unwittingly encourage more risk-taking on dangerous journeys that result in more deaths at sea.

Complicating rescue at sea, states’ obligation to refugees and certain other categories of people requiring international protection is vastly different from its obligations to other migrants. Under the terms of the 1951 UN Refugee Convention, states are not permitted to return a refugee to a territory where he or she faces the threat of persecution. States are free to return most other unauthorized migrants to their home countries. When migrants are rescued at sea, states must engage in an arduous process of distinguishing those who are refugees. The question then arises as to where those in need protection might find it. The answer generates controversy among states, and delays have discourage passing ships from rescuing people in distress.

The increasingly sophisticated tactics used by smugglers pose a major challenge to policymakers. In the past, most maritime human-smuggling operations merely tried to evade border authorities on their journey. It has been common for smugglers to deliberately draw attention to unseaworthy boats carrying migrants, or to purposely disable the boat’s engine as a coast guard or search-and-rescue vessel approaches, thereby converting an interception into a rescue situation and making it impossible for the vessel to return to its origin. In addition, having learned the mechanisms that trigger protection responses from states, smugglers will coach migrants in the behaviours and stories that may help them to be seen as refugees. The manipulation of the rescue response puts rescue itself at risk.

This is the panorama of issues that will be discussed during this 6-day workshop.

This session will briefly cover the global dimension of maritime migration, highlighting historical events, regional migratory trends and crises, and current challenges.

Slides 3-9
Here is a timeline of mass maritime migration movements during the last half century. The duty to render assistance is a basic tenet of seafaring. Traditionally it was assumed that persons rescued at sea would be fishermen or other seafarers who could be deposited at the next port of call, from where they would return to their home countries.

In the 1970s and 1980s disagreements about the disembarkation of Vietnamese boat people generated considerable regional and international tension, foreshadowing problems in the Mediterranean region and elsewhere decades later.

For many years, the U.S. has intercepted Cubans, Haitians, Dominicans and others in the Caribbean, and refused to allow intercepted persons, including those demonstrated to be refugees, to enter its territory. To avoid the obligations which would flow from the label ‘refugee’, it calls these persons ‘protected migrants’. Australia, too, has gone to great lengths to avoid bringing intercepted persons to its territory where they would benefit from Australian legal protections. Both countries have taken intercepted persons to offshore facilities where conditions have been criticised as inadequate, and where independent monitoring has been very difficult.

The maritime migration crises that occurred in the Bay of Bengal and Andaman Sea will be discussed below.
The global tally of deaths at sea is impossible to calculate, because an unknown number of boats sink, leaving no trace of their passengers. Undoubtedly many of those who died were refugees who would have qualified for protection had they managed to reach the shore. This slide represents global estimates of the death toll of maritime migration in 2014.

Mixed movements of refugees and migrants by sea across the Bay of Bengal and Andaman Sea have remained disrupted since mid-2015, with only rumors of isolated attempts and no confirmed maritime arrivals. The absence of large-scale mixed movements from Myanmar to Malaysia in 2016 followed a peak in such movements from 2012 to 2015, when nearly 170,000 refugees and migrants are believed to have travelled by sea from Bangladesh and Myanmar. This slide shows the seasonal flow across each year from 2012-2015, with lulls each rainy season.
As this table shows, some 1,800 people are estimated to have died on this route between 2013 and 2015. The fatality rate in the Bay of Bengal and Andaman sea was 1.2% from 2013 to 2015, with a peak of 1.7% in 2013. During the same period, the fatality rate in mixed movements across the Mediterranean Sea was 0.6%, with a peak of 1.6% in 2014 (in 2016, the fatality rate of the Mediterranean crossing was 1.4%). While deaths in the Mediterranean have been mostly attributed to capsizes and drownings, deaths in the Bay of Bengal and Andaman Sea were largely due to smuggler abuse and deprivation (e.g. starvation, dehydration, disease, and murder by smuggling crew). The growing number of women and girls who undertook this sea journey from 2013 to 2015 were often subjected to child marriage or other exploitative arrangements. By 2015, women and girls travelling in mixed maritime movements from the Bay of Bengal made up about 15% of all passengers, and on some vessels over half the passengers were under 18.

At least 5,000 refugees and migrants from Myanmar and Bangladesh found themselves abandoned en masse by ship crews in the Bay of Bengal and Andaman Sea in May 2015. Hundreds were unaccounted for and were believed to have drowned or died from starvation, dehydration, disease and abuse.

Naval authorities in the region initially did not allow abandoned vessels to disembark and, in some cases, reportedly pushed them further out to sea. Malaysia and Indonesia later agreed to offer temporary shelter to those still at sea and countries in the region subsequently met and put forward a set of proposals to provide humanitarian assistance, prevent human smuggling and trafficking, and address the root causes of these mixed maritime movements.

The number of irregular maritime migrants in the Mediterranean region over the past two years has been staggering. While the number of arrivals in Italy has been about the same over the past two years (130,411 entering in 2016; 132,071 in 2015), there was an enormous surge in the number of arrivals in Greece.
Despite the number of crossings in 2016 (300,000) were 42% lower than during the same period last year (520,000), the number of people reported dead or missing in 2016 (3,211) was only 15% lower than the total number of casualties for the whole of 2015 (3,771). At this rate, 2016 will be the deadliest year on record in the Mediterranean Sea.

The plan agreed to by the European Union (EU) and Member States a year ago to relocate 160,000 asylum-seekers mainly from Greece and Italy to other European countries remains to be fully implemented. So far, less than 5,000 asylum-seekers have been relocated from Greece (3,791) and Italy (1,156), which constitutes only 3% of the original target.

SHORT FILM: A short film (3:38), entitled Danger on the Deep Blue Sea: 40 Years of Peril, (available at: http://www.unhcr.org/seadialogue/) will be shown to illustrate the global dimension of ‘boat people’ in the 21st century and introduce current realities in key regional settings, including the Mediterranean, the Caribbean, the Gulf of Aden, as well as the Asia & Pacific region. This will allow discussion on similarities and differences with the situation in the region, and provide a platform for subsequent detailed discussions on theory and practice.

PART II: INTERNATIONALLY DEVELOPED STANDARDS

SESSION FOUR: LAW OF THE SEA IN THE CONTEXT OF IRREGULAR MOVEMENTS OF PEOPLE BY SEA

PURPOSE: General introduction to the Law of the Sea Convention (UNCLOS) regime and its role in the context of irregular movements of people by sea,\(^3\) paying particular attention to the regulation of the different jurisdictional zones (territorial waters; contiguous zone; Exclusive Economic Zone (EEZ); high seas) and applicable state powers and state obligations per zone. The problem of stateless/flagless vessels and the duty to render assistance under Article 98 UNCLOS/customary law will also be briefly introduced in this session, leaving the detailed study of the maritime conventions (SAR/SOLAS/FAL) for a dedicated session.

CONTENT / LEARNING OBJECTIVES:

- The basic structure and content of UNCLOS as the ‘constitution of the oceans’ will be introduced,

\(^3\) UN Convention on the Law of the Sea (UNCLOS), 1833 UNTS 3.
paying particular attention to the regime applicable per jurisdictional area, including the rights and duties of both coastal and flag states per area. The customary law nature of UNCLOS will be mentioned at this point. In this context, the role and function of IMO will also be outlined.

- The regime applicable to internal waters and the territorial sea will be expounded in detail. Article 25 UNCLOS allows coastal States to adopt ‘the necessary steps … to prevent passage’ which is non-innocent. The precise boundaries of what constitutes ‘non-innocent passage’ will be discussed. The case of vessels in distress and their entitlement to enter port and take refuge will also be addressed in this context.

- The right of police applicable within the contiguous zone will be presented. Particular attention will be paid to Article 33(1) UNCLOS, allowing ‘the coastal State [to] exercise the control necessary to prevent infringement of its customs, fiscal, immigration and sanitary laws and regulations within its territory or territorial sea’. What ‘necessary’ entails in this framework will also be discussed.

- The EEZ’s regime will be briefly expounded, with an indication of its breadth, scope, and state entitlements provided (including those of both coastal and flag states).

- The implications of the freedom of navigation principle and the flag state jurisdiction rule governing the high seas will be thoroughly explained, emphasising that any exceptions must be explicitly authorised or otherwise ‘conferred by treaty’ for other states to exercise jurisdiction. The limited instances where the UNCLOS provides for exceptional cases in which states may exercise jurisdiction with regard to vessels flying the flag of another state will be enumerated. The particular case of stateless/flagless ships will be mentioned, especially the debate surrounding Article 110 UNCLOS and the extent to which the ‘right of visit’ it provides may amount to an interdiction power. Reference will be made to flag state duties regarding safety of navigation and ‘hot pursuit’ rules.

- The duty to render assistance to persons in distress at sea, contemplated in Article 98 UNCLOS, will be introduced, leaving a thorough discussion of the SAR/SOLAS Conventions. The personal, material and territorial scope of application of this duty and the related rescue obligation will be expounded here.

- The presentation will be concluded by a 15 minutes’ quiz. The quiz will be performed in groups of two; feedback for right and wrong answers will be provided. The objective is to allow participants to check whether key elements have been understood as well as to recap essential content.
This session will focus on the UN Convention on the Law of the Sea (UNCLOS) as it applies to the context of irregular maritime movements. It will also look at the institutional framework of the International Maritime Organization (IMO). It will describe the jurisdictional zones, the duties of flag states and the implications for stateless vessels, transit regimes, the limited criminal jurisdiction exercised by states and the duty to render assistance to persons in distress. An in-depth discussion on the duty to render assistance will take later.

**Slide 2**

**UNCLOS** came into force in 1994, and resulted from the third United Nations Conference on the Law of the Sea (UNCLOS III), which took place between 1973 and 1982. As of June 2016, 167 member states have signed the treaty. It defines the rights and responsibilities of nations with respect to their use of the world’s oceans, establishing guidelines for businesses, the environment, and the management of marine natural resources.

UNCLOS is a "framework convention". Its provisions are general and can best be implemented through the specific operative regulations set forth in other international agreements.

UNCLOS broke with customary international law by introducing a new framework for jurisdictional zones and transit regimes, which will be the focus of this presentation. At the same time, it codified international customary law with respect to a ship master’s duty to render assistance to persons in distress at sea.
The International Maritime Organization is a specialized agency of the UN. It is responsible for regulating safety, security and the environmental performance of international shipping. It was established in 1948 and is now based in London.

It is governed by committees, one of which is the Maritime Safety Committee, which addresses human casualties.
The IMO has promulgated several guidelines related to irregular maritime migration. These include guidelines on rescuing persons at sea and their disembarkation, combating human trafficking and migrant smuggling at sea, and others, which will be covered later in the training.

**Slides 6-11**


**Internal waters (Art. 8)**
- Waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State.
- Sovereignty of the Coastal State.

**Archipelagic waters**
- The sovereignty of an archipelagic State extends to the waters enclosed by the archipelagic baselines, regardless of their depth or distance from the coast.
- Ships of all States enjoy the right of innocent passage through archipelagic waters.

UNCLOS established distinct **jurisdictional zones**, including: internal, territorial and archipelagic waters, a contiguous and an Exclusive Economic zone and the high seas.
A coastal state has sovereignty over a territorial sea to a maximum of 12 nautical miles from its baseline.

In contrast to the sovereignty exercised over the territorial sea, coastal states have limited policing power in the contiguous zone, which will be explored, below.

UNCLOS provides for no other jurisdictional rights of the coastal state in the EEZ, that is, no law enforcement rights.
The **high seas** are characterized by the principle of freedom of navigation. Ships on the high seas fall within the exclusive jurisdiction of their flag states, with exceptions, such as the right of visit, the right of hot pursuit and those provided for in bi-lateral and multi-lateral treaties—all of which will be detailed below.

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**Slides 12-16**

The **right of innocent passage** regime applies in territorial and archipelagic waters and straits. Coastal states have a general obligation not to *impede* the exercise of innocent passage.

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**Right of visit (continued)**

**UNTOC Migrant Smuggling Protocol**

- Allows right of visit for warships with *reasonable grounds to suspect* that the foreign flagged ship is engaged in irregular migrant smuggling to request consent of flag State to take *necessary* measures (Art. 8)

**Bi-lateral treaties** permitting interdiction of irregular migrants on the high seas:

- Italy with Albania
- Spain with Mauritania, Senegal and Cape Verde
- U.S. with Haiti
The formulation of Article 19 defining innocent passage creates a presumption that passage is innocent unless otherwise demonstrated.

For a foreign-flagged vessel to exercise the right of innocent passage, there are several conditions it must fulfil. Firstly, passage must be **continuous and expeditious**. Ships are required to proceed swiftly and with due regard for safety. Passage includes stopping and anchoring only if those are incidental to navigation or rendered necessary by force majeure or distress, or for the purpose of providing assistance to persons, ships or aircraft in danger or distress.

Coastal States may take “necessary measures” against passage that is deemed not to be innocent. While Article 25 does not set out the specific measures that a coastal State may take to prevent such passage, each State has sovereign authority to take measures consistent with international law to restrict passage. Foreign ships exercising the right of innocent passage shall comply with all such laws and regulations. Coastal states cannot suspend innocent passage in straits.

Article 25 is broadly drafted and leaves considerable discretion to the coastal State to establish measures calibrated to the circumstances. Any response, however, would be limited by the international legal principles of necessity and proportionality.

According to State practice such measures may include:

- requesting a delinquent ship to refrain from certain conduct;
- requesting a ship to leave the territorial sea;
- physical prevention of the continuation of passage;
- boarding, arrest and detention of the ship; and
• exclusion of the ship from its territorial sea.

Forms of non-innocent passage relevant to irregular maritime migration include the threat to security (such as transnational criminal networks) and the loading and unloading of persons contrary to migration laws.

**Slide 17**

**Flag State entitlements**

- One flag State only
- Exclusive jurisdiction on the high seas (and EEZ), unless exception... (Art. 92)

**Transit passage** refers to freedom of navigation solely for the purpose of continuous and expeditious transit through a strait, or between one part of the high seas and the EEZ. The requirement of continuous and expeditious transit does not preclude passage through the strait for the purpose of entering, leaving or returning from a state bordering the strait, subject to the conditions of entry to that state.

**Slides 18-19**
The right of visit, as provided by Article 110 of UNCLOS, constitutes one such recognized exception to the flag state’s exclusive jurisdiction. A foreign-flagged vessel suspected of involvement in irregular movement of persons (or other illegal activity) on the high seas can only be visited and inspected with the consent of the flag state. The power of visit and inspection do not necessarily provide States with authority to arrest a vessel, except where clearly established by law.

However, the right of visit has been used in ways that amount to the power of interdiction, interdicting migrants on the high seas in stateless vessels. Stateless vessels have no flag state protection and are thus subject to the extraterritorial jurisdiction of another authority on the high seas. Interdiction powers will be discussed later.

The right of visit does not apply to a ship entitled to complete immunity in accordance with Articles 95 and 96 of UNCLOS. These include warships and government service (non-commercial) ships.

The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the UN Convention against Transnational Organized Crime (UNTOC), establishes a right of visit for law enforcement purposes. Article 8 of the Migrant Smuggling Protocol provides for the right of visit if the warship has «reasonable grounds to suspect» that the foreign flagged ship is engaged in migrant smuggling. After requesting permission from the flag State, the intervening State can take «necessary» measures. What constitutes necessary will be discussed later in greater detail in the session on international criminal law.

In the absence of jurisdiction pursuant to UNCLOS or the Migrant Smuggling Protocol, destination and embarkation States have entered into bi-lateral agreements to permit the interdiction of illegal migrants on the high seas. Examples include those between Italy and Albania, and Italy and Libya. The agreement between Italy and Albania allowed the Italian navy not only to interdict migrants on the high seas, but also to engage in operations in Albania’s territorial sea. The agreement between Italy and Libya, the Treaty of Friendship, Partnership and Cooperation, also enabled Italy to patrol the high seas and Libya’s territorial waters and return intercepted vessels carrying irregular migrants to Libya. This bi-lateral agreement was
the subject of a case that was brought to the European Court of Human Rights related to Italy’s policy and practice of intercepting migrants on the high seas and pushing them back to Libya. The case of Hirsi Jama and Others v. Italy will be discussed later.

Right to call at port. The right of a ship to call at port, including in situations of distress or force majeure, is not addressed in UNCLOS. In cases of distress or force majeure it is an internationally accepted practice, at least to preserve human life. A state might refuse access to a port if a ship poses a serious safety, health or security threat – only after determining that the safety of persons on board is assured.

Where a ship is in need of assistance but safety of life is not involved, the IMO guidelines should be followed. Resolution A.949(23) Guidelines on places of refuge for ships in need of assistance are intended for use when a ship is in need of assistance but the safety of life is not involved. The guidelines recognize that, when a ship has suffered an incident, the best way of preventing damage or pollution from its progressive deterioration is to transfer its cargo and bunkers, and to repair the casualty. Such an operation is best carried out in a place of refuge. However, to bring such a ship into a place of refuge near a coast may endanger the coastal State, both economically and from the environmental point of view, and local authorities and populations may strongly object to the operation.

Therefore, granting access to a place of refuge could involve a political decision, which can only be taken on a case-by-case basis. In so doing, consideration would need to be given to balancing the interests of the affected ship with those of the environment.

Resolution A.950(23) Maritime Assistance Services (MAS) recommends that all coastal States should establish a maritime assistance service (MAS). The principal purposes would be to receive various reports, consultations and notifications required in a number of IMO instruments; monitoring a ship’s situation if such a report indicates that an incident may give rise to a situation whereby the ship may be in need of assistance; serving as the point of contact if the ship’s situation is not a distress situation but nevertheless requires exchanges of information between the ship and the coastal State, and for serving as the point of contact between those involved in a marine salvage operation undertaken by private facilities if the coastal State considers that it should monitor all phases of the operation.

Where the safety of life is involved, the provisions of the International Conventions on Search and Rescue and Safety of Life at Sea apply. These Conventions will be discussed later.
Within the territorial sea and archipelagic waters, the coastal state has jurisdiction to enforce criminal sanction under the four exceptions listed. For the purposes of irregular migration by sea, States have the power to enforce migration laws within the territorial sea. Although flag-bearing ships have the right of innocent passage, if passage is not innocent, as in the case of irregular migration or people smuggling, or the ship is stateless, States have interdiction power. Unloading in violation of migration laws violates innocent passage. (Art. 19).
In principle, the freedom of navigation applies in the contiguous zone. Article 33 explicitly allows the coastal State to exercise control for the purposes of immigration control. This does not necessarily extend the State's criminal jurisdiction to the contiguous zone, however. Rather, it grants a policing power, which has been referred to as "supervisory" and "preventative".

The jurisdiction granted to coastal states by UNCLOS relates primarily to prevention short of arrest, and punishment of violations that already occurred within the State's territory or territorial sea. For example, a vessel suspected of migrant smuggling in the contiguous zone could be inspected and not permitted to enter the territorial sea. It could only be arrested in the contiguous zone if it had already breached immigration laws in the territorial sea.

There is no definitive understanding on the scope of State power within the contiguous zone. At a minimum, it provides the power to issue warnings, but not to arrest, unless the arrest is conducted pursuant to another treaty, like the Migrant Smuggling Protocol of UNTOC. Another theory posits that the state can use necessary and proportionate force to effect law enforcement operations in the contiguous zones. What constitutes "necessary" under Article 33(1) remains subject to debate by legal scholars.

Because of this lack of clarity on State policing power within the contiguous zones, questions remain regarding whether « push back » policies can be considered « preventive » actions in the contiguous zone. Collective expulsions and push back will be discussed later.

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**Obligation to render assistance at sea**

- "Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew, or the passengers:
  - to render assistance to any person found at sea in danger of being lost:
  - to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him" (Art. 98)
- Applies in all maritime zones, without discrimination
Obligation to render assistance. A ship master’s obligation to render assistance at sea is a longstanding maritime tradition. Article 98 of UNCLOS codifies this obligation. The duty to rescue applies in all maritime zones.

The duty to rescue it is coupled with a duty that States must maintain maritime search and rescue systems. As emphasized in Day 2 in the discussion of the SOLAS and SAR Conventions, search and rescue duties include coordination and cooperation between States.

The duty to rescue has been further codified and expanded in subsequent conventions and guidelines, including the SOLAS and SAR Conventions and IMO, which will be discussed on DAY 2.

The personal scope of application of the search and rescue obligation is universal. It benefits ‘any person’ found in distress at sea regardless of nationality or legal status. Regarding its territorial ambit, the obligation is due ‘throughout the ocean’. The use of the generic ‘at sea’ in Article 98 UNCLOS does not seem to allow for any geographical restrictions. Otherwise, the effectiveness of the obligation would be compromised.
With respect to material jurisdiction, the term ‘distress’ has been defined in the SAR Convention 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’. The International Law Commission has confirmed that a situation of distress ‘may at most include a situation of serious danger, but not necessarily one that jeopardizes the very existence of the person concerned’. Would the unseaworthiness of the vessel per se render a boat in distress? For example, a vessel which is severely overcrowded as a result of a rescue operation may itself be a vessel in distress if it has become unsafe to sail with the number of persons aboard.

The notion of ‘rescue’ in the SAR Convention entails an ‘operation to retrieve persons in distress, provide for their initial medical or other needs and to deliver them to a place of safety’.

**SESSION FIVE: INTERNATIONAL MIGRATION LAW IN THE CONTEXT OF IRREGULAR MOVEMENTS OF PEOPLE BY SEA**

PURPOSE: Analysing the balance between state sovereignty in relation to migration and the rights of migrants, covering key entitlements in the context of irregular and mixed movements of people by sea, as recognized in international human rights law instruments, consular law, and customary international law, including international humanitarian law.

The role and contribution of IOM, other relevant actors, and partner organizations will also be introduced.

CONTENT / LEARNING OBJECTIVES:

- Presentation of the general right of states to control the entry of non-nationals into its territory, including by sea, as limited only on the basis of international obligations deriving from treaty and/or customary law.

- Introduction to comprehensive migration management of irregular migration including key elements, such as prevention, border control, international protection and assistance, addressing irregular stay (regularisation, AVRR). The latter issues will only be touched upon briefly as a session on Day 4 will cover durable solutions in detail, including legal channels. Mention will also be made of the role of regional arrangements in addressing related challenges.

- Discussion of the concept of mixed migration and its application in the context of sea journeys, exploring its implications for states and how they may exercise their powers to control the movement of persons by sea.

- The role and function of IOM, other relevant actors, and partner organisations will be highlighted in this framework.

- Special emphasis will be put on the demarcation of the personal, material and territorial scope of application of the key rights and entitlements of migrants involved in irregular movements of people by sea, so as to clearly delineate the content of the key obligations binding upon states in

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this context. Relevant sources of international human rights law, consular law, and customary international law, including IHL, will be identified and expounded.

- Particular attention will be paid to the rights to leave any country including one’s own, the right to life, the prohibition of torture and inhuman or degrading treatment or punishment (including an entitlement to adequate treatment upon rescue/interception), the prohibition of collective expulsion, the prohibition of arbitrary detention (including onboard vessels at sea), the right to consular protection and assistance to voluntary return, and the right to fair procedures and to an effective remedy, where any of the substantive rights listed may have been violated. Issues related to refugees and asylum, including the right to seek asylum and the principle of non-refoulement, will be discussed in detail during the session on international refugee law.

- The impact of extraterritoriality and the fact that rights/obligations may extend beyond the territorial frontiers of the state concerned, provided migrants come under the remit of its authority and control will be clarified. The concept of jurisdiction / 'effective control' will be explained for the purpose.

- The presentation will be concluded by a 15 minutes’ quiz. The quiz will be performed in groups of two; feedback for right and wrong answers will be provided. The objective is to allow participants to check whether key elements have been understood as well as to recap essential content.

ACTIVITY

(15 minutes)

Break into pairs. Each person should ask their partner the following questions and be prepared to introduce their partner to the group, providing their name, organization and answers to the following questions:

1. Have you ever lived in another country?

2. If you were to live in another country, which would it be, and why?
This session will cover the characteristics of mixed migration and States’ sovereign power to control the entry of non-nationals. It will then detail the limitations to States’ power with respect to migrants as determined by international human rights and humanitarian law, customary international law, and consular law. It will explain the framework for determining State jurisdiction over migrants outside of its territory. Finally, it will briefly describe the roles and functions of IOM and UNHCR.
IOM defines mixed migration as “complex population movements including refugees, asylum seekers, economic migrants and other migrants.” Contemporary irregular migration is mostly ‘mixed’, meaning that it consists of flows of people who are on the move for different reasons but who share the same routes, modes of travel and vessels. They cross land and sea borders without authorisation, frequently with the help of people smugglers.

IOM and UNHCR point out that mixed flows can include refugees, asylum seekers and others with specific needs, such as trafficked persons, stateless persons and unaccompanied or separated children, as well as other irregular migrants. The groups are not mutually exclusive, however, as people often have more than one reason for leaving home. The vast majority of migrants in mixed flows does not fit any label or legal category, but may have humanitarian and other needs. For those that do fall under these categories, these categories are not fixed, and can intersect. Example: a migrant worker who suffered sexual violence.

Also, the term ‘other irregular migrants’ fails to capture the extent to which mixed flows include people who have left home because they were directly affected or threatened by a humanitarian crisis – including one resulting from climate change – and need some type of protection, even if they do not qualify as refugees.

Mixed migration flows have three primary characteristics: i) the irregular nature of the migration; ii) the multiplicity of factors driving the migration; and, iii) the humanitarian challenges in response. Each of these characteristics requires reflection as to the implications of the approach taken.

While irregular flows impede the rule of law and undermine governmental authority to regulate the entry and stay of non-nationals, at the same time, irregular migrants disproportionately face hardships, dangers and human rights violations.

Many factors drive migration, including conflict, economic opportunity, persecution, and secondary flows. Addressing mixed migration flows must go beyond ad hoc emergency, humanitarian response. Rather, attention must be paid of the full migratory cycle, including the genesis, the movement itself, migrants’ arrivals in transit and destination countries, post-arrival stages, integration or return and re-integration.
Operational responses to irregular flows must take into account the differentiated profiles and needs of migrants, and the fact that they all possess human rights. **Doing so further ensures the integrity of the governmental authority.** Some victims have specialized needs and rights to protection. As detailed below, multiple legal instruments apply, depending upon the circumstances of each individual migrant. Thus, responding to mixed migration flows requires the need to adopt an individualized approach.

The essence of the term "common and differentiated approaches" is the requirement to address the individualized needs and rights of each migrant. Common and differentiated approaches will be covered in more extensive detail on DAY 2.

**Slides 7-10**
Protection of the rights of all categories of migrants, and empowering them to live in safety and dignity, are central to IOM’s mandate and action. At the same time, IOM supports states in developing and implementing comprehensive, balanced, coherent and rights-based migration governance policies and structures.

Effective migration management requires effective cooperation between states, which involves:
• Dialogue between states, intergovernmental and non-governmental organizations, including the private sector, on migration at the national, regional and global level, with a view toward enhancing understanding and cooperation in the management of migration;

• Regional consultative processes as effective means to enhance cooperation among States in the field of migration.

**Slides 11-13**

A State is said to have material jurisdiction if it has *de jure* and/or effective *de facto* control over a territory or a person. A state’s jurisdiction is an objective question of fact and does not depend on any subjective acknowledgement. Domestic law is not determinative for determining a jurisdiction issue under international law.
States possess broad authority to regulate the movement of foreign nationals across their borders. Although these sovereign powers are not absolute, States exercise them to determine who will be admitted and for what period of time. In support of these powers, States enact laws and regulations to govern the issuance of passports, admissions, the exclusion and removal of aliens, and border security. States vary in the types of laws and regulations adopted, with some being more restrictive than others, but all States adopt rules that govern entry into and exit from their territories.

Slides 14-15

State sovereignty is concomitant with duties and obligations as set forth by international commitments. Non-nationals enjoy all the unalienable rights applicable in international law. These derive from treaty and customary law, which include, inter alia, international human rights, international humanitarian law and refugee law. These are discussed in greater detail, below.

States’ exercise of jurisdiction triggers their responsibility under international human rights, humanitarian and refugee law. States exercise jurisdiction when they have legal competence or effective, de facto, control over migrants.
A State’s authority to regulate entry, stay, and removal on its territory is not absolute. States have a number of international responsibilities that limit or restrict their authority over migration. International migration law refers to these international responsibilities. States are increasingly realizing that migration must be managed, and that cooperation with other States is necessary. International obligations (that limit State authority over migration issues) provide a means for protecting human rights and balancing the interests of migrants with the interests of States. These international obligations are set forth in international human rights law, consular law, customary international law and international humanitarian law. Each one will be addressed separately, below.

**Slide 16**

States have broad authority, if not obligation, to represent the interests of their nationals who visit or reside in other States. Under the Vienna Convention on Consular Relations, States may establish consular posts in other countries. Consular assistance is help and advice provided by the diplomatic agents of a country to citizens of that country who are living or traveling overseas. Consular assistance includes: advice and support in the case of an accident, serious illness or death advice and support to victims of serious crime overseas, and arranging for next-of-kin to be informed, providing a list of local doctors and lawyers supervising their flag vessels in foreign harbours.

Consular assistance includes:

- Help and assisting nationals, both individuals and corporate bodies, of the sending State;
- Issue passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State; and
• Represent or arrange appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State ... where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests.

Specific training should be provided to consular staff to address the gendered needs of women migrants, in addition to other categories of persons.

Diplomatic protection is a mechanism allowing States to invoke the responsibility of the receiving State for injury to their nationals resulting from a violation of a rule of international law, including violations of international human rights law. Diplomatic protection can include consular action, negotiations with the other State, political and economic pressure, judicial or arbitral proceedings or other forms of peaceful dispute settlement. Diplomatic protection is a right of the State, not of the individual that has been wronged under international law. An injury to an alien is considered to be an indirect injury to his home country and in taking up his case the State is seen as asserting its own rights. This means that a State is in no way obliged to take up its national’s case and resort to diplomatic protection if it considers this not to be in its own political or economic interests. Diplomatic protection is distinct from consular protection, which does not internationalize the individual’s claim but merely involves an appeal by consular officials to the domestic legal order of the state where the individual’s rights were violated.

Slides 17-24

Non-nationals enjoy all of the unalienable rights applicable in international law. The International Covenant on Civil and Political Rights (ICCPR) defines such basic rights of all persons as: the right to life, liberty and security; the right not to be held in slavery or servitude; the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment; the right not to be subjected to arbitrary arrest, detention or exile; the right to marry and to found a family. Article 2 of the ICCPR specifies that such rights are provided without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.


See, CEDAW, General Recommendation No. 26, para. 24(j).
International human rights apply to all persons, including migrants and asylum seekers. There are a number of human rights known as “movement-related rights” that are particularly relevant to migrants and refugees. There is not time to cover the full range of human rights protections that apply to migrants, so the focus will be on a few key protections. Several of those on this list will be discussed under refugee rights, and others will arise in discussions on human trafficking and migrant smuggling.

‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.’ The prohibition of torture is absolute, and is found in many international human rights conventions and is a matter of customary international law. It applies during armed conflicts. The Torture Committee in its General Comment No. 2 explicitly situated gender-based violence and abuse within the scope of the Convention against Torture.

It is also a component of the principle of non-refoulement as the well-founded fear of persecution includes the fear of torture and inhuman and degrading treatment. Any form of international protection applied should include be a protection from torture.

The prohibition against torture has been found to create an entitlement to adequate treatment upon rescue/interception.
All international human rights conventions contain non-discrimination clauses. The right to be free from discrimination requires that States’ laws and policies must not discriminate against migrants, that is, it limits the distinctions that States can make between its citizens and migrants. Although some differences in treatment may be allowed, they cannot be based on any of the protected categories set forth in the law.

The prohibition of discrimination has two important implications for rescued and intercepted migrants by sea. First, the duty to rescue at sea applies irrespective of nationality or circumstances. Secondly, States can’t discriminate in ensuring human rights protections to rescued and intercepted migrants.
The "best interest of the child" standard applies to all acts concerning children, public or private (by the social welfare system, courts and administrative bodies). In cases involving children, the “best interests of the child” is also a paramount factor, limiting a State’s right to remove an alien from its territory.

The right to found a family is enshrined in several international human rights instruments, including the Universal Declaration of Human Rights, which constitutes customary international law.

A tension arises between the ability of States to control entry and residence within its borders and the impact this control has over an individual’s right to family life. When this power of control results in the deportation of an individual, this may cause a breach of an individual’s right to stay with their family. This conflict occurs where the immigrant is the spouse, parent or relative of a State's citizen, and the State wishes to remove or refuse entry to the immigrant.

Family unity includes family reunification in cases where a family has been separated. This can place a positive obligation on a State to allow entry to a person.

The Convention on the Rights of All Migrant Workers and Members of their Families entered into force in July 2003, and has been ratified by 49 countries.

In addition to codifying the application of inalienable rights to migrant workers, it provides for social and economic rights, including equality in remuneration (Art. 25) and the right to urgent health care (Art. 28). It permits some distinction with nationals to be made, for example with regard to social security benefits, and the right to freely choose one's employment (Art. 52).
The Convention mainly deals with social and economic rights, it is relevant here for its reaffirmation of the right to freedom of movement (Art. 39), consular protection (Arts 23). It prohibits collective expulsion, (Art. 22).

The Convention also requires State cooperation, for example in the return of migrants to their country of origin (Art. 67). Particularly relevant for the prevention and elimination of trafficking in persons and smuggling of migrants, Article 68 invites States parties to collaborate with a view to preventing and eliminating illegal or clandestine movements and employment of migrant workers in an irregular situation. The measures States parties should take include: (a) measures against the dissemination of misleading information relating to emigration and immigration; (b) measures to detect and eradicate illegal or clandestine movements of migrant workers and members of their families and to impose effective sanctions on persons, groups or entities that organize, operate and assist in organizing or operating such movements; (c) measures to impose effective sanctions on persons, groups or entities that use violence, threats or intimidation against migrant workers or members of their families in an irregular situation.

**Slide 25**

Before discussing the rights accorded to refugees and asylum seekers, which we be done in the next session (Session 5) it is important to distinguish migrants and refugees. This can be difficult as policymakers, international organizations, and media outlets understand and use the word ‘migrant’ as an umbrella term to cover both migrants and refugees. ‘Migration’ is often understood to imply a voluntary process, and a migrant as someone who crosses a border in search of better economic opportunities. However, the search for better opportunities can also be caused by hardships, climate change of other adversities. **Refugees** are people outside their country of origin because of feared persecution, conflict, violence, or other circumstances that have seriously disturbed public order, and who, as a result, require ‘international protection’.

Blurring the terms ‘refugees’ and ‘migrants’ takes attention away from the specific legal protections refugees require, and can undermine public support for refugees and the institution of asylum. Mixed migration flows create difficulties in identifying refugees and asylum seekers to ensure their protection, which will be discussed later.
The freedom of movement and residence within the border of a State applies only to persons lawfully within the territory of a State, not to undocumented migrants or migrants in an irregular situation.

The right to leave any country including one’s own implies a right to travel and have access to appropriate travel documents. Under international law, there is no corresponding right to enter the territory of another country. This creates a major limitation on the right to freedom of movement and is an example of a gap in international migration law.

The right to return to one’s own country has been the subject of lengthy debate because “own country” raises issues as to whether citizenship is a requirement. Arguably, this right includes aliens and stateless persons who have a strong attachment to a State such that they view it as their home country, for example, long-term residents.

The duty of States to accept returning nationals is generally accepted to be a norm of customary international law. Most logically, it is the State of origin who must allow the individual to return. In order to clarify the duty therefore, returning States and States of origin are increasingly entering into bilateral agreements known as “readmission agreements”. In practice, the duty to readmit is often hampered by lack of travel or identification documents.

All persons have a right to seek asylum, but a State does not have a corresponding legal duty to grant asylum or allow asylum-seekers entry to its territory.
States are not free to detain or expel aliens at will. In this regard, closed reception centres for migrants are considered as detention. The term “arbitrary” can be defined as including elements of inappropriateness, injustice or lack of predictability. In order to not be considered as arbitrary, the detention in question must be: necessary, reasonable, proportionate and non-discriminatory.

Detention should be used only as a last resort, where legal grounds are shown, and subject to judicial control. Special attention should be paid to safeguards as they relate to minors. Alternative to detention should be employed whenever possible.

Similarly, expulsion cannot be arbitrary, nor can it be discriminatory. There are certain international human rights standards that must be respected. For example, a State would be in violation of its international responsibilities if it decided to expel all persons of a certain race. Expulsions and detentions must not be carried out with ill-treatment or torture. Due process must be respected. Under international law, an alien has the right to have the expulsion decision reviewed and to have proper representation.

Grounds for exclusion and deportation may be similar: public health, criminal convictions or activities, earlier violations of immigration law, economic reasons, for example, in addition to the national security grounds discussed previously. Procedures may differ substantially, however, and States generally provide more rights to persons already in the countries to contest the deportation or expulsion. This stance is consistent with international law. Article 13 of the ICCPR provides that aliens lawfully present in a State are entitled to procedural protections prior to being expelled, including review by a competent authority and the opportunity to submit reasons against the expulsion. These procedural rights may be denied, however, if national security so requires. Clearly, those unlawfully present would not be entitled to the same level of procedural protection, although many States recognize that individuals gain equities and rights the longer they are present on their territory. Moreover, States need to establish a procedure to determine if the alien falls into a category protected against return (e.g., persons fearing persecution or torture).

The application of the prohibition of collective expulsions to the maritime migration context will be addressed in greater detail in the session on international refugee law on DAY 2.

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6 UNGA res. 64/142. Guidelines for the Alternative Care of Children
7 UNHCR, Bilateral and/or multi-lateral arrangements for processing claims for international protection and finding durable solutions for refugees, para. 9(e).
Where irregular movements by sea occur in the **context of armed conflict**, international humanitarian law may be relevant. The foundation of international humanitarian law consists of four Conventions, known collectively as the **Geneva Conventions of 1949**. There are also three additional Protocols, which bring up to date the rules governing the conduct of hostilities and those protecting war victims.

The Geneva Conventions apply only to international armed conflicts. Only Common Article 3 and Additional Protocol II apply to non-international armed conflict (between Government forces and non-governmental armed groups, or between non-governmental armed groups). These instruments codify longstanding rules of customary international law.

International humanitarian law obliges parties to an armed conflict to take all possible measures to search for, collect and evacuate the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment and to ensure their adequate care. There are also obligations on parties to take feasible measures to account for persons reported missing, with respect to the right of families to know the fate of their missing relatives, and with respect to the management of the dead and related issues.

**Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea** codifies obligations for each party to an international armed conflict to search for, collect and evacuate the shipwrecked, sick and wounded, to protect them against pillage and ill-treatment and ensure their adequate care.

**Convention (IV) relative to the Protection of Civilian Persons in Time of War** was adopted after World War II to enhance the protection of civilians during wartime. This Convention, *inter alia*, creates an obligation for parties to an armed conflict to facilitate the right of families to know the fate of their missing relatives and to renew contact with them.

**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)** contains specific provisions regarding the protection of victims of international armed conflicts. *Inter alia*, it sets out standards regarding the protection and care of the wounded, sick and shipwrecked, as well as with regards to missing persons and the treatment of the remains of deceased persons.

**Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)** applies to victims of non-international armed conflicts (an estimated 85% of all victims of armed conflicts since 1945). The aim of Protocol II is to extend the essential rules of the law of armed conflict to internal wars. It establishes certain fundamental guarantees with regard to the treatment of victims of non-international armed conflicts. It also contains specific provisions with regards to the search, protection and care of those wounded, sick or shipwrecked as a result of such conflicts.
COUSE DAY: TWO

SESSION SIX: INTERNATIONAL REFUGEE LAW IN THE CONTEXT OF IRREGULAR MOVEMENTS OF PEOPLE BY SEA

PURPOSE: Introduction of the role and importance of international refugee law in the context of irregular sea movements, drawing on the 1951 Refugee Convention and its 1967 Protocol as well as relevant EXCOM Conclusions, related human rights instruments, and UNHCR/IMO Guidelines regarding the treatment of persons recovered at sea who may be in need of international protection.

CONTENT / LEARNING OBJECTIVES:

The overall regime of the 1951 Convention and 1967 Protocol will be presented. Special emphasis will be made on the provisions regarding the refugee definition (including people falling under extended refugee definitions in regional instruments, including the 1984 Cartagena Declaration on Refugees, and the 1966 Bangkok Principles on the Status and Treatment of Refugees), the right to seek asylum, and the principles of non-refoulement and non-penalization for illegal entry (including Articles 1, 3, 31 and 33 of the 1951 Convention and relevant principles of customary international law) and their implications for how irregular maritime movements may be administered by the states concerned.

The scope of application of these rights and concomitant state obligations will be expounded in detail, paying particular attention to the possibility of extraterritorial application. Relevant EXCOM conclusions and UNHCR Guidelines on the correct implementation of these rights/duties will be mentioned.

Other categories of people of concern to UNHCR in need of, or entitled to, international protection, including asylum seekers and stateless persons, and concepts/schemes such as complementary/subsidiary protection and temporary protection will also be presented. The issue of durable solutions may be briefly introduced, but detailed discussions will be left to the dedicated session on Day 4.

In such case, IMO/UNHCR Guidelines on search and rescue, disembarkation and first-line reception, the 10-Point Plan of Action, the Dijbouti Conclusions, and the Global Initiative on Protection at Sea may be mentioned.

Slides 1-8
The 1951 Refugee Convention was ratified by 145 State parties. It defines the term ‘refugee’ and outlines the rights of the displaced, as well as the legal obligations of States to protect them. The 1967 Protocol removed the temporal and geographic scope of the Refugee Convention, which had restricted refugee status to those whose circumstances had come about "as a result of events occurring before 1 January 1951", as well as giving States party to the Convention the option of interpreting this as "events occurring in Europe" or "events occurring in Europe or elsewhere". This was needed in the historical context of refugee flows resulting from decolonization. 146 countries are parties to the Protocol. As described below, international customary law prevents non-signatory States from engaging in refoulement or returning refugees to countries where they face a threat of persecution. The 1951 Convention’s definition of a refugee is centred on persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.
Sources of international refugee law

- 1951 Refugee Convention and 1967 Protocol
  - Defines who is a refugee
  - Standards of treatment for refugees
  - Non-refoulement
  - Treatment of refugees unlawfully in the country
  - Non-discrimination
- Customary International Law: non refoulement
- United Nations General Assembly resolutions
- Regional agreements (OAU, IA)

Refugee: 1951 definition

Article 1A(2)

- Outside the country of origin or former habitual residence
- Unable or unwilling to return there
- "Well-founded fear of persecution"
- 5 Convention grounds:
  - race, religion, nationality, membership of a particular social group, political opinion

Protection for refugees

- No penalization for illegal entry
  - If authorities notified and good cause (Article 31)
- No restriction on movement of refugees
- Non-refoulement
  - No one shall be returned (refouled) to a place where his life or freedom is in danger, including indirectly (Article 33).
  
  This principle is also enshrined in many other International conventions.
Notably, gender-based persecution is not an enumerated ground. To address this gap, the CEDAW Committee issued General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women. The General recommendation attempts "to ensure that States parties apply a gender perspective when interpreting all five grounds, use gender as a factor in recognizing membership of a particular social group for purposes of granting refugee status under the 1951
Convention and further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers."

UNHCR Executive Committee EXCOM Conclusion No. 6 – The prohibition of refoulement applies to all refugees, including those who have not been formally recognised as such, and to asylum seekers whose status has not yet been determined. The core principle is non-refoulement, which asserts that a refugee should not be returned to a country where they face serious threats to their life or freedom. This is now considered a rule of customary international law and international human rights law, as discussed above.

The Human Rights Committee, in its General Comment 20 of 1991 on ICCPR Article 7 stated: "In the view of the Committee, States Parties must not expose individuals to the danger of torture or cruel inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

Slide 11

Extra-territorial control
• Exterritorial migration “control” can pose a serious threat to individuals – especially in cases of possible refoulement,
• When asylum determinations take place in countries without resources or systems for effective human rights protection.

The ECtHR has held that Article 3 of ECHR applies when States assert effective control, and therefore irrespective of location of rescue (extraterritorially). According to the UN Human Rights Committee, the principle of non-refoulement in Article 7(1) of the ICCPR applies extraterritorially. This will be discussed in greater detail below, on the issue of collective expulsions.

Slide 12

No refugee status (Article 1F)
• Refugee status does not apply if reasonable grounds for considering claimant committed:
  – War crimes, crimes against humanity, crimes against peace
  – Serious non-political crimes (outside country of refuge)
  – Acts contrary to the purposes and principles of the UN.
Article 1F of the Convention provides that no refugee status shall be granted to persons who have committed war crimes or crimes against humanity.

Slides 13

Temporary protection

- An administrative measure until an individual examination is carried out or group recognition occurs
- A precursor, not alternative, to 1951 Geneva Convention protection
- Does not suspend States’ duties under 1951 Geneva Convention

The purpose of temporary protection is to ensure immediate access to safety and protection of basic human rights, including protection from refoulement, in those countries directly affected by a large-scale influx. Temporary protection may also serve to enhance prospects for a coherent regional response, beyond the immediately affected areas. UNHCR recommends that temporary protection be clearly distinguished from other forms of protection.

Slides 14-16

Responsibility for determining refugee status

- States are responsible for determining status and offering protection
- Some States request UNHCR to fulfil this role and UNHCR refers to this as “mandate” determination
As UNHCR notes in its 'Handbook on Procedures', in order to enable states parties to the Convention to implement their provisions, refugees have to be identified. The Refugee Convention may implicitly require States to perform status determination procedures. Such identification, although mentioned in the Convention itself, is not specifically regulated. See Articles 9, 31(2), Refugee Convention. The Convention does not indicate which kind of procedures are to be adopted. At a minimum, provision for an individual assessment of each particular case is necessary.

Only a core of very essential rights, worded in a generic fashion, is not predicated on any territorial or other material link to a country. Non-discrimination amongst refugees, access to courts, and non-refoulment belong to this category of entitlements addressed broadly to all refugees.

As far as judicial review is concerned, article 16(l) CSR allows every refugee to 'have free access to the courts of law on the territory of all Contracting Parties'. This has been held to include the right to appeal with suspensive effect.
Collective expulsions

Extra-territorial control
• Extraterritorial migration "control" can pose a serious threat to individuals – especially in cases of possible refoulement,
• When asylum determinations take place in countries without resources or systems for effective human rights protection

Collective expulsions
Definition:
• any measure by competent authorities compelling aliens as a group to leave the country,

except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular case of each individual alien of the group.

« Disguised expulsion »
The term "extra-territorial control" refers to the fact that border management activities are often no longer confined to the physical frontiers of States. Borders have been ‘de-territorialised’ and are now virtual borders, monitored through the use of advanced identification technologies and databases. The scope of border control has been extended towards the high seas and into the territory of third countries, sometimes in cooperation with those countries’ authorities. The ultimate goal is to stem flows at their source, by ensuring that irregular migrants do not leave their countries of origin or, if they manage to do so, that they remain as close as possible to the country/region from which they come.

This functions in contravention with the right to leave one’s country as set forth the Universal Declaration of Human Rights, which is central to the right to seek asylum. It also creates the risk of effective refoulement, when persons in need of protection are excluded from gaining access to a fair and efficient asylum procedure.

This well-established definition of « collective expulsion » was codified in Article 4 of Protocol 4 of the ECHR. Essentially, collective expulsion occurs when no individualized assessment has been conducted.

The term « any measure » encompasses both an informal or simple action. The Special Rapporteur of the International Law Commission on the Expulsion of Aliens shares the same view, finding little difference between a formal measure of expulsion and conduct designed to force an individual from State territory.

The Special Rapporteur has specifically prohibited « disguised expulsion». Feigned or masked expulsions are contrary to international law because they violate both the substantive rules and the procedural protections that give opportunity to defend one’s rights.
The issue that arose (before the Hirsi decision) was whether interdiction prior to arrival on State territory constitutes collective expulsion. The prohibition of collection expulsion is not substantively the same as the prohibition on refoulement. The former is a procedural guarantee; the latter constitutes substantive protection.

The facts of the case: Applicants were Eritreans and Somalis intercepted by Italian revenue police and coast guard in the Maltese search and rescue area. They were transferred to Italian military ships and returned to Tripoli based on a bi-lateral agreement between Libya and Italy. Two of the applicants subsequently died for unknown reasons; others fled during the revolution.

The human rights issues related to extra-territorial control of immigration/asylum systems were highlighted by the judgment of the European Court of Human Rights in the Hirsi Jamaa and others v. Italy case, which arose from the Italian policy of preventing the arrival of migrants by sea on Italian territory. The fundamental question faced by the Court was whether the intercepted migrants were within Italian jurisdiction for the purposes of the ECHR and its protocols. Contracting states parties are obliged to guarantee Convention rights and freedoms ‘to everyone within their jurisdiction’ (Article 1 ECHR). The precise circumstances in which a State is responsible for the actions of its agents outside its territory have troubled the court since a ECtHR Grand Chamber ruled in Banković and others v. Belgium and 16 other contracting states that extraterritorial jurisdiction was exceptional, and did not extend to isolated acts. The Court has subsequently adopted the general position that extraterritorial jurisdiction arises whenever a State exercises effective control over another place, or its agents exercise ‘physical power and control’ over a person. Application no. 27765/09, judgment delivered on 23 February 2012.

The Court held: “The removal of aliens carried out in the context of interceptions on the high seas by the authorities of a State in the exercise of their sovereign authority, the effect of which is to prevent migrants from reaching the borders of the State or even to push them back to another State, constitutes an exercise of jurisdiction.”
SESSION SEVEN: Group Discussion: Discussion on refugee law practices in respective countries

Suggested questions:

- What is the legal basis in your country for dealing with refugees?
- What national institutions handle cases of applications for asylum: at the border, inside the country?
- What are the reception conditions for asylum seekers and persons granted refugee status?

SESSION EIGHT: INTERNATIONAL LAW ON TRANSNATIONAL CRIME IN THE CONTEXT OF IRREGULAR MOVEMENTS OF PEOPLE BY SEA

PURPOSE: Introduction to UN Convention on Transnational Organized Crime (UNTOC) and UNODC’s role as custodian. Presentation of key provisions of the Palermo Protocols on the Smuggling of Migrants by Land, Sea and Air (SoM), and on the Prevention, Suppression and Punishment of Trafficking in Persons, especially women and children (TiP), as they relate to irregular movements of people by sea.8

CONTENT / LEARNING OBJECTIVES:

- Introduction of UNTOC and UNODC’s role as custodian.

- Discussion of key provisions of the Palermo Protocols and their impact on the regulation of irregular movements of persons by sea. Emphasis will be put on the distinction between smuggling and trafficking, with examples to illustrate the differences; and on the definition of each of these crimes, underlining the need for financial/material benefit and intentionality (mens rea) as essential components, thereby excluding actions of humanitarian assistance, ‘self-smuggling’ or mere ‘transportation’ of migrants from punishment and prosecution.9 The need to separate and protect victims from perpetrators and the importance of saving clauses in Articles 14 and 19 of each Protocol will also be highlighted.

- Regarding human trafficking, the rules on protection and assistance of victims (Articles 2(b) and 6, TiP Protocol) and their status in receiving states (Article 7, TiP Protocol), as well as other measures to prevent and combat trafficking in persons will be detailed.

- Regarding smuggling, cooperation related to smuggling of migrants by sea (Article 7, SoM Protocol), measures against the smuggling of migrants by sea (Article 8, SoM Protocol), safeguards to ensure the safety and humane treatment of persons on board and the security of the vessel concerned (Article 9(1)(a)(b), SoM Protocol) will be specified.

- International cooperation tools under Article 18 UNTOC, including for the purposes of collection of evidence, prosecution of offenders, mutual legal assistance and extradition, to ensure compliance with and adequate implementation of the Palermo Protocols at national, regional and international

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level will also be examined.⁹

- The presentation will be concluded by a 15 minutes quiz. The quiz will be performed in groups of two; feedback for right and wrong answers will be provided. The objective is to allow participants to check whether key elements have been understood as well as to recap essential content.

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Slides 1-3

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⁹ D Guilfoyle and E Papastavridis, Background Paper, pp. 21-22.
This session will set forth the key provisions of what are often referred to as the Palermo Protocols of the UN Convention on Transnational Crime, as they relate to migrant smuggling and human trafficking by sea.

Slides 4-7

The UN Convention on Transnational Organized Crime (UNTOC) is the main international instrument in the fight against transnational organized crime. States that ratify this instrument commit themselves to taking a series of measures against transnational organized crime, including the creation of domestic criminal offences (participation in an organized criminal group, money laundering, corruption and obstruction of justice); the adoption of new and sweeping frameworks for extradition, mutual legal assistance and law enforcement cooperation; and the promotion of training and technical assistance for building or upgrading the necessary capacity of national authorities. Bangladesh, Indonesia, Malaysia Sri Lanka and Thailand are all parties to UNTOC.

There are three Protocols supplementing the Convention: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, their Parts and Components and Ammunition. Only the first two will be discussed for the purposes of this workshop. Countries must become parties to the Convention itself before they can become parties to any of the Protocols.

Even though smuggling of migrants and human trafficking are often conflated, they are distinct and separate activities and are treated as such by the Protocols.
While mutual legal assistance normally occurs under bilateral treaties the provisions in Article 18 of UNTOC are sufficiently detailed to be applied in the absence of an existing mutual legal assistance treaty between the two State parties.
Trafficking in persons and migrant smuggling constitute serious crimes and result in grave violations of human rights, affecting men, women and children. Traffickers and smugglers often employ the same routes and means of transportation and the crimes themselves frequently overlap. However, migrant smuggling and human trafficking are distinct crimes; the former constitutes a crime against the State, the latter a crime primarily against an individual as well as against the State. While migrant smuggling inherently involves the crossing of borders, people are trafficked both within their own countries and abroad. Migrant smuggling ends when the person reaches their destination; human trafficking involves the ongoing exploitation of the victim.

Another difference between the crimes relate to consent. Migrant smuggling involves the initial consent of the smuggled person, while the deceptive or abusive means involved in trafficking render any initial consent by the trafficked person irrelevant. Such distinctions can be quite subtle, as a migrant might initially agree to be smuggled only to be deceived and exploited after the journey has commenced. Indeed, smuggled migrants are extremely vulnerable to being trafficked. Moreover, both smuggled migrants and victims of trafficking might also be refugees.

The Protocol against the Smuggling of Migrants by Land, Sea and Air addresses the growing problem of organized criminal groups who smuggle migrants, often at high risk to the migrants and at great profit for the offenders. The Migrant Smuggling Protocol aims at preventing and combating the smuggling of migrants, as well as promoting cooperation among States parties. An additional aim is to protect the rights of smuggled migrants and to prevent the worst forms of their exploitation, which often characterize the smuggling process.
Unlike human trafficking, exploitation is not part of the definition of migrant smuggling. As such, exploitative practices should constitute an aggravating factor in national laws against migrant smuggling: Article 6(3)(b).

Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air establishes the definition of the crime. The following sub-sections provide:

(c) “Fraudulent travel or identity document” shall mean any travel or identity document:

(i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or

issue the travel or identity document on behalf of a State; or

(ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or

(iii) That is being used by a person other than the rightful holder;

(d) “Vessel” shall mean any type of water craft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water, except a warship, naval auxiliary or other vessel owned or operated by a Government and used, for the time being, only on government non-commercial service.

Article 6 of the Protocol requires States to criminalize the offences listed.

As governments have intensified their efforts to combat irregular migration, people smugglers and migrants have resorted to ever more dangerous routes and means of transport. The resulting situations bear little resemblance to what the architects of the international law of the sea had in mind when they codified the duty to render assistance to persons in distress at sea.
Article 5 ensures the non-criminalization of smuggled migrants for having been the object of the crime. That is, a person who was smuggled cannot be charged with the crime of smuggling of migrants, or other conduct described in Article 6.

Migrants can be prosecuted for other offences, such as for illegal entry, or for the possession of fraudulent documents. This is in contrast to the protections provided for victims of human trafficking in the Trafficking Protocol. It may often in practice be difficult to distinguish between a smuggled migrant and a victim of human trafficking.

UNHCR proposes that "[i]n clear-cut situations it is contrary to article 5 to initiate criminal proceedings against a person being the object of conduct described in article 6. In other cases, article 5 should be read as a non-penalization provision."  

**Article 7** requires state cooperation to address migrant smuggling by sea in accordance with international law of the sea. It states: « State Parties shall cooperate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea. »

**Article 8** sets forth provisions for State cooperation in addressing migrant smuggling by sea. States may request permission from another State party (the flag State) to board and inspect, and possibly take law enforcement action against, a vessel of its nationality. Obviously, however, this provision only applies where both the requesting State and flag State are parties to the Protocol. It does not require that permission be

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granted, but does usefully require that States designate a national authority capable of receiving such requests and either granting or denying them. Key points include:

- State parties can request assistance of other States to suppress the use of a vessel suspected of smuggling migrants that is flying its flag, or refuses to show its flag or is without nationality.
- State parties must respond « expeditiously » to requests by other States concerning vessels flying their flags and requests for authorizations
- Authorizations can be subject to conditions as to the responsibility for, and extent of, measures
- States must delegate national authorities to respond to such requests.

**Article 8** provides that a State with reasonable grounds to suspect that a vessel flying the flag of another State is engaged in migrant smuggling must first notify the flag State, request confirmation of registry and request authorization to board and search the vessel.

What constitutes "appropriate" with respect to the measures taken by a flag State remain undefined, and should be assessed in light of the circumstances of specific cases. Upon finding evidence of migrant smuggling, the State must also inform the flag State of the outcome of the measure(s) taken.

As stateless vessels do not enjoy the protection of flag States, they can be boarded and searched in cases of suspected migrant smuggling. What constitutes "appropriate" with respect to the measures taken remains undefined, to be assessed in the circumstances of the case.
The Migrant Smuggling Protocol also contains a number of safeguards and saving clauses. In particular, State parties taking action against a vessel under the Protocol must: i) “Ensure the safety and humane treatment of the persons on board”; and ii) “Take due account of the need not to endanger the security of the vessel or its cargo”. These provisions represent generally accepted international standards and are found in other treaties as well. Further, the intention of the parties that interception of migrants under the Protocol should be conducted in accordance with the human rights and refugee law binding upon State parties is reinforced in the savings clause.

Article 19(1) states: “Nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”.

The Protocol does provide for basic human rights protections for smuggled migrants, and a generalized right to assistance.

Detention is a separate issue. Not only does the Smuggling Protocol fail to regulate the conditions under which those suspected of involvement in migrant smuggling by sea can be detained, but it specifically requires a general distinction to be drawn between the victims of smuggling and the smugglers themselves. Whereas the Protocol provides for ‘the prevention, investigation and prosecution’ of the crimes related to migrant smuggling, the victims of smuggling must be the object of ‘protection and assistance’.

The Protocol nowhere regulates the conditions under which smuggled migrants can be detained. It provides merely for the State party concerned to take ‘appropriate measures’ if evidence is found confirming the suspicion that the vessel is engaged in the smuggling of migrants by sea.
The definition of human trafficking is contained in Article 3(a) of the Protocol. Human trafficking is characterized by the exploitation of its victims, be it for the purposes of forced labour, sexual exploitation or organ removal, among others. For adult victims, it can involve a variety of means, such as an abuse of power, the threat of force or coercion, deception or fraud, and can involve maintaining victims in conditions considered analogous to slavery.

In addition to the purpose and means, human trafficking involves the following acts: the recruitment, transporting, harbouring or receipt of persons. The legal definition of human trafficking is thus comprised of all three of these elements: the acts AND the means AND the purpose.

For example, given the evidence of forced labour in the international fishing industry, transporting people for the purposes of forced labour would be enough to render them trafficked persons under the Protocol. Article 3(b) negates any argument related to the consent of the victim if any of the means were used. In other words, the victim may have consented to engage in prostitution, but not the abuse of power, or any use of deception or fraud by the traffickers.

For child victims of trafficking, no means are required. The definition is met by proving the acts and the purpose. (Article 3(c)).

Article 5 requires States party to criminalize human trafficking within the national legislative framework in line with this definition, and to include liability for attempt, accomplices and ordering or directing the commission of the crime.
In contrast to the provisions providing for the right of visit, inspection and taking « appropriate measures » under the Migrant Smuggling Protocol, the Trafficking Protocol does not provide for the possibility for interdicting victims of human trafficking at sea. Similarly, under UNCLOS, the articles pertaining to the slave trade, Articles 99 and 110, provide only a right of visit. The Slavery Conventions do not provide for interdiction powers either.

Article 6 of the Protocol requires States to include within their national legislative frameworks provisions for protecting victims’ human rights. These include protections for the right to privacy, as well as their procedural rights in conjunction with legal proceedings, including the right to information about judicial or administrative proceedings, as well as the right to express their views and concerns in any criminal proceedings. It also provides for the right to multi-sectoral assistance, including: housing, counselling, medical, psychological and material assistance, employment, and education and training.

Article 7 requires that “each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases” including, possibly, on humanitarian or compassionate grounds.

These provisions are of particular relevance when discussing common and differentiated approaches toward migrants as well as initial reception standards post-disembarkation, topics for discussion on DAY 2 and DAY 3, respectively.
Recall that in the Hirsi case, the ECtHR emphasized the importance of providing information to migrants on their rights with respect to legal proceedings. This information is a prerequisite for ensuring a meaningful right to a remedy.

The Trafficking Protocol, in contrast to the Migrant Smuggling Protocol, protects victims from all criminal liability for those crimes committed while being trafficked.

**SESSION NINE: GROUP DISCUSSION - DISCUSSION ON TRANSNATIONAL CRIME LAW PRACTICES IN RESPECTIVE COUNTRIES**

Discussion to be led by a facilitator.

**SESSION TEN: COUNTRY REPORTS 1**

Session will be led by a facilitator.

**COURSE DAY: THREE**

**PURPOSE:**

Detailed discussion on mixed migration and the different categories of persons comprised within this notion. Presentation of particular factual circumstances giving rise to specific needs and/or human rights protections applicable in each case (on top of general entitlements explored in previous sessions) to cater for accrued levels of vulnerability of those concerned, and of recommended and best practices.

**CONTENT / LEARNING OBJECTIVES:**

- Beyond groups such as asylum-seekers, refugees, and victims of trafficking and/or smuggling that were discussed in previous sessions, some additional profiles will be introduced to enable a full understanding of the mixed nature of people moving by sea. These include unaccompanied and separated children (UASC), minors, victims of torture or other trauma, women, elderly and/or disabled persons, etc.

- Particular attention will be given to adequate processes and material arrangements to cater for those with international protection needs as well as other groups with vulnerabilities and specific needs, and to provide for tailored outcomes and solutions. Reference may be made in this framework to the 10-Point Plan of Action, the Djibouti Conclusions, and the Global Initiative on Protection at Sea, as they relate to approaches to differentiated approaches.
Mixed migration flows involve a diverse array of persons, each with particular rights and special needs. We have previously gone through a number of conventions that spell out the approaches in the international context. These categories are not fixed, and can overlap, as in the case with a smuggled migrant who is elderly and seeking asylum on the basis of ethnic persecution, or an unaccompanied minor who is a traumatized victim of trafficking.

Entry officials and humanitarian actors can work together to identify and address short-comings in the mechanisms used to identify persons in need of international protection. In some countries, entry officials and humanitarian actors have institutionalized their co-operation through the establishment of formal dialogues, working/coordination groups, or specific consultation processes. These arrangements often include training and monitoring components.

**Screening and referral mechanisms** – These are a non-binding process that precedes any formal status determination procedure and aims to identify the needs of, and differentiate between, categories of persons traveling as part of mixed movements as soon as possible after they arrive in the host State. Its core elements include: providing information to new arrivals, gathering information through questionnaires, informal interviews, establishing a preliminary profile for each person, and counseling and referring individuals to the authorities, services or procedures that can best meet their needs and manage their cases. Measures undertaken by States to identify persons who may pose a security risk are sometimes referred to
as “screening”. Such processes are also an important component of protection-sensitive border management.

Dividing people into different categories (e.g. asylum-seeker, “woman-at-risk”, victims of trafficking, unaccompanied or separated child) requires caution. Categories are not mutually exclusive. Individuals may have multiple needs, and the identification of these various needs, especially in the immediate post-arrival phase, can be challenging. For a variety of reasons, individuals may not always be forthcoming with information or self-identify with any particular category or group. An environment of trust, confidence and transparency where individuals know what they can expect and where service providers have adequate capacity to assist arrivals, is a necessary pre-condition to an effective screening and referral exercise.

Joint screening teams, with male and female staff from different backgrounds and, ideally, including persons from the same background as arrivals, can help ensure that individual needs are accurately identified and enhance the legitimacy of the process. In general, host government authorities should be part of screening teams.

Screening and referral can be conducted at border or coastal entry points, in group reception facilities or in places of detention. Expert screening teams can be deployed on a temporary basis to various locations according to needs in particular circumstances.

The objective is to complete the screening and referral process as soon as possible after arrival so as to allow for the rapid identification of individual needs. The process can be completed within a short time. The recommended screening time is between 30 minutes and a few hours per person. Screening and referral are integral parts of registration procedures.

Counseling and referring – Counseling aims to provide advice to individuals so that their expectations remain realistic and they can determine the most appropriate way forward. It is important that counseling be provided by trained staff and that staff retains a careful record of the information or advice provided to the interviewee, as well as any statements or explanations given by that individual.

Confidentiality and security guidelines – Ensure that personal data is only shared with third parties if the individual provides informed consent. This applies to all personal data and information, including name, date of birth, place of origin, contact information, as well as narrative interview records, questionnaires and other records. Ensuring the confidentiality of data and information provided during screening mechanisms, whether through a questionnaire or an interview, also establishes an environment of trust and allows individuals to provide sensitive information without fear of negative repercussions. Further, the sharing of personal data for subsequent procedures, such as registration, should be subject to a formal data-sharing agreement, ensuring that data protection safeguards are in place.

Barriers to identification - This can include fear of stigmatization, particularly if the exploitation suffered was sexual in nature. Irregular migrants may fear deportation if they identify themselves to authorities. Individuals may also still be under the control or influence of traffickers and unwilling to reveal their situations for fear of retaliation. In some cases, they may be entirely dependent on their traffickers or indeed, related to them. To improve the likelihood of successfully identifying victims of trafficking the following is recommended:

- Screening should be undertaken on an individual basis in a confidential space and in an age- and gender-sensitive manner.
- Information on how to access and apply for asylum procedures, about the rights and services available to victims of trafficking, and what support is available to them when pursuing remedies in criminal justice procedures should be provided.
- Questions should be asked to clarify each individual’s situation before asking if trafficked has occurred. Victims of trafficking may not be aware that they have been or are being trafficked. Questions may be about the level of control a person exerts over his or her present or past living situation and/or movement, and whether or not he or she has or is currently providing, without pay
or to settle debt, services such as work, sex, personal servitude or support for criminal activities in a manner that is, for example, indeterminate or characterized by unsafe conditions.

- Refer to differentiated procedures, such as refugee status determination procedures for asylum-seekers, support services for direct assistance for victims of trafficking, child protection systems for unaccompanied and separated children, legal migration channels for labour migrants and voluntary return assistance.

- Provide authorities with information about each group as a whole; such information can also be used to establish a more strategic response to mixed movements.

**Identifying children at risk** - The information gathered should inform immediate support measures (for example, accommodation arrangements and family tracing, health, education and counseling services) that provide care and protection including referrals and subsequent protection and assistance interventions. Basic screening interviews with children to identify those in need of further protection and assistance can be conducted by staff with minimal training. The use of a screening form can be useful to ensure that relevant information on various risk factors is gathered and appropriate follow-up action is taken, i.e. referrals to differentiated procedures tailored to specific needs. Where a need for more in-depth assessment of needs and vulnerabilities is identified, a referral should be made to staff skilled in child protection and communication with children.

Children with independent asylum claims as well as unaccompanied or separated children should have individual interviews. It is important to ask questions that help to identify vulnerabilities in a way that is appropriate to the age, gender and cultural background of the child. Take time to explain to children the process and the use of any equipment (e.g. tablets and biometric equipment) to help allay any fears that they may have. Children may have been coerced to provide false information about their situation to conceal exploitation or in the belief that this could help their claims. Being open about the purpose and the confidentiality of interviews and counseling (including the limitations of confidentiality) is essential to building trust.

Special efforts should be made to ensure that children, in particular unaccompanied or separated children or others with specific vulnerabilities and needs, have access to information on asylum procedures, including the right to submit an independent asylum claim. In order to provide information to children and to support identification, a group activity may help engage children in waiting areas and draw out any general concerns or queries they might have. Outdoor games can also be set up so that children are kept busy and perceive the waiting space as less intimidating.

A children’s desk manned by staff dedicated to assisting and supporting children (especially unaccompanied and separated children) at reception/screening centres is recognized good practice. This allows for more in-depth assessment and referral as soon as possible. Where possible, staff from child protection services (NGO, government, etc.) should be present to provide in-depth assessment of needs and vulnerabilities if required.

**Identifying women at risk** - Basic screening interviews to identify women in need of further protection and assistance can be conducted by staff with minimal training. Where the need for more in-depth assessment of needs and vulnerabilities is identified, a referral should be made to staff with training and expertise in working with women with specific needs. Some practical suggestions to help non-specialized staff with screening of women at risk include:

- Women should be interviewed individually in a safe, confidential space with female interviewers and translators.

- Interviewers should provide information about available services for survivors of sexual and gender based violence and may offer to support individuals to access these services.

- Information about any experience of sexual and gender-based violence should not be collected at the screening stage, but rather at the point of service provision.
Differentiated processes and procedures for various categories of persons traveling as part of mixed movements allows tailored and appropriate responses to be provided according to the respective needs and profiles. The range of procedures that can be made available in any situation of mixed movement depends on the profile and numbers of arrivals, the legal framework and socio-economic capacity of the host country, and the support of the international community. Procedures can include the following:

**Asylum procedures for persons seeking international protection** – Refugee Status Determination (RSD) remains the most effective protection intervention for individuals for whom there is a protection dividend in determining their eligibility for refugee status in a timely manner, and whose eligibility for refugee status cannot be (or risks not being) accurately determined in more simplified procedures. For example, for individuals with claims that raise complex eligibility requirements, credibility or exclusion concerns, or for specific categories of persons in need (such as those in detention) or for whom RSD is required as a precursor to resettlement, regular RSD is crucial.

**Temporary protection or stay arrangements** – These respond to humanitarian crises and complex or mixed population movements, particularly in situations where existing responses are not suited or are inadequate.

**Special protection mechanisms for victims of trafficking** – Some States have coordinated systems or mechanisms in place for identifying and responding to the needs of all victims of trafficking within their territories. National referral mechanisms often comprise a multi-stakeholder co-operative framework through which identification, referrals and responses to victims of trafficking are coordinated and harmonized between State actors (such as law enforcement personnel, immigration and asylum officers), social welfare organizations and NGOs.

**Child protection systems** – Instead of treating separately each category or form of risk for children (e.g. child trafficking or separation from family members), an effective child protection system considers the situation of a particular child and the interrelated actions that can be undertaken by communities, national and international actors in a comprehensive manner in order to protect that child. The various elements of the child protection system should operate in a complementary way and be coordinated across a range of sectors. Mechanisms should identify children at risk traveling as part of mixed movements, address each child’s immediate needs, and ensure the appointment of a legal representative and/or guardian for unaccompanied and separated children. They ensure: age assessment (only where necessary), procedures
that are child friendly, provision of information on asylum procedures in a child-friendly manner, processes for children to report protection risks and seek support, family tracing and identification of solutions based on best interests determinations.

**Family tracing** - Family members can become separated during travel for a number of reasons. While family tracing is relevant for all family members, regardless of age, it is of utmost importance for unaccompanied children, including children seeking asylum. Family tracing can lead to family reunification; however, safeguards are needed to ensure that children are not returned to a family or custodial situation where they would face abuse or neglect.

**Identifying women and girls at heightened risk** – Experiences of abuse and exploitation often contribute to the decisions made by women, men, girls, or boys to flee their homes. Unaccompanied children may flee in order to avoid violence and abuse such as labour exploitation, forced or child marriage, or female genital mutilation/cutting. Women and girls may flee abusive relationships. LGBTI persons may be leaving behind aggressive official, community or family attitudes.

**Persons with physical and mental disabilities and torture victims** – Like the categories of persons discussed above, persons with disabilities and infirmities associated with age, and victims of torture and trauma, must be identified and referred to specialized medical and psychological treatment.

Categorization is not an end in itself. Persons traveling within mixed movements may have multiple needs and fit into several categories. For example, victims of trafficking and unaccompanied or separated children may also need international protection. In such cases, asylum procedures can be conducted alongside other processes, including support and services to meet immediate needs. New categories of needs may also arise after arrival. Responses should be informed by a person’s individual needs, rather than according to their categorization. Establishing well-functioning referral systems between different processes and coordination mechanisms between all relevant actors (e.g. government agencies, NGOs, international organizations, legal advisors, social workers, health care providers) will increase the likelihood that the most appropriate outcome is provided for each individual. Irrespective of the category or categories into which a person falls, every person is entitled to be treated in a humane and dignified manner, consistent with international human rights standards.

**SESSION TWELVE: GROUP DISCUSSION - IRREGULAR MIGRANT APPROACHES OF RESPECTIVE COUNTRIES**

Discussion to be led by a facilitator

**SESSION THIRTEEN: GROUP EXERCISE - APPLYING INTERNATIONAL STANDARDS AND PRINCIPLES**

GROUP EXERCISE: CASE STUDIES TO APPLY INTERNATIONAL STANDARDS AND PRINCIPLES

OUTLINE: Mapping out exercise to apply international standards and principles discussed in the previous sessions, on international maritime, migration, and refugee law and international law regarding transnational crime, to a real-world scenario to appreciate how numerous legal instruments from different but inter-related bodies of law interact with one another and apply concurrently to situations of people moving irregularly by sea. The final goal is to understand how the relationship between the different regimes should be managed in practice.

Facts:
Situation in country of origin

Silva (14) is a national of Alphastan, a country whose economy is controlled by organized crime. In recent years, one branch of the local mafia has started sending young women and girls abroad in order to exploit them as prostitutes in Betastan. Most of the women are from small towns and villages in Alphastan. They are taken abroad after being promised employment as factory workers and signing contracts with local offices established by the mafia. Due to widespread corruption, the offices remain open, in spite of police attempts at closing them and stop the practice.

In the past, once in Betastan some of the women were able to escape from those guarding them, but in a number of cases they were detained by the authorities in Betastan and returned to Alphastan, only to be killed by the mafia for having disobeyed. Their asylum applications in Betastan were rejected, because the asylum authorities considered that the women had signed up voluntarily to go abroad in the first place; they simply were victims of crime, not refugees. The media in Alphastan, under threats from the mafia, has never reported these killings. However, renowned human rights organisations abroad have issued several reports, documenting a pattern of impunity due to corruption and a lack of means by the Government of Alphastan to suppress the practice.

Mona (25) is a nurse originating from Altavia. She got married recently and is expecting a child. Although she was able to complete her training, right after graduation the Government of Altavia changed, with an ethnic group different from her own raising to power and stripping members of Mona’s ethnic minority of their land and identity documents, and subjecting their right to move within Altavia and their access to the labour market to very strict conditions, which Mona does not meet.

Some members of Mona’s ethnic minority have spoken out and demonstrated, demanding respect for their human rights. This has attracted repressive measures, including beatings and imprisonment by Government security forces. The situation in Altavia has rapidly deteriorated, with widespread violence and high intensity fighting taking place between the Government forces and rebel factions from minority ethnic groups, including that of Mona.

Although Mona is not politically active, she feels in danger and thinks there is no future for her or her family in Altavia. She decides to leave to seek employment in Betastan, where she has been offered a position as a health carer in a privately-owned mental-health institution, although without a proper contract and for considerably less than the minimum legal wage.

Lek (22) comes from Arsiland, a country with a one-party system, where life conditions are extremely difficult and people die of hunger due to famine and related diseases. As a recent graduate from the National School of Pedagogy, he is assigned as a teacher to a local school in a very remote and deprived area of the country, where he has no links and no family.

Following advice by some family members already settled in Betastan, he decides to leave clandestinely, without permission from the Arsilandish authorities, feeling that it would otherwise be impossible for him to provide for himself. This action (i.e. leaving his country without authorisation) is severely punished under Arsilandish law. The criminal code of Arsiland prescribes mandatory life imprisonment in these cases. The authorities consider such persons political criminals who can be charged with treason and sentenced to death. These practices are longstanding and well documented in international sources.
Sea journey

Silva, Mona and Lek have no passports or visas to leave their countries and enter Betastan. Nor do they have the authorisation to transit through Alphastan to reach Betastan.

In the case of Silva, the local mafia of her village arranges for her travel. Mona’s journey, in turn, is organised by her Betastani employer, while Lek’s trip is organised by his family members from Betastan.

All three joined a crew of 27 migrants from different countries, including children, boarding a small wooden dinghy provided by a delegate of the Alphastani mafia. They departed at night from a coastal town in Alphastan, upon payment of USD 500 per person. No captain on board; they were left with a compass and a few provisions. The journey on the 120 miles of rough sea dividing Alphastan from Betastan took, however, much longer than expected, due to lack of skills of the crew and the weather conditions.

After 7 days adrift, the situation became desperate, the dinghy was taking water, there was no food or drinkable water supplies left, and several disputes broke out. Some people became aggressive, one person was killed as a result, two jumped over-board, and three children perished of dehydration. At that point, they spotted a large tuna fishing boat, flying the flag of Arsiland. The captain of the boat did not allow them on board and, with the dinghy useless, there was no choice but to grab onto the large fishing net dragging behind the boat and hang on for survival.

The captain was afraid the migrants would overpower his crew of 6 men and feared that changing the course of his route would jeopardize the tuna catch, which was due for dispatch following a precise schedule. Instead, he notified the authorities of Betastan of the situation. The boat was indeed sailing within the search and rescue area of Betastan. However, its next port of call was in Arsiland.

The authorities of Betastan and those of Arsiland could not find an agreement to decide which State was responsible to take the migrants. So, the 21 survivors hung onto the fishing net for 3 additional days, waiting for the dispute to be resolved. At the end, a warship from the Betastani coast guard took them to port in Betastan. They were held on board the vessel for 3 further days, where food, water and medical attention was provided, but without authorisation to disembark and leave the port until their circumstances had been clarified.

Arrival in Betastan

In this situation, Silva, Mona and Tek, who are among the survivors taken to Betastan, decide to submit asylum applications, under the 1951 Refugee Convention and its 1967 Protocol, of which Betastan is a party. Betastan has also ratified all major human rights instruments as well as the smuggling and trafficking protocols and the Law of the Sea Convention. In the meantime, the Betastani police charged Lek’s family members with smuggling and Mona’s employer with trafficking in human beings. They are uncertain, however, as for the involvement of the Alphastani mafia.

Questions:

• Identify the rules that are applicable from those seen in previous sessions:
• Law of the Sea / International Maritime Law;
• International Migration Law, incl. International Human Rights Law;
• International Refugee Law;
• International Criminal Law, incl. Protocols on Smuggling and Human Trafficking.

• Explain how they apply in the particular case:
  o Which State had jurisdiction over the migrants in the various phases of the rescue operation? Which responsibilities did this entail for each State?
  o Did the captain of the fishing vessel correctly discharged his duty to render assistance? Is the fact that the cargo could have lost its economic value a relevant consideration? What should the flag state have done in this case?
  o Did Alphastan have any obligations at any point in the case? o Could states have cooperated more / better? If so, how?
  o Which rights of migrants are engaged? Are Silva, Mona and/or Tek refugees? Are they human trafficking victims / smuggled migrants? Re Silva, is the fact that she signed a contract with the office established by the Mafia in her home town relevant? Is the fact that she is a minor girl relevant? Re Mona, is the fact that she is a pregnant woman relevant? If so, how / to which extend?
  o Should Lek’s family members be charged with smuggling? Should Mona’s employer be prosecuted for human trafficking? What about the Alphastani mafia?
  o Are there any (real / potential) conflicts between the rights of states and the rights of migrants that you can identify in any of the phases of the operation?
  o How should these be solved and why?

SESSION FOURTEEN: COUNTRY REPORT 2

Session lead by a facilitator.

COURSE DAY: FOUR

SESSION FIFTEEN: INTERCEPTION AND RESCUE AT SEA: INTERNATIONAL STANDARDS AND BEST PRACTICES

PURPOSE: Detailed discussion on interdiction powers and search and rescue at sea, introducing key international standards from the maritime conventions and best practice guidelines codified by IMO. The International Convention on Salvage; the Convention on Maritime Search and Rescue (SAR); the Convention for the Safety of Life at Sea (SOLAS); the Convention on Facilitation of International Maritime Traffic (FAL) in addition to relevant IMO Guidelines on search and rescue, and disembarkation will be covered. The discussion of key terms and their implications, including ‘distress’, ‘place of safety’, etc. will be introduced.

11 D Guilfoyle and E Papastavridis, Background Paper, above note 2, pp. 2-7, 12-13, and 18-19.
CONTENT / LEARNING OBJECTIVES:

- Building on the session introducing the Law of the Sea on Day 1, the first part of this session will delve into the UNCLOS regime on interdiction powers applicable at sea per jurisdictional area and the fact that these remain subject to the Convention itself and to ‘other rules of international law’.  

- The concept of interdiction will be defined, with examples of actions that may amount to it. How powers of interdiction are regulated per jurisdictional area should be clarified, distinguishing the regimes applicable within national jurisdiction (i.e. territorial sea / contiguous zone) and beyond (i.e. high seas / territorial sea of a third country) and noting the limits existing to state authority in this framework. A brief re-count of Articles 25 and 33 UNCLOS from this perspective will be carried out. Interdiction under Article 56 UNCLOS regarding sovereign rights within EEZ and the limits thereof will be presented. On the high seas, the case of unregistered small vessels will be discussed in detail, including whether they are stateless and whether Article 110 UNCLOS allows states to exercise jurisdiction against them, including acts of interdiction.  

- Additional provisions on interdiction in the Palermo Protocols should also be noted at this point (Articles 7-8 SoM) together with related guarantees (Article 9 SoM).  

- The links / transition between an act of interdiction and rescue at sea will be elucidated, with differences and similarities highlighted in terms of scope of application, geographical extent, need of flag state consent, and related requirements.  

- Search and rescue obligations will then be thoroughly presented, building on the discussion on Article 98 UNCLOS from Day 1, which will be briefly reintroduced. In this context, obligations on both coastal and flag states under the SAR and SOLAS Conventions to render assistance to persons in distress at sea; to proceed to their rescue; to set up, run and coordinate coast watching and SAR services on a continuous basis; and to delimit SAR regions, will be detailed. The problem of concurrent responsibilities, the absence of a definition of what constitutes ‘distress’, and whether obligations of conduct (as opposed to obligations of result) are effective in this framework will be highlighted.  

- The SAR and SOLAS amendments, including a duty to deliver survivors to a place of safety, will also be discussed, paying particular attention to what constitutes a ‘place of safety’ and what ‘safety’ itself may entail for different categories of migrants. The requirement of compliance with non-refoulement and related guarantees as well as applicable plans and procedures to follow in distress situations will be pointed out. Emphasis will be placed on the SAR state duty to ‘exercise primary responsibility for ensuring ... co-ordination and co-operation occurs’ in this context. The UNHCR, IMO and ICS Rescue at Sea Guide will be briefly presented in preparation of the exercise in the following session.  

- Issues surrounding disembarkation will be briefly introduced.

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12 Arts 2(3) and 87(1) UNCLOS.
14 D Guilfoyle and E Papastavridis, Background Paper, above note 2, p. 18.
16 SOLAS, Chapter V, Reg 33(1.1).
This session will cover the international legal framework pertaining to interdiction and rescue at sea. It will briefly discuss disembarkation of persons rescued at sea.
The terms interception and interdiction are sometimes used interchangeably.

There is no internationally accepted definition of the term "interception," and its meaning is largely informed by State practice.

UNHCR’s working definition of 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 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; where, in relation to the above, the person or persons do not have the required documentation or valid permission to enter.”

There are two forms of interception:

**Physical interception**, also referred to as the **interdiction** of vessels suspected of carrying irregular migrants or asylum seekers. Following the interception, passengers are disembarked on dependent territories of the intercepting country or on the territory of a third country. In most instances the aim of physical interception is to return without delay all irregular passengers to their country of origin or of embarkation.

**Administrative interception** refers to extraterritorial immigration control imposed by some countries in transit hubs. It also refers to airline liaison companies posted at international airports to prevent the embarkation of improperly documented persons.

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18 This definition of Interception was taken from UNHCR, ‘Interception of Asylum-Seekers and Refugees: The International Framework and Recommendations for a Comprehensive Approach, 9 June 2000, EC/50/SC/CRP.17, 2.

19 See, UNHCR Executive Committee Conclusion No. 97 (LIV) (2003) on Protection Safeguards in Interception Measures.
Given the concern over a global increase in irregular migration and the number of spontaneous arrivals, interception is mostly practiced in order to disrupt major smuggling and trafficking routes. Smuggling often endangers the lives of migrants, in particular those traveling in unseaworthy boats. Their interception contributes to the rescue of persons in distress at sea and can help to save lives. Although, some interceptions involve search and rescue components they should not be equated with search and rescue.  

Immigration control measures, although aimed principally at combating irregular migration, persons at risk of persecution should not in themselves entail obstacles to gain access to safety and asylum. That said, many of the undocumented asylum-seekers are found to be refugees who had already found protection in another country and for whom protection continues to be available.

**Slides 6-12**

As discussed on DAY 1, UNCLOS provides for distinct interdiction powers within each maritime zone, which are briefly reviewed.

Within the **territorial sea**, the coastal State has **limited interdiction powers**, namely only if the consequences of a crime extend to the coastal state, or disturbs the peace/order of the territorial sea, its assistance is requested by a ship master or the consular authorities of the flag State, or if the ship has left the internal waters of the coastal State.

The concerned State must notify a diplomatic agent or consular officer of the flag State, upon the shipmaster’s request. In emergency situations, it can notify the flag State while measures are undertaken.

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In the event that asylum seekers are onboard, as asylum legislation is commonly integrated into immigration law, passage for the purpose of requesting international protection would not be 'contrary to the immigration rules of the coastal State'.

Within the contiguous zone coastal States can exercise the control necessary to prevent violations of its laws within its territory or territorial sea, and to punish the violation of its laws already committed within its territory or territorial sea.

There is no legal clarity as to whether the powers of detention, escort to port and forcible return are encompassed by this provision. In any event, an exercise of jurisdiction in this zone remains limited by the observance of 'other rules of international law,' (Article 87(1) UNCLOS) including refugee law and human rights.

The powers of control in the contiguous zone provides for acts of prevention short of arrest. Arrest and prosecution constitute punishment, which may only be exercised if a crime has already occurred in coastal State territory or the territorial sea. A vessel suspected of migrant smuggling that enters the contiguous zone, could thus be inspected, and not allowed to proceed to enter the territorial sea. However, it could only be arrested in the contiguous zone, if it had already entered the territorial sea and breached the immigration laws of the coastal State concerned.

As discussed on DAY 1, the freedom of navigation on the high seas is limited by the right of hot pursuit and the right of visit. The right of visit, entailing the right to board and inspection, is provided on five grounds.
Vessels engaged in the slave trade may be visited on the high seas and by virtue of Article 99, and any slave taking refuge on board of the ship shall ipso facto be free. However, UNCLOS contains no definition of "slavery," nor of the "slave trade". Some commentators suggest that this provision could be applied to migrants on vessels who are victims of human trafficking, which has been held to be analogous to slavery. Universal and regional human rights instruments prohibit slavery-like practices or modern forms of slavery, including debt bondage, forced labour, trafficking in persons. The exploitation of migrant workers as domestic servants or slaves are prevalent in many parts of the world. Rather than de jure slaves, modern day slavery is de facto.

In the absence of any territorial jurisdiction, States’ jurisdictional claims on the high seas are largely governed by the principle of flag State jurisdiction.

The right to arrest is only clear in the cases of privacy and unauthorized broadcasting. Many vessels suspected of involvement in the irregular movement of people may bear no national markings and carry no paperwork. The question of interception of stateless vessels remains a “grey area.”

Examples of bilateral treaties include: Italy with Albania and Libya; U.S. with Haiti, etc.

With regard to the power to intercept Stateless vessels, the UK and the US have taken the position that stateless vessels can be seized by any State since they are protected by none. According to one strand of legal doctrine, the boarding States may also completely subject stateless vessels to their laws. The right to visit such vessels does not ipso facto entail the full extension of the jurisdictional powers of the boarding States. The arrest of potential migrants or asylum seekers on the high seas, seems to beg the question whether a crime has been really committed on the high seas, and thus whether the boarding State can exert its jurisdiction and a fortiori arrest persons on board. The act of carrying migrants on the high seas is not an international crime as such; save in cases of ‘smuggling of migrants’ solely for the States parties to the respective Protocol.
A jurisdictional nexus is required between the interests of the arresting State and the acts of the vessel. Examples of such jurisdictional nexus include the UNTOC Migrant Smuggling Protocol and the nationality principle.

UNCLOS defines vessels as having nationality either by registration or through a right to fly a flag. Therefore, many States have a category of unregistered vessels, which nonetheless have a right to fly their flag based on the ownership of the vessel. In practice it may be hard to determine whether a small craft encountered on the high seas is actually legally stateless or not.

If a government vessel encounters a small craft on the high seas bearing no obvious marks of nationality, there may be grounds for visiting and inspecting the vessel on suspicion of statelessness. However, the mere fact a vessel is not carrying registration papers will not be enough to prove it is stateless. Even if the absence of nationality is confirmed, it is by no means clear that it results in a right of arrest and law-enforcement jurisdiction over the vessel. This remains grey area under the law.

Interdiction powers should be exercised with due regard to the UNCLOS and ‘other rules of international law’, respecting the regime of innocent passage as well as the right of vessels in distress to seek refuge in an adjacent coastal State. International law is not well developed with regard to interception. However, there is a broad consensus that States are bound by their international human rights obligations wherever they assert their jurisdiction, including outside their territory or territorial waters and indeed the European Court of Human Rights in the Hirsi case has held that States must take affirmative measures to ensure that intercepted migrants have access to protection.
As noted, physical interception represents one mechanism available to States to combat criminal and organized smuggling across international borders. The Migrant Smuggling Protocol contemplates such interdiction. As discussed on DAY 1, Article 7 of the Migrant Smuggling Protocol calls for State cooperation specifically related to combating migrant smuggling by sea. Article 8 provides for States to request the assistance of other States in cases where the vessel is registered in the same State or is stateless.

Article 8(2) of the Migrant Smuggling Protocol provides that a State with reasonable grounds to suspect that a vessel flying the flag of another State is engaged in migrant smuggling must first notify the flag state, request confirmation of registry and authorization to board and search the vessel. Upon evidence of migrant smuggling, the Protocol provides that the State may take "appropriate measures".
The intervening State must also inform the flag State of the outcome of the measure(s) taken.

Article 9 contains safeguard clauses.

Slides 19-20
Interception policies in certain regions, in isolation from other measures, risk diverting smuggling and trafficking routes to other regions, thereby increasing the burden on other States.

Interception and enforcement measures should take into account the difference between refugees and asylum-seekers, and other migrants.

Intercepted persons who present a claim for refugee status should enjoy the required protection, in particular from refoulement, until their status has been determined. For those found to be refugees, intercepting States, in cooperation with concerned international agencies and NGOs, should undertake all efforts to identify a durable solution, including, where appropriate, through the use of resettlement.

In cases where refugees and asylum-seekers have moved in an irregular manner from a country in which they had already found protection, enhanced efforts should be undertaken for their readmission including, where appropriate, through the assistance of concerned international agencies. In this context, States and UNHCR should jointly analyze possible ways of strengthening the delivery of protection in countries of first asylum. There could also be more concerted efforts to raise awareness among refugees of the dangers linked to smuggling and irregular movements.

In order to discourage the irregular arrival of persons with abusive claims, rejected cases which are clearly not deserving of international protection under applicable instruments should be returned as soon as possible to countries of origin, which should facilitate and accept the return of their own nationals. States should further explore proposals to enhance the use and effectiveness of voluntary return programmes, for instance with the assistance of IOM.
When people are found in distress at sea, it is of secondary importance whether they meet the refugee definition or not: the first priority must be to protect the universal human right to life by ensuring that those in distress are rescued and disembarked to a safe location in a timely manner.

‘Rescue’ and ‘interception’ are two different things. While ‘Interception’ measures undertaken for humanitarian and law-enforcement reasons can entail retrieving people in potentially dangerous circumstances at sea and deliver them to safety before a distress situation arises they cannot be characterized as ‘rescues’ which operates under a distinct regime of rules and modes of collaboration. It should be underlined that interception measures which are directed at avoiding or shifting refugee-protection responsibilities, which frustrate access to international protection or seek to ‘deter’ asylum-seekers, which lead to a risk of *refoulement* or which endanger safety, are not consistent with international standards.

Also, a clear distinction should be made between: (i) criminals who smuggle migrants for profit; (ii) irregular migrants themselves; and (iii) the masters of private vessels who rescue migrants. At the moment of rescue those who are attempting to migrate to another country have committed no crime. Thus, irregular migrants should not be subjected to detention or arrest, provided that they have not illegally entered the territory or territorial sea of the coastal State and have thus not violated its immigration laws. A private vessel rescuing migrants should not be treated as engaged in migrant smuggling – even if it attempts to enter port.
The general provision in UNCLOS related to rescue at sea has been presented. Article 98 requires shipmasters to render assistance to persons distressed at sea. Although this provision is located in the Part of UNCLOS concerning the high seas, it is generally accepted that the duty in question applies in all maritime zones. The duty to render assistance also applies to every person in distress without discrimination, including refugees and asylum seekers. Article 10(2) of the Convention on Salvage requires States Parties to « adopt the measures necessary to enforce the duty » to rescue.

The duty to render assistance to persons in distress and to engage in cooperation with other States was also codified in the International Convention on Salvage, the International Convention for the Safety of Life at Sea (SOLAS), and the International Convention on Maritime Search and Rescue (SAR), which are presented below. The right of a foreign ship to enter a port or internal waters of another State in situations of force majeure or distress is not regulated by UNCLOS, but internationally accepted practice, at least in order to preserve human life.

IMO adopted two resolutions addressing the issue of places of refuge for ships in distress:

- Guidelines on places of refuge for ships in need of assistance
- Maritime Assistance Services (MAS)

Slides 23-24

Slides 25-28
**SOLAS** is one of the most important treaties concerning maritime safety. The original version of this Convention was adopted in 1914 in response to the Titanic disaster, but was updated several times. The general duty to render assistance at sea is given more detail under the regulations to SOLAS in 1974. These regulations enjoy binding force under the treaty.

**Chapter V** applies to all vessels on the sea. Many countries have incorporated these provisions into national law, so violators can be subject to national legal proceedings.

Chapter V identifies certain navigation safety services to be provided by Contracting States, and sets forth provisions of an operational nature applicable in general to all ships on all voyages. This is in contrast to the Convention as a whole, which only applies to certain classes of ship engaged on international voyages. This Chapter also includes a general obligation for masters to proceed to the assistance of those in distress and for Contracting Governments to ensure that all ships shall be sufficiently and efficiently manned from a safety point of view.

2004 Amendments were drafted to address challenges encountered by shipmasters seeking to meet their rescue at sea obligations but not being able to conclude rescue operations due to lack of cooperation between concerned States. The amendments complement the shipmaster’s obligations to render assistance with a corresponding obligation for States to cooperate and coordinate in rescue situations.

Search-and-rescue operations are frequently undertaken by commercial vessels. While the continuing respect for the rescue-at-sea tradition of their captains and crews is central to the integrity of the global search-and-rescue system, commercial vessels coming to the aid of people in distress at sea are often faced with considerable difficulties, including cost and delay occasioned by the rescue operation itself or by the process of finding a coastal State willing to allow disembarkation; concerns about the security and wellbeing of crew; and the risk, in some instances, that captain or crew undertaking a rescue may even be penalized under national anti-people-smuggling laws.
Search-and-rescue capacities are often limited, or strained by, large numbers of people moving by sea. Such limits include material and technical capacity, but also political will, institutional arrangements, and coordination at national and regional levels. These limits affect not only capacity to respond to a known distress situation, but also ongoing arrangements for surveillance, search and communications to ensure that distress situations are identified and those at risk are assisted in a timely fashion. Notably, the search and rescue services include medical assistance under SOLAS.

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**SOLAS: Search and rescue facilities**

“Each contracting Government undertakes to ensure that to ensure that necessary arrangements are made for distress communication and coordination in their area of responsibility, and for the rescue of persons in distress at sea around its coasts. These arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as are deemed practicable and necessary.”

Regulation V.7

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**Duty to maintain search and rescue service: SOLAS V – 2004 Amendments**

- Contracting State responsible for search and rescue area bears primary responsibility for ensuring coordination and cooperation
- Arrangements shall include the establishment, operation and maintenance of such search and rescue facilities as deemed practicable and necessary.
- SAR service: is the performance of distress monitoring, communication, co-ordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation through the use of public and private resources...

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**International Convention on Maritime Search and Rescue (SAR)**

- Comprehensive international regime governing search and rescue operations
- Obligates States to establish 24h rescue coordination centres
- Designation of on-scene coordinator
- Obligations to rescue persons in distress at sea, regardless of nationality, status or circumstances

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**Slides 29-31**
The SAR Convention was adopted in 1979 and entered into force in 1980. It introduced for the first time a comprehensive international regime governing search and rescue operations. Within the region, only Bangladesh and Indonesia are party to SAR.

The SAR Convention defines rescue as: « An operation to retrieve persons in distress, provide for their initial medical or other needs and deliver them to a place of safety ». The 2004 Amendments included an expansion of the definition to include « persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex ». Yet, restrictive definitions of what constitutes a « distress situation » can result in a lack of timely assistance.

Like under the SOLAS Convention, SAR services are defined as: « the performance of distress monitoring, communication coordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources, including co-operating aircraft, vessels and other craft and installations. » SAR services further include making arrangements for disembarkation of survivors from assisting ships.

Disagreement over what level of assistance is required and under what circumstances can hinder timely response. So-called ‘help-on’ policies and practices provide assistance that falls short of rescue, generally facilitating onward travel by sea, often in precarious conditions. Such practices may endanger safety or life at sea, avoid or shift responsibilities, and increase the risk of ‘orbit situations’ or even refoulement. They also tend to increase inter-State tensions and undermine regional cooperation. Similar concerns arise with regard to ‘interception’ or ‘pushback’ practices aimed at preventing or deterring unauthorized arrival by sea.

SAR requires the establishment of rescue coordination centres (RCCs) and sub-centres to be operational on a 24-hour basis staffed with personnel with working knowledge of English.
Each volume of the IAMSAR Manual can be used as a standalone document or, in conjunction with the other two volumes, as a means to attain full view of the SAR system.
SAR implementation

National and regional systems:
- The basic requirements for developing an effective SAR system include:
  - legislative establishment of the SAR services;
  - arrangements for use of all available resources, and provision of others if necessary;
  - establishing geographic area of responsibility with associated (JRCCs and RSCs);
  - staffing, training, and other personnel support to manage and operate the system;
  - adequate and functioning communications capabilities; and
  - agreements, plans and related documents, to achieve goals and define working relationships.

SAR: Rescue Coordination Centres (RCCs, JRCCs and RSCs)
- RCC: operational facility responsible for promoting efficient organisation of SAR services and for coordinating the conduct of SAR operations within an SSR.
- RCCs coordinate, but do not necessarily provide SAR facilities throughout the internationally-recognised SSR.
- JRCCs can be established at minimal cost by combining aeronautical and maritime RCCs, staffing determined by the responsible agencies and could include joint staffing by more than one agency. (Co-operation helps to develop better capabilities and plans to assist both aircraft and ships in distress.)
- In situations where an RCC is not able to exercise direct and effective control over SAR facilities in an SSR area, the establishment of an RSC with fly-SAR may be appropriate.
A search and rescue region (SRR) is established solely to ensure that primary responsibility for coordinating SAR services for that geographic area is assumed by some State. SRR limits should not be viewed as barriers to assisting persons in distress. The States concerned should agree among themselves, formally or informally, on the lines separating their SRRs and then inform IMO or the applicable ICAO regional office.
One of the key challenges in international discussions on protection at sea is reaching agreement on how to achieve swift disembarkation to a place of safety following a rescue.
IMO Resolution A.920(22) on the review of safety measures and procedures for the treatment of persons rescued at sea reads: "REQUESTS the Maritime Safety Committee, the Legal Committee and the Facilitation Committee, under the direction of the Council, to review on a priority basis the international conventions referred to above and any other IMO instruments under their scope, for the purpose of identifying any existing gaps, inconsistencies, ambiguities, vagueness or other inadequacies and, in the light of such review, to take action as appropriate, so that:

- survivors of distress incidents are given assistance regardless of nationality or status or of the circumstances in which they are found;
- ships which have retrieved persons in distress at sea are able to deliver the survivors to a place of safety; and
- survivors, regardless of nationality or status, including undocumented migrants, asylum seekers, refugees and stowaways, are treated while on board in the manner prescribed in the relevant IMO instruments and in accordance with relevant international agreements and long-standing humanitarian maritime traditions.

The aforementioned Conventions include: UNCLOS, SOLAS, SAR, FAL and International Convention on Salvage, covering the provisions related to assistance to persons in distress.

The Amendments were approved in 2004, and entered into force 1 July 2006. See, MSC Resolutions 153(78) and 155(78).

Legally binding amendments to the SOLAS regulations in 2004 imposed additional obligations upon State parties to ensure that rescued persons are delivered to a place of safety with minimum further deviation for the ship’s intended voyage.
Although « a place of safety » is not defined in SOLAS, it is defined in the IMO Guidelines on the Treatment of Persons Rescued at Sea, as covered, below.

The 2004 Amendments to SAR aimed to enhance State cooperation to ensure that persons in distress at sea are rescued while minimizing the inconvenience for the assisting ship and releasing them from their obligations with minimum deviation from their voyage. Like the 2004 SOLAS Amendments, they aim to ensure survivors are disembarked and delivered to a « place of safety » as soon as reasonable practicable.

The relationship between the law of the sea and international refugee law—and the consequent need, recognized by IMO’s Guidelines on rescue at sea, to take into account the risk of persecution, ill-treatment or onward refoulement in identifying a ‘place of safety’ for the disembarkation of rescued asylum-seekers or refugees—is not always respected in practice. A proposed place of disembarkation cannot be considered ‘safe’ if it could be reasonably foreseen that disembarkation of rescued asylum-seekers or refugees there could place their lives or freedoms at risk or lead to their refoulement. Ship captains—including those of commercial vessels—who are involved in rescue operations cannot be expected to assess the ‘safety’ in this sense of a proposed place of disembarkation or the possible protection needs of those rescued. Primary responsibility for avoiding refoulement in such cases falls to coastal States tasked with search-and-rescue coordination, as well as the flag States of assisting ships.
Although international treaty law on search and rescue imposes a duty on States to coordinate and cooperate to ensure that those rescued are disembarked and delivered to a place of safety as soon as possible—with the coastal State in whose search-and-rescue region the rescue takes place having primary responsibility—States do not always agree in practice on who is responsible within this framework for: (i) disembarkation; and, (ii) subsequent follow-up. This uncertainty can lead to delay and risks to safety at sea both for the assisting vessel and for those rescued. A broader concern is that such uncertainty may, in some instances, also constitute a disincentive to active search-and-rescue efforts. Associated guidelines, contained in resolution MSC.167(78).

« Place of safety » is defined in the IMO Guidelines on the Treatment of Persons Rescued at Sea. It is not specified as to whether a place of safety must be on land.
SAR’s absence of a provision on disembarkation to land, lack of certainty regarding States’ obligations to receive survivors and lack of political will render irregular migrants at sea without guarantees to fundamental rights, including timely access to asylum claims...

« Place of safety » Physical characteristics: on land or aboard a rescue unit; temporal characteristics: provisional or final.

Safety may have a different meaning when applied to different categories of persons rescued. Whereas it may simply relate to the passengers’ immediate well-being, considering shipwrecked persons in general, when the notion concerns refugees and asylum seekers, in particular, their special position has to be taken into account.

Discussion question: Can pushback in sea-worthy vessels with enough supplies to reach the embarkation State constitute delivery to a « place of safety »?

Shipboard safety and security, providing accommodation and immediate assistance to those rescued, and identifying those who may be seeking asylum or have other protection needs prove challenging for captains and crews of assisting vessels. This is particularly so where large numbers of people are involved or where those rescued need to be brought aboard a vessel that is structurally unsuited for search-and-rescue functions. Protection screening and refugee status determination should not take place at sea. Nor are they the responsibility of a ship captain. But those involved in rescue operations may benefit from increased guidance and practical support for appropriate on-board arrangements pending disembarkation. The importance of preserving, wherever possible, family units following a rescue (both pre- and post-disembarkation) warrants particular attention.

Disembarkation States

- Ensure that the human rights of the disembarked persons are safeguarded:
  - Right to life
  - Prohibition of torture or cruel, inhumane or degrading treatment
  - Prohibition on non-refoulement
  - Prohibition of forced labour or servitude
  - Right to liberty and security
- Specific protections for victims of trafficking under UNTOC Trafficking Protocol

Participating States in whose territories the rescued persons are disembarked shall ensure that the human rights of the disembarked persons are safeguarded. These will include in particular: the right to life; the prohibition of torture or cruel, inhumane or degrading treatment; the prohibition of non-refoulement; the
prohibition of forced labour or servitude; and the right to liberty and security (no arbitrary arrest and detention).

Indonesia, Malaysia and Thailand, as parties to the Trafficking Protocol, are under specific obligations to protect and assist the victims of trafficking with full respect for their human rights.

While there is no explicit duty to allow disembarkation in the State responsible for the search and rescue, there is a duty of result. Although the duty on the Coastal State is limited to ensuring collaboration and does not require allowing disembarkation onto its own territory, the amendments establish nonetheless an obligation of result. The SAR operation will not be considered accomplished unless the survivors are effectively disembarked. Responsibility accrues in these situations from the mere fact of exercising effective control through rescue or interdiction. See, IMO Principles relating to administrative procedures for disembarking persons rescued at sea, 22 January 2009, FAL.3/Circ. 194.

UNHCR’s position is that the obligation on the coastal state to allow disembarkation is implicit in the maritime Conventions. UNHCR, ‘Problems Related to the Rescue of Asylum-Seekers in Distress at Sea’, UN doc. EC/SCP/18, 26 Aug 1981, paras. 19-21.

Under international law, ‘no State can avoid responsibility by outsourcing or contracting out its obligations, either to another State, or to an international organisation’. When a plurality of States is responsible for the same wrongful act the general rule is that ‘in such cases each State is separately responsible for the conduct attributable to it, and that responsibility is not diminished or reduced by the fact that one or more other States are also responsible for the same act’. See, Special Rapporteur J. Crawford, ‘Commentary to the Draft Articles on State Responsibility International Law Commission’, Annual Report (2001), ch. IV, at 314, available at: <http://wwwdcil.cam.ac.uk/Media/ILCSR/ILC2001chpt Vpdf>. Art. 47 of the ILO Articles on State Responsibility stipulates that ‘[w]here several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act’ (emphasis added).

With regard to the human rights violations that may result from joint maritime operations, the independent responsibility of each State may be invoked. In the case Xkavara v. Italy, Appl. No. 39473/98, 11 Jan. 2001, the ECtHR attributed exclusive responsibility to Italy for the acts it perpetrated in international waters as a result of the bi-lateral agreement concluded with Albania, authorising it to patrol both international and Albanian waters for the purpose of migration control. The Court explicitly established that, because the shipwreck had been directly provoked by the Italian navy, any complaint in this regard had to be considered to be addressed exclusively against Italy. The Court made clear that the mere fact that Albania was a Party to the bilateral agreement with Italy could not engage its responsibility with regard to the ECHR for every measure that the Italian authorities might adopt for the implementation of the agreement in question.
Although jurisdiction in international law is generally framed territorially, extraterritoriality does not prevent human rights obligations from being engaged in particular circumstances. The same applies to non-refoulement.

Unsafe and dangerous crossings can be: unseaworthiness of vessels, and inhuman and degrading conditions.

The term 'distress' has been defined in the SAR Convention 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'. The 2004 Amendments included an expansion of the definition to include «persons in need of assistance who have found refuge on a coast in a remote location within an ocean area inaccessible to any rescue facility other than as provided for in the annex». Yet, restrictive definitions of what constitutes a «distress situation» continue to result in a lack of timely assistance.

While national views may vary as to when a vessel is in distress, under international law the question is quite straightforward. The regime of distress also extends a right to dock and to seek refuge in adjacent ports to vessels in distress. Although UNCLOS does not directly codify it, the existence of this right in customary law is supported by commentary and consistent jurisprudence.
The obligation upon State parties to the SOLAS Convention to provide “a place of safety” as soon as reasonably practicable to alleviate the burdens of shipmasters does not explicitly stipulate that the State responsible for the SAR zone is obliged to disembark the survivors in its own territory. It only requires that the SAR State maintain the primary role for ensuring cooperation and coordination. The treaties thus do not oblige a coastal State to allow disembarkation on its own territory when it has not been possible to do so elsewhere. This has been criticized as the major shortcoming of the treaty regime. The SAR State response—such as returning migrants to point of embarkation—must also be assessed in terms of refugee law and international human rights law. *Non-refoulement* applies to disembarkation.

**Discussion question:** Is a vessel carrying irregular migrants necessarily «in distress»?

**Discussion question:** Is there any residual obligation upon the coastal State, in whose Search and Rescue zone (SAR zone) the rescue operation took place, (or the SAR State) to permit disembarkation of rescued persons in its territory if no other solution can be found?
In sum, flag States are under the obligations to:

- Require the master of a ship flying its flag to proceed with all possible speed to the rescue of persons in distress when informed of their need of assistance. This duty applies to both private and public vessels. If the vessel is unable or considers it unnecessary to proceed to the assistance of the vessel in distress, the master must enter in the log-book the reason for the failure and inform the search and rescue authorities accordingly;

- Monitor whether the masters of vessels flying its flag discharge these duties. This is a so-called duty of “due diligence”. Such duties involve an obligation not only to adopt appropriate national “rules and measures” but also to exercise “a certain level of vigilance in their enforcement”, including exercising “administrative control” over relevant “public and private operators”.

States bear direct responsibility for public vessels that fail to discharge duty to rescue, and remain liable (along with the shipmaster) for any failure of private vessels under due diligence.

In the lead-up to the High Commissioner for Refugee’s Dialogue on Protection at Sea in December 2014, UNHCR partnered with the International Chamber of Shipping and the International Maritime Organization to develop an updated version of the joint publication “Rescue at sea: A guide to principles and practice as applied to refugees and migrants”. The Guide, first published in 2006, is intended for shipmasters, ship owners, government authorities and others involved in rescue-at-sea situations involving refugees and migrants. It provides basic guidance on relevant legal provisions, on practical procedures to ensure prompt disembarkation of rescued persons and on measures to meet their specific needs—particularly in cases of refugees and asylum-seekers.
GROUP DISCUSSION

Questions for Discussion:

• What steps can States and others take to strengthen search-and-rescue capacity and coordination at the national and regional levels?

• What can States do to support rescue by commercial vessels so that ship captains can continue to fulfil their obligations under maritime law without being penalized or incurring avoidable costs for doing so?

• How can States achieve more effective and predictable coordination and cooperation so that rescued people are disembarked (i) as safely and as swiftly as possible, and (ii) to a place where those in need of international protection can find it?

• How can definitions of ‘distress’ and approaches to search and rescue be better harmonized?

These documents go toward disembarkation

• IMO/UNHCR/ICS, Rescue at Sea. A Guide to Principles and Practice as Applied to Migrants and Refugees

• Djibouti Conclusions

SESSION SIXTEEN: GROUP DISCUSSION - SEARCH-AND-RESCUE CAPACITY AND COORDINATION AT THE NATIONAL AND REGIONAL LEVELS

Breaking up into four groups, each group will choose a country or a region and during 30 minutes make a SWOT analysis of internal strengths, weakness and external opportunities and challenges that affect the national/regional search-and-rescue capacity.

Each group will get seven minutes each to present their findings, preferably visualizing this with a SWOT-analysis matrix (see the template with leading questions below).
<table>
<thead>
<tr>
<th>Inside the Program (Internal Attributes)</th>
<th>Factors likely to lead to positive change and further improvement in the quality of the program</th>
<th>Factors which may compromise further improvement in the quality of the program</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Strengths</strong></td>
<td>What have been the strengths of our program? What are we known for? What are we most proud of? What are we doing well? What are our key resources and exemplars? What do we control (people, resources, knowledge) that gives us an advantage? What are our key areas of expertise? What resources or capabilities allow us to meet our mandate/mission? What positive aspects of the program have students/faculty or others commented on?</td>
<td><strong>Weaknesses</strong></td>
</tr>
<tr>
<td><strong>Opportunities</strong></td>
<td>What opportunities will most dramatically enhance the quality of our program? What changes in demand do we expect to see over the next years? What key environmental/market factors may positively impact the program? Where can we create more value for the program? What external or future opportunities exist for the program? What are some key areas of untapped potential?</td>
<td><strong>Challenges</strong></td>
</tr>
<tr>
<td>Outside the Program (External Attributes)</td>
<td>What are we doing poorly or struggling with? What frustrations/challenges have students faculty expressed? What do we need to fix? What are the internal weaknesses and deficiencies in resources or capabilities that may be hindering the program’s ability to accomplish its mandate?</td>
<td>What are the key challenges or threats to the quality of our program that need to be addressed? What are others doing that we are not? What future challenges may affect the program? What external or future challenges or threats does the program face?</td>
</tr>
</tbody>
</table>
SESSION SEVENTEEN: LAW ENFORCEMENT AGAINST TRANSNATIONAL CRIMINAL NETWORKS

The overall aim of this session is for participants to gain practical knowledge of law enforcement action against transnational criminal networks responsible for people smuggling and trafficking in persons by sea. This session will thus focus on the practical aspect of policy design and implementation of anti-trafficking and anti-smuggling law enforcement action, following the ‘three Ps’ model (see below), in accordance with international laws and guiding principles.

Slides 1-2

Overview

- 3Ps
- Bali Process Regional Strategic Roadmap – online tool
- Examples of Regional partnerships on counter-trafficking responses

Slide 3

Guiding Principles

- Whole-of-government approach
- Victim-centred approach
- Human-rights approach
- Strategic partnership
- Evidence-based approach
Drawing on the discussion of international human rights on DAY 1, working with victims of trafficking in the field of law enforcement, prosecution, services, protection and their access to justice requires adherence to these five principles.

**Whole-of-government approach.** Multiple branches of government should coordinate efforts on trafficking, for example: law enforcement, judiciary, social services and consular services. This can be coupled with applying **subsidiarity** principle to counter-trafficking actions and policies, which mean that they are developed nationally for the most part and delegated to regional levels of government as appropriate.

**Victim-centred approach.** When combating the crime of trafficking in persons, relevant actors could take account of the individual needs of trafficked persons and respond accordingly. Legal provisions, policies and assistance for victims of trafficking should be independent to their participation in the criminal justice system. Practitioners who work directly with victims of trafficking should endeavour not to re-traumatize them further. Empowerment programmes could be consider to mitigate possibilities of re-traumatization. Non-state actors should be allowed to provide assistance to victims of trafficking where States are unable to respond.

**Human rights-based approach.** States have obligations under international treaties to respect, protect and fulfil human rights. Combatting trafficking in persons should uphold fundamental rights and freedoms outlined by international human rights instruments. Victims and potential victims of trafficking should be the primary consideration when actions are taken. States may additionally provide specific human rights protection and assistance to vulnerable populations such as children, refugees and stranded migrants. Human rights-based approach embraces the **non-discrimination, gender equality** and the **best interest of the child** principles in its foundation. Therefore, responders to trafficking in persons cases should act in a manner that is aligned with these principles.

**Strategic Partnership.** Partnership is an essential component and requirement for combating this crime nationally, regionally and globally. Law enforcement officials, the judiciary and other relevant actors should collaborate with counter-trafficking partners in other States, with multiple agencies within their States, and also with international organizations and non-government stakeholders from a range of fields, including human rights, labour or employment, education, and health.

**Evidence-based approach.** To effectively respond to the usually transnational nature of trafficking in persons and to shape national policies, it requires law enforcement and intelligence agencies to share information and evidence across their government agencies and across governments. Intelligence such as personal biometrics, movements, criminal assets, proceeds of crime could be considered for sharing.

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**Slide 4**

UNTDOC Trafficking Protocol establishes the “3Ps” paradigm – **prevention, protection, and prosecution** – which serves as the framework used by governments and international organizations around the world to
combat human trafficking. The **strategic partnership** principle is sometimes emphasized as the fourth P to help combating transnational organized crimes in the form of cross-border cooperation.

**Slides 5-6**

One way to combat trafficking in persons is to prevent it from happening in the first instance. Measures to **reduce vulnerability** to trafficking could be taken to mitigate the risk among the disadvantaged. **Economic measures** that would address poverty, economic inequality, and unjust land reform could discourage vulnerable populations from resorting to unsafe migration and therefore reduce the risk of victimization. **Civil registration**, particularly births and marriages, will grant access to welfare, civil rights and freedoms, identity and travel documents and legal protection to the people who otherwise will have no means to migrate safely and legally. Discrimination, stereotype, prejudice and biases are the origin of **gender-based violence**, including trafficking in persons. Responders to trafficking should be sensitized about forms of gender-based violence and how to prevent them. Law enforcement action should be modified to avoid discriminatory behaviour, attitude, programmes and policies.

Developing **information campaigns** to reduce trafficking in persons crime and increase social awareness is an integral part of any trafficking prevention policies. Government agencies, including law enforcement authorities, could undertake **awareness raising** initiatives should do research to formulate a clear goal for the campaign and message, methods to evaluate and measure its effectiveness, and identify recipients of that message. Steps on how to build an effective information campaign and examples of effective campaigns can be found on the Bali Process Regional Strategic Roadmap. An IOM’s campaign has also develop a toolkit to prevent trafficking in persons using Behaviour Change Communication. **Discouraging the demand** refers to eliminating the need for cheap and exploitative labour and services. Mass media campaigns could be a tool to inform consumers of exploitation that is occurring and how to avoid buying products or using services provided by victims. Information about migrants’ rights and victims’ entitlement to protection and assistance should be provided by relevant authorities, law enforcement included.

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Law enforcement officials are exposed to the grave nature of trafficking in persons and people smuggling crimes. The experience with and insight into trafficking could translate effectively into educational programmes to reduce vulnerability among children. Law enforcement authorities, in partnership with academic institutes and education agencies, should integrate and mainstream the topic of trafficking in persons into curricula, for example providing children with information about trafficking, or introducing programmes to develop special skills that will help them avoid being trafficked.

Research and analysis is integral in developing comprehensive prevention measures that address existing trends of trafficking. To build evidence-based measures and preventive programmes, States should introduce data-collection and data-gathering mechanisms among relevant government agencies. Ethical collection of data and privacy principles (confidentiality) should be considered during the process. Sharing information in a systematic way is an important factor that requires a great level of cooperation among relevant agencies and other relevant stakeholders.

All trafficking and smuggling cases will come through the law enforcement, enabling them to collect data for monitoring and evaluation purposes. Monitoring of prevention measures and evaluating the impact of projects, programs (including information campaigns) and enforcement action are equally important. This involves collecting information through available channels about the progress of any given initiative, analyzing information including crime statistics, biometric and demographic information, criminal records, financial reports, and responding to changing dynamics with appropriate action to ensure set goals can be achieved.

It is crucial that States share one common understanding of the crime in the region and its full complexity, including patterns of trafficking and smuggling, modus operandi of criminal groups, established methods of identifying and protecting victims and prosecuting the crime. Understanding of the issue will allow States to develop regional approaches based on the principle of partnership, cooperation and information sharing that will increase counter-trafficking measures’ impact and reduce duplication. In order to do so States not only are encouraged to increase bilateral State-to-State cooperation but to engage on multilateral levels through various fora and platforms, like the Bali Process. Law enforcement authorities should participate in these fora and platforms wherever appropriate and to the greatest extent possible.
Controlling national borders is a way to interrupt traffickers’ and smugglers’ activities and combat these crimes. The UNTOC Trafficking Protocol outlines several policy measures States can introduce to reduce the numbers of victims being moved across national borders. Some of the measures include: investing in technical capacity building of border control agencies, increasing information sharing among relevant domestic agencies and States, and improving detection and examination systems for identity documents.

States should ensure **legitimacy and quality of travel documents** and call for preventing the unlawful creation of such documents. States are encouraged to introduce documents that are difficult to falsify, forge or alter; to ensure the secure production of such documents, and methods to detect forged documents. In addition, States should train border officials, law enforcement officials, consular staff, travel agents and others who come in contact with travel documents to verify their authenticity.

**Proactive measures** explore various sectors within the economic and social space that can directly affect the trafficking and smuggling situations, either by facilitating supply or creating demand. States should consider: introducing measures to prevent operation of illegal recruitment agencies and/or abusive recruitment practices; address the issue of corrupt officials; consider extra measures to prevent vulnerable populations from taking desperate and risky decisions; improve safe and regular labour migration opportunities and provide measures for better labour control methods; and institute legislative or policy measures to monitor and issue operating licenses for tourist companies, au-pair agencies, and bridal or adoption agencies. Law enforcement authorities are encouraged to proactively take part in these activities wherever appropriate.
States should incorporate prevention and specific anti-trafficking measures in policies and disaster management plans. For example, first responders from relevant government agencies and humanitarian agencies should be trained to recognize risks and identify potential victims of trafficking. Law enforcement authorities should be trained to prepare towards prevention and disruption of trafficking and smuggling during the times of disasters, emergencies, conflicts and large-scale projects, including major sporting events where these crimes proliferate.

**Slides 9-10**

The authority to identify a victim of trafficking in persons and people smuggling usually fall in the hands of law enforcement agencies. **Victim identification** could also be performed by a team of officials from law enforcement, social services and embassy and consular offices. It is very important that victims and potential victims are identified and therefore can access protection, assistance and remedies. Strengthening the capacity of different stakeholders involved in identification is key to combat trafficking in persons and people smuggling. States should introduce clear guidelines and operating procedures to clarify roles and responsibilities of a broad pool of State authorities and other relevant actors in effective victim identification processes. Law enforcement officials should receive appropriate and regular training to quickly and effectively identify victims of trafficking and smuggling. Standard guidelines and procedures for identification should respect and protect the dignity and human rights of presumed victims of trafficking. The Bali Process has produced several policy and reference guides on identifying and interviewing victims of trafficking.23

Those who are the first point of contact with potential victims of trafficking or smuggling will have to take steps to protect the **security** of the potential victim, as well as staff who come into contact with the victim.

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Through a process of risk assessment, appropriate measures can be put in place to manage those risks. Security measures may range from the presence of security personnel, or direct communication and cooperation with police, to the presence of private security companies in shelters. Where victims are placed in non-shelter accommodation, the risk assessment conducted will need to consider the security challenges that may be posed to the victim, the victim’s family and friends, and service providers, including access to communication and the reliability and competence of local police. It is crucial that all staff members involved in providing assistance to victims are given security briefings and are kept up to date with risks to victims and to themselves. Information about victims and their circumstances should only be shared on a ‘need-to-know’ basis, meaning that staff should be only provided with information they need for the purpose of performing their protection work. There is a risk that traffickers may seek to infiltrate assistance programmes or obtain information about a victim’s location. Service providers should remain alert to this risk and not disclose any information to people whose identities and credentials are unknown.

Victims of trafficking and smuggling should be provided with various support measures, including food, clothing and safe accommodation in shelters or other locations appropriate to their needs, and should be allowed freedom of movement. Victims should not be held in locked facilities, whether immigration detention centres, jails, or other closed facilities where they are not free to come and go. Law enforcement officials should respond to these basic needs whenever possible, including during investigations and legal proceedings.

Law enforcement and judicial officials should be able to provide information about their rights, as well as the scope, nature and function of the assistance and protection programme, and the obligations and responsibilities it will entail. The information should be provided when victims of trafficking or smuggling are in a position to adequately discern and understand all the information provided. Access to translators or interpreters may be necessary if victims of trafficking do not speak the language of the place in which they are identified. Informing them of the availability of assistance may ease the anxiety of victims of trafficking and help them decide on next steps and processes.

Because various types of exploitation are often accompanied by physical and mental abuse, victims require immediate medical attention and access to health care for long-term recovery. States should develop minimum standards for health care and designate specialized agencies to deliver medical services. Law enforcement officials working with victims should be observant to physical, psychological and behavioural symptoms that victims may exhibit.

It is considered a best practice to provide victims of trafficking (domestic or foreign victims) with a ‘reflection period’ to begin to recover from their experiences and make a decision about whether or not to assist with an investigation or prosecution. Reflection periods vary amongst States, and typically range from 30 to 90 days. The protection plan for victims of trafficking who are non-citizens with irregular status may require temporary visa arrangements to enable the person to remain in the country during the reflection period or in cases when victims agree to participate in criminal investigation and/or a trial.

Family tracing is not only important for a victim who wishes to be reunited with his or her family as soon as possible, but also for the family the victim has left behind. Family tracing can be a lengthy process, but when successful, leads to family reunification. However, it is important to ensure that family members were not complicit in the trafficking of the victim. This is especially essential in the case of children and unaccompanied minors, to prevent children from going back to situations where they could face abuse, neglect, or possibly being re-trafficked.

Presumed child victims of trafficking should be referred immediately to child protection authorities to conduct age assessments, appoint legal guardians and conduct best-interest determinations in making interim care arrangements as appropriate. Some victims of trafficking or smuggling might also have well-founded fear of persecution or be at risk of serious harm and be eligible to claim asylum status. Helping victims of trafficking to submit an asylum or refugee claim, or referring a victim to appropriate departments or specialized agencies, should be part of comprehensive assistance services.
Protection III

- Sustainable solutions
  - Return and reintegration
  - Compensation
- Coordination
  - International, regional and sub-regional
  - Inter-agency and cross-sectoral
- Multi-stakeholder approach
  - Direct assistance
  - Return and reintegration

Any return to countries of origin should, to the extent possible, be voluntary and carried out with regard for the rights, safety and dignity of returnees and include the provision of the adequate protection, assistance and support necessary to achieve reintegration and prevent re-trafficking. Where it is preferable for a victim to relocate to a third State, the State in question should assist in the facilitation of safe relocation and integration. Where there are ongoing safety concerns, humanitarian considerations or other risks that prohibit victims from being returned, temporary or permanent residency in the country of destination should be considered. Victims who returned to their place of origin, either domestically or in another State, should be monitored to ensure that they do not face any retaliation from traffickers or being re-trafficked. Return to the home community and reunification can be a challenging process as a victim might face stigmatization, discrimination, even rejection by their relatives. When considering whether to return victims, risk assessments should be conducted to determine if there is a chance that poor reintegration might lead to the victim being re-trafficked.

Economic empowerment is one of the key factors in successful reintegration of a victim. Upon return to their home or country of origin, victims very often face the same financial hardship that led them to leave in the first place, in addition to repaying acquired debt. To help victims achieve economic self-sustainability that will prevent them from being re-trafficked, States and/or international or local organizations can take various measures, including: providing some financial support, small business loans, skills training, guidance in seeking employment, etc.

A key means of facilitating sustainable protection solutions is through the provision of compensation, financial assistance, or reparation in recognition of the injury, loss or harm experienced by the victim of trafficking. Compensation may include unpaid wages, legal fees, medical expenses, lost opportunities and compensation for pain and suffering. Consideration should be given to ensuring that compensation is accessible to victims of trafficking who are non-citizens. There are many possible sources of victim compensation that States can establish. For example, asset forfeiture is one means to secure legal remedies and compensation for victims. States should facilitate such acquisition of a perpetrator’s assets on behalf of victims.

Given that several stakeholders may be involved in ensuring that victims of trafficking and smuggling are protected, it is vital that coordination mechanisms are put in place to allow for the different services to complement each other in providing appropriate assistance. Operational level coordination to ensure inter-agency collaboration is a prerequisite for the success of any national or local strategy to prevent and combat human trafficking. Good practice examples include standard operating procedures (SOPs), regular meetings as well as evaluation and monitoring mechanisms agreed upon and utilized by different stakeholders. At the national level, coordination occurs in many ways, including through arrangements entered into by government and non-governmental actors to coordinate their protection functions. Approaches differ from State to State, but generally involve a national coordinator who is a high-level government official or agency, and a committee or roundtable comprised of senior representatives of government agencies and civil
society groups who work together to develop national policy and procedural recommendations. Lastly, coordination at the international level is required in order to lay foundations for effective multi-stakeholder coordination of protection, including recovery, return and reintegration of victims.

Slide 12

The term ‘trafficking in persons’ is defined by Article 3(a) of the UNTOC Trafficking Protocol: “Trafficking in Persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

States should provide a clear and broad definition of trafficking in persons. Domestic legislation does not need to adopt the exact language of the UNTOC Trafficking Protocol precisely, but should be aligned with domestic legal systems to give effect to the meaning and concepts contained in the Protocol. Consent, means, purposes of exploitation and trafficking in children are specific elements of the definition that should be considered.

Once the elements of the crime of trafficking, including the means (coercion, deception, etc.) are proven, any defence or suggestion that the victim ‘consented’ is irrelevant. This is because such purported ‘consent’ was obtained through improper means, was not full and free, was given only partially, or was subsequently revoked. A victim’s consent cannot serve as a defence for the perpetrator in court. At the same time, absence of consent is not a prerequisite for the crime of trafficking in persons to be proven.

Exploitative conduct such as forced labour, servitude and slavery-like practices are serious offences and establishing standalone offences for this conduct provides States with a more rigorous legal framework to prosecute offenders. For example, where some elements of the trafficking offence are difficult to prove the conduct at the destination can still be prosecuted using a separate forced labour or servitude offence.

It is essential for countries to have separate offences for migrant smuggling and trafficking in persons respectively. This is important because the two offences have different elements that need to be taken into consideration when investigating the crimes, identifying the victims of trafficking in persons or of other human rights violations, and when prosecuting the offenders. Separate offences are particularly important when it comes to international cooperation (mutual legal assistance and extradition) to enable countries to seek evidence or suspects/offenders that are located in another country (in relation to those specific crimes).

Trafficking in persons can occur across country borders or within a country’s borders. In criminalizing trafficking in persons, States could:
(a) adopt a single trafficking in persons offence, which covers both transnational and domestic trafficking, by ensuring that the offence does not include a requirement for victims to be trafficked across borders; or

(b) adopt separate offences, one covering transnational trafficking and the other covering domestic trafficking.

The principle of territorial jurisdiction provides that States can make and enforce laws where the conduct constituting an offence occurs within the physical territory of the State. Territorial jurisdiction also extends to a vessel under the flag of a State or an aircraft registered under the law of a State. Under the UNTOC (Article 15), a State must establish jurisdiction if the offender is its own national and is present in its territory, but the State refuses to extradite (hand over) the offender to another country to face charges solely because the person is a national. This obligation on States to establish jurisdiction applies regardless of where the offence occurred. The UNTOC also provides that a State may establish jurisdiction where an offender is present in its territory and the State refuses to extradite the offender for any other reason (i.e. not on the basis of nationality).

Extraterritorial jurisdiction refers to a situation where a State’s jurisdiction extends outside of the State’s borders. To ensure maximum effectiveness of laws that combat transnational crime, States may establish extraterritorial jurisdiction when an offence is committed:

(a) against a national of that State;

(b) by a national of that State or by a person who is stateless who habitually resides in that State; or

(c) outside the territory of a State with a view to commission of a serious crime within the territory of that State.

These extraterritorial jurisdiction provisions encourage (but do not compel) a State to take action against its own nationals where they commit a trafficking in persons offence in another country. They also allow a State to exercise jurisdiction over persons operating outside its territory who traffic people into its territory. Otherwise, organized criminal groups can exploit gaps in laws between different States to escape prosecution.

In addition to charging any aggravating circumstances, the permitting jurisdictions, prosecutors should charge any additional crimes that were committed during the course of trafficking or smuggling, including rape and sexual assault, fraud, etc, as well as accomplice and attempt liability. This will increase the chances of conviction as well as justify a higher sentence.

Non-imposition of sanctions upon the victim applies when, in the course of being trafficked, a victim will find himself or herself committing illegal acts, whether or not intentionally, such as crossing a State border without documents, possessing forged documents, begging, and/or engaging in prostitution. In fact, victims are often identified while conducting an illegal act. However, the attempt to prosecute or criminalize a trafficking victim for such acts can be counterproductive because it deters victims from reporting crimes, particularly trafficking, and from accessing protection and assistance services. Fear of prosecution for illegal acts committed while being trafficked discourages victims from giving critical information to police, thereby decreasing protection for the victim and precluding him or her from cooperating with the authorities. Enduring a prosecution can be traumatizing, especially if the victim is required to give evidence regarding his/her trafficking experience in order to explain his/her defence or to mitigate the criminal offence and penalty.

Slides 13-17
Law enforcement agencies should consider applying proactive techniques used in organized crime investigations for developing cases against traffickers when there is limited victim cooperation. This can include intelligence gathering on criminal networks through undercover operations, infiltration surveillance, or ad hoc international criminal action/initiatives.

Reactive investigation in most criminal cases usually is based on police being alerted, tipped off about the existence of the crime by either victims or witnesses affected by the crime, or the crime might be uncovered during investigation of another crime. Reactive investigations are time sensitive, often requiring immediate intervention. The primary objective is to rescue and provide assistance to victims of trafficking. Collecting all available evidence and arresting all offenders involved in the crime might not be possible, which is why victims’ testimony and cooperation is essential in building prosecution cases against traffickers.

In order to effectively combat trafficking in persons, States need to ensure that the penalties are proportionate to the severity of the offence, as noted in Article 11 of the UNTOC. States can strengthen these minimum standards to improve their capacity to prevent and combat trafficking in persons by:

(a) lowering the threshold for the mental element of certain offences – requiring that the offender need only be ‘reckless’ that an individual will be exploited, rather than requiring that the offender have a proven ‘intention’ to exploit; and

(b) applying higher penalties for offences conducted in aggravating circumstances.

Additional administrative and/or other non-criminal sanctions can also be applicable where parents or legal guardians are involved in the trafficking of their children to deprive them of their parental rights, to ensure the best interests of the child.

The extension of criminal responsibility ensures that those who attempt to traffic people can be prosecuted. It should cover attempts to commit a trafficking offence (subject to a State’s domestic legal system), participation as an accomplice in a trafficking offence, organizing or directing others to commit a trafficking offence, and participation in a criminal group. States may implement this by creating an offence of conspiracy, or by creating offences that prohibit association and participation in criminal organizations. Those involved in transnational organized crime may seek to hide behind the cover of legal persons such as companies, charities, or other associations. Article 10 of the UNTOC requires States to ensure legal persons are held liable for participation in serious crimes involving an organized criminal group, and for specific offences under the UNTOC related to laundering proceeds of crime, corruption, and obstruction of justice. It is not mandatory to establish criminal liability of legal persons under the UNTOC; however, States could establish some form of liability of legal persons – for example under civil or administrative regimes.
Trafficking in persons and people smuggling should be **extraditable offences** under certain circumstances. Extradition requests should be in line with applicable international law. States may use the UNTOC as a direct legal basis for requesting and granting extradition. However, where States have not accepted to use the UNTOC for this purpose and rather require separate legal bases for extradition (e.g. national legislation or a specific extradition treaty), they should ensure that trafficking of persons is included as an extraditable offence. For example, if a State has a 'list' of extradition offences in its extradition legislation, it needs to make sure that the trafficking in persons offences are included in that list. This will ensure compliance with the international crime cooperation obligations in the UNTOC, which apply to the offences in its Trafficking Protocol.

**Mutual legal assistance** (MLA) is a process by which States seek and provide formal government-to-government assistance in criminal investigations, prosecutions and related judicial proceedings. The types of assistance that may be provided through MLA are subject to applicable treaties and domestic law. States are encouraged to cooperate and provide to each other the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences. The UNTOC sets out the types of MLA that may be requested:

- (a) taking evidence or statements from persons;
- (b) effecting service of judicial documents;
- (c) executing searches and seizures, and freezing of assets;
- (d) examining objects and sites;
- (e) providing information, evidential items and expert evaluations;
- (f) providing originals or certified copies of relevant documents and records,
  - (g) including government, bank, financial, corporate or business records;
- (h) identifying or tracing proceeds of crime, property, instrumentalities or other things for evidential purposes; and
- (i) facilitating the voluntary appearance of persons in the requesting State Party.

Formal and informal cooperation are complementary. In some cases **informal cooperation** will become formal cooperation, but once cooperation is formalized, informal cooperation may still continue to take place. For instance, during the early stages of an investigation, informal law enforcement cooperation can be helpful to efficiently gain investigative leads when there are time constraints. At a later stage, the information obtained informally may need to be re-obtained through formal means to ensure it is admissible in court. Informal forms of cooperation can be regularized through bilateral and multilateral legal agreements and through memoranda of understandings.
Victim protection is a cornerstone of an effective criminal justice response to crime. Unless victims of trafficking are appropriately protected, they will not be empowered to support criminal justice action against traffickers. The protection of victims should not be conditional on, nor compromised by, their participation in the criminal justice system. State authorities are supported in their work where they understand protection challenges, and are trained to effectively address them in accordance with the relevant legal framework and international best practice. Victims of trafficking in persons – irrespective of their migration or other status – must be protected from further harm. Domestic legislation should introduce sanctions against anyone threatening or intimidating a victim or witness, and should permit measures aimed at ensuring the physical safety of victims, their families and others whose safety may be at risk. Following a prosecution, threats and intimidation against victims of trafficking and their family or friends may increase. States should consider the need for ongoing witness protection and personal safety measures, including by allowing victims to remain permanently in the jurisdiction if they would be in danger upon return to their country of origin.

A key component of protection occurs before the trial begins, during the investigation and case-preparation phase. Victims need to be kept informed, for example by having explained to them what is happening, how long processes are likely to take, why their personal belongings may have been taken from them to use as evidence, and when those items will be returned. During the pre-trial phase, counselling and emotional support can prepare victims for the trial phase, which may include giving evidence as witnesses. This support should continue into the trial phase. States can introduce laws mandating that vulnerable victim-witnesses receive counselling and emotional support prior to trials. Such support may include the use of a qualified person to prepare the victim for trial, such as by accompanying him or her to the courtroom, explaining court procedures and helping victims understand the questions they may be asked.

Some State prosecution services employ specific witness assistance or victim liaison officers to reduce stress and trauma by providing victims with information and face-to-face support, and to accompany them at court appearances. Civil society organizations can also provide an invaluable source of supplementary care and support to victims as they go through the prosecution process.

Witness assistance officers or other appropriate authorities should provide victims with information about the outcome of the trial and its implications, including the sentence imposed on the trafficker, its duration, and the trafficker’s proposed release date, as well as any appeal possibilities. The victim’s protection plan should be revised accordingly, in consultation with the victim and in consideration of his or her concerns, filing criminal complaints and other legal remedies before law enforcement and/or prosecutorial authorities. Victims should be provided with assistance in recovering compensation; in applying for a temporary stay permit or permanent residency where available; and in representation to discharge victims of trafficking of the crimes committed as a result of trafficking.

States can either introduce new legislation, or modify existing laws or procedures to ensure that privacy/confidentiality rules apply to trafficking victims. Communications technology such as video links can be used to protect witness or victim identity; use of closed courts or screened testimony can also protect
confidentiality, as can witness relocation. Authorities and service providers, either employed by the State or by NGOs, should be encouraged to respect victims’ privacy and to ensure that no information that could reveal the identity of a trafficked person is released, disseminated, or broadcast.

Deciding whether victims of transnational trafficking should be returned to their country of origin between the initial investigation and the trial must take into account the best interests of victims. Such decisions may depend on protection mechanisms in the origin country, the logistical challenges of bringing the victim back to the country where the trial is due to take place, or the possibility of providing remote testimony (with the use of internet or other technology that can be used in a way that protects the privacy of the witness). Where it is not practical or appropriate for testimonies to be given, witness statements may be used. Beyond any danger from retaliation or re-trafficking, an assessment of the risks posed by inadequate assistance and support in States of origin may be relevant in determining whether or not a victim should be returned or rather be granted a residence permit in the country in which the trial takes place or elsewhere.

When a verdict has been reached and offenders are being sentenced, States may consider allowing victims to make voluntary victim impact statements, in order to outline to the court the harm they experienced. Victim impact statements can benefit victims in their recovery process, including by allowing them to explain to a judge how the crime has affected them physically, emotionally, financially and/or socially. Victim impact statements may also be beneficial in:

(a) reducing the public perception of the victim’s alienation in the criminal justice process;

(b) making sentencing more transparent and more reflective of the community’s response to crime; and,

(c) promoting the rehabilitation of traffickers by confronting them with the impact of their offence.

Law enforcement officials and practitioners to take into account special needs of children, especially when they are part of the criminal proceedings. States should apply special measures designed to protect trafficked children from further harm and address their specific needs, for example, by applying special interviewing techniques. States may consider making any measures and testimonial aids designed for the protection of vulnerable persons, automatically available for child victims. Additional protections may also be considered, such as allowing submission of video recordings of police interviews with child victims and/or witnesses as evidence in chief. However, child victims should not be required to participate, especially when they have experienced extreme trauma.

In their domestic legal systems, States should provide for compensation in recognition of the injury, loss or harm experienced by the victim of trafficking. Compensation may include unpaid wages, legal fees, medical expenses, lost opportunities and compensation for pain and suffering. Compensation schemes for victims of trafficking may be sourced from assets of traffickers, or from State-funded schemes administered through judicial processes or administrative actions. In many jurisdictions, a civil claim for damages is associated with filing a criminal action and monetary awards are included in court decisions, or
compensation payments to victims are made a part of the penalty. It is also possible to allow recovery of damages through civil action, independent of the criminal prosecution. Claims through labour courts for unpaid wages and other contractual benefits, especially in cases of trafficking for exploitation, are another possibility for compensation.

Some countries in the Asia-Pacific region have established funds out of State resources to provide material support to victims as they recover from their trafficking experiences. Trust funds for victims of trafficking have also been created with finances sourced from monetary fines and penalties as a result of criminal conviction. Others have allowed victims of trafficking to access existing general assistance funds such as those established for victims of serious crimes or violence.

**Criminalizing corruption** is a key complementary obligation of the Organized Crime Convention that may assist in preventing acts or offences related to trafficking in persons, such as crimes related to forgery of travel documents by way of bribing border officials, or collusion in trafficking crimes. The UNTOC provides the necessary legal framework for international cooperation to combat corruption.

If there is evidence to demonstrate that the convicted party deliberately attempted to **obstruct the administration of justice** during the investigative, or prosecutorial stages or during the sentencing, this can be taken to be an aggravating factor. Examples could include attempting to destroy or conceal evidence, misleading criminal justice officials or attempting to intimidate witnesses, police officers, prosecutors or other justice system participants.

![Prosecution VI](image)

**Money laundering** involves concealing the identity, source, or destination of, or possessing or using, illegally gained money. In other words, money laundering is dealing with the proceeds of crime. States should criminalize the laundering of the proceeds of crime, as stipulated in Article 6(1)(a) and (b) of the UNTOC. The main requirements are to criminalize the conversion or transfer of property, the concealment or disguise of the true nature, and the acquisition, possession or use of property, knowing that such property is the proceeds of crime. States could further criminalize the participation in, association with or conspiracy to commit, attempts to commit, and aiding, abetting, facilitating and counselling the commission of, the offences related to money laundering.

The UNTOC requires that money laundering offences apply to the widest range of offences that may generate proceeds of crime – known as ‘predicate offences’. In this regard, trafficking in persons should be included as a predicate offence in a State’s money laundering law. The predicate offence (e.g. the trafficking in persons offence) does not need to occur within a State’s territory in order for that State to prosecute a person for money laundering.

States may take additional measures (mandatory as well as non-mandatory) aimed at preventing money laundering, including assistance to financial institutions to prevent criminal funds from entering the financial system, and detecting and tracing of illicit assets.
Criminal asset confiscation may also be referred to as asset forfeiture, asset recovery or proceeds of crime action. Apart from establishing a robust anti-money laundering regime, States should have at their disposal the authority to identify, detect, trace, and seize proceeds of crime for the purpose of eventual confiscation. This can be achieved through asset confiscation provisions in a State’s penal code, its legislation pertaining to money laundering, or, i.e., a law on the proceeds of crime.

Generally, States can confiscate the proceeds of trafficking in persons in two ways:

(a) once a criminal conviction is secured (conviction based proceeds of crime laws); or,

(b) in the absence of a criminal conviction, where it’s possible to prove that the particular assets are proceeds of trafficking in persons (non-conviction based proceeds of crime laws – also known as civil forfeiture).

The latter is a useful option for States to target criminals where it is not possible to secure a conviction for the trafficking offence.

The main legislative obligations are for States to create powers to enable seizures and confiscation of proceeds of crime, including the proceeds of trafficking in persons. Proceeds of crime laws allow law enforcement authorities to target the proceeds of all criminal activity, not just those relating to the offence of money laundering.

Using a multi-agency task force can be an efficient strategy to coordinate implementation of counter-trafficking activities in line with a State’s policy. Such multi-agency task forces can exercise power and perform functions necessary to reach the goals of existing policy framework in line with domestic legislation. They also can develop rules and regulations as may be necessary for the effective implementation of counter-trafficking activities; coordinate programs and projects of the various member agencies; coordinate information-sharing and awareness campaigns regarding current laws and various issues and problems attendant to trafficking, through local government units (LGUs), concerned agencies, and NGOs. A multi-agency task force can also be a focal point for all counter-trafficking operations beyond the domestic borders. Multi-agency task forces can include representatives of all relevant agencies, including but not limited to: Ministry/Department of Justice, Social Welfare and Development, Foreign Affairs, Labour/Employment, National Police, Immigration and civil society groups (if applicable).

Specialized units and specialized agencies can have a leading role in identifying, investigating and prosecuting cases of trafficking in persons. Providing space for prosecutors, law enforcement investigators, social workers and NGOs to come together and work in close capacity can increase effectiveness and efficiency in prosecuting cases while providing required protection and assistance to victims. Initiatives to establish specialized agencies can be introduced in domestic legislation and incorporated into a national action plan or policy framework.

Slide 18
Bali Process Regional Strategic Roadmap on Strengthening Counter-Trafficking Responses (RSR) is a comprehensive tool that enables Bali Process members to evaluate existing national policies, and identify gaps in current counter-trafficking programs in a self-directed manner. The RSR has been designed to assist policy makers and practitioners navigate through four distinct categories: planning, principles, policy and practices.

Coordinated Mekong Ministerial Initiative against Trafficking (COMMIT) is a high-level policy dialogue in the Mekong sub-region, functioning as a superstructure on which a cohesive and comprehensive anti-trafficking response can be built. It is a government-led process between China, Cambodia, Laos, Vietnam, Thailand and Myanmar. COMMIT is the region's first instrument, aiming to institutionalize a multi-sectoral approach to ensure that the obligations and commitments made in its 2004 MOU and the subsequent Sub-regional Plan of Action (SPA) are translated into actions in a timely manner and in accordance with agreed international norms and standards.

UNODC’s Port Intelligence Unit (PIU) is another regional project that aims to dismantle the smuggling of migrants by boat through establishing intelligence units in the ports of Cambodia, Indonesia and Thailand. According to UNODC estimates, tens of thousands of Cambodians are smuggled into Thailand alone, risking situations of abuse, exploitation and human trafficking.

Creation of inter-department enforcement units (e.g., Departments of Immigration, Internal Security, Maritime Police and Anti-Human Trafficking and Juvenile Protection) equipped with proper technology and trained, knowledgeable staff have proven to be effective in combating complex criminal networks. UNODC Regional Training Programme on Operational and Strategic Analysis on Migrant Smuggling aims to strengthen law enforcement’s capacity to carry out operational analysis of migrant smuggling cases and to more effectively support migrant smuggling investigations. It also trains law enforcement to use that intelligence to carry out strategic analysis of a country’s migrant smuggling situation in order to identify overall migrant smuggling trends, risk and threats and provide input to policy development. The PIU project aims to increase intelligence-led investigative capacities and thereby prevent maritime migrant smuggling in Southeast Asia. Strategically situated for more effective response, the PIUs will gather migrant smuggling intelligence from beyond their immediate locations and share it with local and international operational law enforcement.

The Regional Strategic Roadmap is a comprehensive tool for Bali Process member States, policy makers and practitioners to review, develop or strengthen national counter-trafficking policies through prevention, prosecution and protection (3Ps) by aligning international legal standards, human rights principles and effective practices from across the Bali Process membership.
The Regional Strategic Roadmap also serves as a resource centre for domestic laws and policies that address trafficking in persons which have been instituted by Bali Process member States. The Regional Strategic Roadmap compiles available materials, references, publications, and training available in the region. Importantly, the Regional Strategic Roadmap is a platform to share knowledge and effective practices identified among Bali Process members, and promote regional cooperation.24

SESSION EIGHTEEN: Exercise - Joint law enforcement operations against transnational criminal networks

Exercise on investigations techniques of a transnational organized criminal ring involved in migrant smuggling from Africa to South-East Asia will be organised, drawing on examples from effective experiences of governments in the region and beyond, to put in practice the rules and principles learned in previous sessions.

The overall objective of the exercise is to recreate a hypothetical scenario to simulate the investigation of an organized transnational criminal network involved in migrant smuggling. Participants will work in small groups (5-6 people) and receive 8 different, consecutive paper feeds, which update the scenario with additional investigative leads and information, reproducing real-life circumstances. For each paper feed, participants will have a limited time (15 to 30 minutes) to analyse the information and prepare follow-up actions based on the updated situation report. At the end of the exercise, each team will present the findings of their operation to the whole group, using PowerPoint slides and/or a flipchart/whiteboard to visualize the results.

COURS DAY: FIVE

PART III: DISEMBARKATION AND POST-DISEMBARKATION

SESSION NINETEEN: DISEMBARKATION AND ITS RULES AND REALITIES

24 Please contact the Regional Support Office of the Bali Process (RSO) at roadmap@rso.baliprocess.net if your government agency would like to contribute and share your National Action Plans with other Bali Process member States, or promote other policy measures, including practices in implementing 3Ps.
PURPOSE: Brief presentation of the applicable international legal framework relevant to disembarkation, including an introduction of key issues from the RSO’s Disembarkation Mapping Meeting in March 2014 (with the Co-Chair’s Summary of the Meeting being shared and distributed amongst participants), followed by a presentation of a government on concrete application of standards and tools that have been developed (e.g. a national framework for disembarkation), with a view to illustrate effective practices, cooperation with other countries, solutions and challenges. The session will focus on discussion with participants on similar/dissimilar experiences at domestic level, including means and recommendations at operational level.

CONTENT / LEARNING OBJECTIVES:

- Building on sessions during Day 2 on search and rescue, the SAR and SOLAS amendments introducing a duty to deliver survivors to a place of safety will be briefly discussed. Chapter III of the SAR Convention, especially Rules 3.1.6.4 and 3.1.9, respectively on the obligation of identification of a place of disembarkation and on the primary responsibility of the SAR region state for ensuring cooperation and coordination regarding disembarkation operations, will be presented. The irrelevance of the nationality or status of survivors for rescue and disembarkation purposes will be noted and the key question of whether there is any residual obligation upon the coastal State, in whose SAR region the rescue operation took place, to permit disembarkation of rescued persons in its territory if no other solution can be found will be thoroughly examined.

- The duty to identify an appropriate place of disembarkation where safety can be guaranteed in accordance with *non-refoulement* and related human rights standards, ‘taking into account the particular circumstances of the case’, will be mentioned.

- The IMO *Guidelines on the Treatment of Persons Rescued at Sea* (in particular, paras. 6.12, 6.13, 6.15, 6.17, 6.20) together with the relevant IMO *Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea* (especially Principle No. 3) will be taken into account in this regard. Guarantees within the Palermo Protocols concerning the obligation to protect and assist smuggling and trafficking victims will also be considered.

- The requirements for flag and coastal states to adopt appropriate legislation and policy plans at national level to discharge their obligations and facilitate disembarkation at the earliest opportunity will be examined. The need for states to cooperate among themselves at regional and international level to adequately implement and comply with their international commitments in this regard will also be noted – without going into substantive considerations, which will be the object of dedicated sessions during Day 5.

- An example of a national framework, including concrete tools used, mechanisms of referral and coordination systems as well as means of international cooperation for joint action, will be examined in detail. The reasons that led the government to adopt such a strategy will be presented, together with the key features of the plan devised, and the practical steps undertaken so far. The final goal will be for participants to identify best practices and exchange views in this regard.

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26 D Guilfoyle and E Papastavridis, Background Paper, above note 2, pp. 16-17.
27 Art 33, 1951 Refugee Convention; Art 7, ICCPR; Art 3, UNCAT; Art 37, CRC; 2004 IMO Guidelines, para. 6.17.
28 SAR Annex 3.1.9; SOLAS, chap. V, Reg. 33.1-1.
29 Art 2(b), TiH Protocol; Art 16, SoM Protocol.
Closely related to the question of safe and predictable disembarkation arrangements is the capacity of disembarkation States to provide adequate initial assistance, reception facilities and services—including mechanisms to identify asylum-seekers and others with particular vulnerabilities and refer them to appropriate services and procedures.

Bringing rescued persons ashore raises further issues including, first, identifying alternatives to post-disembarkation detention; and, second, apportioning responsibility for assessing protection claims and for providing solutions. The latter may account for occasional reluctance by some coastal States to allow disembarkation on their territory. While UNHCR has long recognized that the disembarking State need not be solely responsible for providing protection and solutions, it will often be that State whose protection responsibilities are engaged in the first instance, in the absence of established mechanisms for sharing burdens and responsibilities following a rescue.

A core challenge in any particular rescue at sea operation involving asylum-seekers and refugees is often the timely identification of a place of safety for disembarkation, as well as necessary follow-up, including reception arrangements, access to appropriate processes and procedures, and outcomes. If a shipmaster is likely to face delay in disembarking rescued people, he/she may be less ready to come to the assistance of those in distress at sea. Addressing these challenges and developing predictable responses requires strengthened cooperation and coordination among all States and other stakeholders implicated in rescue at sea operations.
Both SAR and SOLAS 2004 amendments (SAR Annex 3.1.9; SOLAS, chap. V, Reg. 33.1-1) are legally binding for State parties, and impose additional obligations on States. Several components should be emphasized:

- **State coordination and cooperation**
- The requirement to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligations with minimum further deviation from the ship’s intended voyage, provided that releasing the master of the ship from the obligations under the current regulation does not further endanger the safety of life at sea.
- The SAR State has the primary responsibility for ensuring such co-ordination and cooperation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety.
- Disembarkation should occur as soon as reasonably practicable.

At the IMO Maritime Safety Committee, it was accepted that the purpose of these amendments was to ensure that a place of safety is provided within a reasonable time. Grey areas in this drafting will be discussed below, but notably, the “Government responsible for the search and rescue region” has “primary responsibility” to coordinate disembarkation but not an absolute duty to provide a “place of safety” itself. The reference to “minimum further deviation from the ship’s intended voyage” does not create specific obligations for the next port of call.

The lack of capacity and/or willingness on the part of coastal States to fully implement their obligations under the SAR and SOLAS Conventions (e.g., insufficient controls to prevent the departure of unseaworthy vessels, no declared SAR area and insufficient SAR services) remains a key challenge.

Recall from DAY 2, that the duty to rescue persons in distress applies irrespective of the nationality or status of those rescued, and in accordance with the principle of non-refoulement.
It falls to the RCC to identify the place of safety for the purpose of disembarkation and inform the shipmaster and relevant parties.

Another key challenge are the difficulties faced by shipmasters in finding a coastal State willing to provide a place of safety for disembarkation, due to the costs and other complexities involved in processing and identifying solutions for rescued persons. Coastal States have concerns about border security, human smuggling and trafficking, and creating pull factors inducing more arrivals. This, in turn, renders shipmasters reluctant to assist those in distress.

The key issue is whether the coastal State, in whose SAR region the rescue operation took place, has any residual obligation to permit disembarkation of rescued persons on its territory if no other solution can be found.

Pursuant to paragraph 2.1.3 of the SAR Annex, contracting States exercise search and rescue services in the area under their responsibility and are invited to conclude SAR agreements with neighbouring States to regulate and coordinate operations and rescue services in the maritime zone designated in the agreement.

However, this obligation does not explicitly stipulate that the State responsible for the SAR zone is obliged to disembark the survivors in its own territory. In other words, the formal treaty law does not oblige a coastal State to allow disembarkation on its own territory when it has not been possible to do so elsewhere. This has been criticized as the major shortcoming of the treaty regime.
Maintain effective operational plans and inter-agency coordination arrangements to respond to all SAR situations

RCCs play an important role in ensuring coordination and cooperation arrangements under SOLAS and SAR amendments.\textsuperscript{30}

As discussed on DAY 2, the 2004 \textit{IMO Guidelines on the treatment of persons rescued at sea} were developed to provide guidance to governments and to shipmasters in implementing the 2004 SOLAS and SAR Amendments. These guidelines are not binding, but they provide an important means for interpreting obligations under the above-mentioned amendments.

6.1.2 Defines a \textit{place of safety}.

6.1.3 Precludes an assisting ship to be considered as a place of safety.

6.1.4 Limits a place of safety to land or aboard a rescue unit.

\textsuperscript{30} Excerpted from UNHCR, Rescue at Sea—A guide to Principles and Practice as applied to migrants and refugees.
6.1.5. Each rescue operation is unique so, what is to be considered as a place of safety will vary depending upon the circumstances of the particular case. Factors might include:

- The situation on board assisting ship
- On-scene conditions
- Medical needs
- The availability of transportation or rescue units

6.1.7 Applies the principle of *non-refoulement* to disembarkation.

6.1.9 Requires that all matters not related to the search and rescue operation be addressed only *after* survivors have been delivered to a place of safety.

6.2.0 Screening and status assessments should not get in the way of assisting distressed persons or disembarkation.

In other words, disembarkation procedures should not be governed by immigration control objectives.

Returning to the definition of SAR services from the SAR Convention, they are defined as: « the performance of distress monitoring, communication coordination and search and rescue functions, including provision of medical advice, initial medical assistance, or medical evacuation, through the use of public and private resources, including co-operating aircraft, vessels and other craft and installations. » SAR services thus include making arrangements for disembarkation of survivors from assisting ships.
The IMO Facilitation Committee (FAL) also adopted Principles relating to administrative procedures for disembarking persons rescued at sea. These Principles are not legally binding, but are intended to guide States as how best to discharge their obligations. They aim to harmonize national disembarkation practices in IMO member States. They contain 5 key principles on the administrative procedures to be incorporated by member Governments for disembarking persons rescued at sea.

**Principle 1**: State coordination.

**Principle 2**: «Any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s). The master should normally only be asked to aid such processes by obtaining information about the name, age, gender, apparent health and medical condition and any special medical needs of persons rescued. »

Security should be provided for the asylum seeker, and communication of this information should not be shared with the country of origin or any other country where he or she may face a threat.

**Principle 3**: All parties involved (such as the Government responsible for the SAR area where the persons are rescued, other coastal states in the planned route of the rescuing ship, the flag state, the ship owners and their representatives, states of nationality or residence of the persons rescued, the State from which the persons rescued departed, if known, UNHCR) should cooperate to ensure swift disembarkation, taking into account master’s preferred arrangements for disembarkation and immediate basic needs of rescued persons.

SAR Government is primarily responsible for this coordination

“If disembarkation from the rescuing ship cannot be arranged swiftly elsewhere, the Government responsible for the SAR area should accept the disembarkation of the persons rescued in accordance with
immigration laws to a place of safety under its control "to provide rescued persons with timely access to post-rescue support."

Again, we return to the issue of whether there is any residual obligation upon the coastal State, in whose Search and Rescue zone (SAR zone) the rescue operation took place, to permit disembarkation of rescued persons in its territory if no other solution can be found.

It has been noted that there is an obligation upon the State parties to the SOLAS Convention is to provide "a place of safety" as soon as reasonably practicable. However, this obligation does not explicitly stipulate that the State responsible for the SAR zone is obliged to disembark the survivors in its own territory. In other words, the formal treaty law does not oblige a coastal State to allow disembarkation on its own territory when it has not been possible to do so elsewhere. This has been criticized as the major shortcoming of the treaty regime.

While it has been proposed that the coastal State in whose SAR zone the rescue operation takes place should have a residual obligation to allow rescued persons to enter its territory, there is no clear consensus at the international level, or in regional practice, that such an obligation exists.

Slides 13-14

To comply with international and regional human rights obligations, as discussed on DAY 1, the responsible State must disembark the rescued migrants where necessary screening operations will be performed and afford sufficient protection of the individual needs of migrants.

As covered on DAY 2 in the discussion on common and differentiated approaches, States should ensure that the people disembarked in their territories have their status properly assessed; when they are found in need of special protection, because they are refugees, at risk of torture or victims of human trafficking or of exploitation or abuse by migrant smugglers, States should ensure that the proper mechanisms are in
place so as to assist them and treat them accordingly. Special care should be afforded to unaccompanied minors and persons with physical disabilities, among other particularly vulnerable categories.

While initial screening can be conducted on the ship, thorough assessment cannot be carried out on board a vessel, which is considered insufficient for determining claims for asylum and other forms of international protection. Asylum proceedings require the possibility of verification, procedural safeguards, translators, legal counsel and the right to privacy—none of which can be ensured onboard a vessel.

A series of procedural guarantees follow from an entitlement to protection against *refoulement*. Where an arguable claim is made that removal would expose the person concerned to persecution or mistreatment, an independent and rigorous scrutiny is to be undertaken by a competent national authority in every individual case. Member states cannot rely automatically on bilateral arrangements with third countries to transfer the person in question. Compatibility of the removal with the requirements of *non-refoulement* must be determined first. Where the initial procedure is conducted physically is not without repercussions.

Migrants must be informed of the procedure followed and the outcome. The right to information improves migrants awareness of their rights and duties and facilitates the identification of their needs, renders them less vulnerable to abuse and exploitation because they are aware of risks. Right to information enshrined in the ICCPR, and Article 33 in the Convention on the Rights of All Migrant Workers and their Families.

States must ensure equality of procedures for all migrants, including access to national migration procedures and the possibility of appeal.

Refugee right and human rights obligations apply extraterritorially to both interception and rescue operations, the also apply in determining a « place of safety » for the purpose of disembarkation.

State parties to the Trafficking and Migrant Smuggling Protocols are under specific obligations to protect and assist the victims of trafficking and smuggled migrants with full respect for their human rights.

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Disembarkation procedures should be harmonized, speedy and predictable in order to avoid recurrent, time-consuming case-by-case negotiation problems, which can endanger the lives of those rescued. Procedures should balance the needs of the shipping industry with the basic needs of persons rescued at sea.

Slides 16-18
UNCLOS, SOLAS, SAR set forth States’ duties to engage in cooperation with other States, not only to ensure effective search and rescue services but also to ensure that survivors are disembarked to a place of safety. The SAR and SOLAS Conventions place the onus of this duty to cooperate on the State responsible for the SAR region.

Coordination and cooperation in order to deliver survivors to a place of safety (disembarkation) may involve arrangements with other entities (such as customs, border control and immigration authorities, the ship owner or flag State), while survivors are still aboard the assisting ship.

SAR Amended 3.1.9 reads in full: “Parties shall co-ordinate and co-operate to ensure that masters of ships providing assistance by embarking persons in distress at sea are released from their obligation with minimum further deviation from the ships’ intended voyage, provided that releasing the master of the ship from these obligations does not further endanger the safety of life at sea. The Party responsible for the search and rescue region in which such assistance is rendered shall exercise primary responsibility for ensuring such coordination and co-operation occurs, so that survivors assisted are disembarked from the assisting ship and delivered to a place of safety, taking into account the particular circumstances of the case and guidelines developed by the Organization. In these cases, the relevant Parties shall arrange for such disembarkation to be effected as soon as reasonably practicable.”

As noted above, the “Government responsible for the search and rescue region” has “primary responsibility” to coordinate disembarkation but not an absolute duty to provide a “place of safety” itself. Nor does the reference to “minimum further deviation from the ship’s intended voyage” create specific obligations for the next port of call.32

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32 UNHCR, ExCom 23 (XXXII), 1981, [3].
SESSION TWENTY: EXCERISE - TESTING DISEMBARKATION OPTIONS IN REAL LIFE CASE SCENARIOS

Drawing on the ‘Mapping Disembarkation Options’ Background Paper, commissioned by UNHCR, the exercise will consist in participants, working in small groups, testing different disembarkation possibilities in different ports (the ‘first port of call’, the ‘closest safe port’, the ‘safest port’, the ‘port of embarkation’, etc.), taking account of different needs and entitlements of those rescued at sea, applying knowledge from preceding sessions to a real-life scenario. Although there will be a dedicated session in Day 5, the need for regional cooperation (at least between the flag State(s)/coastal State(s) involved) will be taken into account to solve the specific case.

Instructions:

- Participants are to work in small groups of 6 maximum. They are encouraged to consult their colleagues to
- Prepare a detailed response.
- Instruct the participants to carefully read the sets of facts and questions provided.
- They should be required to give reasons for their answers.

Facts:

On 19 January 2015, a group of 27 migrants fleeing war from Alphastan on a small, unmarked vessel releases a distress signal calling for assistance on the high seas. Betastan’s maritime rescue service logs the signal recording the location of the vessel in international waters within the Search and Rescue (SAR) Zone of Altavia. The passengers have paid smugglers to take them to Betastan, a State Party to the 1951 Refugee Convention and all major human rights instruments. It is not clear under which flag the ship is sailing, nor who the owner of the ship is.

A navy patrol vessel of Betastan, involved in anti-smuggling operations in the region, receives the distress call. The captain informs the Betastani control centre that he plans to approach the boat and, if needed, provide assistance to the passengers on board.

In turn, the authorities of Altavia request Betastan to proceed to the rescue, claiming that they do not have the means to assist themselves. They also inform Arsiland about the situation, given the fact that the nearest port to the emergency is on their territory. In the meantime, the navy patrol vessel of Betastan proceeds with investigating the situation and providing immediate relief to the vessel in distress by handing over water and food supplies to all passengers. A visit on board the vessel is undertaken to assess the condition of passengers as well as the vessel’s engine, which has broken down. A pregnant woman and a few infants are identified among the passengers. For reasons of “safety”, passengers are transferred onto the warship of Betastan and crammed together below deck, receiving food and water by means of rope.

At that point, negotiations commence between Betastan, Altavia and Arsiland regarding the fate of the passengers of the rescued vessel. The rescue operation stalls as Betastan, Altavia and Arsiland dispute over which one of them should assume responsibility:

- Betastan argues that disembarkation in Altavia is required, given that the incident has occurred on the high seas within Altavia’s SAR zone of responsibility and upon its request. Given the proximity to the location of the emergency of the geographically closest port in Arsiland, Arsiland should alternatively be expected to allow for disembarkation. Betastan also expresses concern about creating a pull factor for further prospective migrants, if allowing disembarkation on its territory.
• Altavia refuses disembarkation, insisting that the rescue had taken place closer to Betastan and Arsiland. It argues that passengers should be transferred to Betastan under the jurisdiction of which the vessel is. It claims to be overwhelmed by the number of irregular migrants in its territory and lacking resources to deal with them. As a non-contracting State to the Refugee Convention, it claims not to have any obligations to discharge.

• Altavia and Arsiland further argue that disembarkation in Betastan is justified given that the passengers intended to reach Betastan in the first place; Betastan is the country of destination. If disembarkation is not possible in Betastan, the vessel should then be towed to Alphastan, where most passengers came from.

• During the stalling of negotiations, a number of passengers start falling ill given unhygienic conditions on the boat, with one pregnant woman and a young mother with two infants displaying high levels of physical and mental discomfort and distress. Water and food become scarce.

After a diplomatic standoff of some days and the medical evacuation by Betastan of five passengers, Arsiland concedes to the disembarkation of the remaining survivors against an undisclosed payment as well as the commitment by Betastan and Altavia to arrange for their resettlement within a short timeframe.

Questions:

1) What are the obligations of the Betastani warship upon receipt of the distress call? What specific duties does the Betastani rescue service have at that point?

2) What are the obligations of the shipmaster of the Betastani warship? Take account of all legal frameworks applicable to the situation, beside the Law of the Sea.

3) Is the migrants’ ship in ‘distress’? How should ‘distress’ be defined?

4) Which treatment should be accorded to survivors while at sea?

5) Can ‘distress’ be neutralized at sea, without providing for disembarkation, or does the duty to ‘deliver to a place of safety’ always require disembarkation on dry land?

6) If so, who should provide for disembarkation: Betastan (i.e. flag state of rescue ship), Altavia (i.e. SAR zone state), Arsiland (i.e. nearest port), or Alphastan (i.e. country of embarkation)? Which specific responsibilities does each country have in this regard?

7) How should ‘safety’ be defined? How is the ‘place of safety’ to be determined?

8) Is the “disembarkation deal” reached at the end of diplomatic negotiations between the four countries appropriate? Give reasons why/why not.
**SESSION TWENTY-ONE: POST-DISEMBARKATION - INITIAL RECEPTION AND ASSISTANCE**

PURPOSE: Reception and temporary protection and/or stay arrangements as well as basic services to be provided to sea arrivals will be covered. Particular emphasis will be put on differentiated processes and procedures, referral services and tailored solutions according to the specific needs.

**CONTENT / LEARNING OBJECTIVES**

- This session will cover post-disembarkation, initial reception, and assistance arrangements in detail, as applicable both generally to all sea arrivals as well as to particular groups thereof. The session will be practitioner-oriented and mainly focus on how to implement the relevant standards, rather than on the standards themselves. Account will be taken of IMO Guidelines on the Treatment of Persons Rescued at Sea; the Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea; and Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea.

- Particular attention will be paid to adequate processes and procedures to be established to identify and cater for those with international protection needs as well as other groups with specific needs and/or vulnerabilities, such as children or victims of trafficking. Profiling and referral procedures as well as suitable material conditions and basic services are key in this framework. Access to adequate solutions and outcomes will also be discussed, according to rights and/or specific needs of different groups, including asylum, return / or other migration options.

- In this framework, an organisation with specialist knowledge and expertise such as the ICRC will intervene to discuss family tracing and restoration of family links policies and mechanisms.

- A Q&A session will follow at the end for participants to ask any questions and enter into a dialogue with the specialists on the matter. The possibility of discussing national experiences / practices in this context will be offered for participants to engage in a debate on domestic policies in this field.

Slide 1

Inadequate reception and processing facilities at disembarkation sites to respond to survivors’ immediate needs, ensure protection against *refoulement* and provide timely outcomes, including for refugees continues to be a significant challenge. More specifically, steps must be taken to establish entry systems that are able to identify new arrivals with international protection needs and which provide appropriate and differentiated solutions for them, side by side with such other solutions as need to be pursued for other groups involved in mixed movements.
Reception arrangements must address the basic needs of new arrivals and provide for a stay consistent with the **right to an adequate standard of living**, pursuant to Article 25, Universal Declaration of Human Rights and Article 11, International Convention on Economic, Social and Cultural Rights.

On arrival, persons with acute medical needs are to be treated and a basic medical check up given to others. Information explaining available procedures and the practicalities of reception arrangements can be given in writing or verbally, in languages understood by new arrivals (e.g. using videos or trained interpreters).

If arrivals are housed in reception centres, standard services will include regular, culturally-appropriate meals, the provision of basic non-food items, and access to communication devices (telephone, mail or email services). When designing reception centres, measures are needed to prevent overcrowding and to ensure basic space and privacy for residents (including minimal facilities for religious/cultural practices and daily outdoor activities). Other factors include provision of adequate security, a confidential and accessible complaints procedure, as well as regular cleaning and maintenance of the centres.
Open reception centres are the preferred way of housing arrivals. Depending on the specific situation, smaller group homes, community placements or private accommodation may be more appropriate than large reception centres. The use of semi-open reception centres with measures to ensure ongoing presence in the centre, such as daily reporting requirements and leave-with-permission, will in many cases be sufficient to minimize absconding.

Closed reception centers constitute ‘detention’ under international human rights law, pursuant to Article 9, International Convention on Civil and Political Rights. International human rights law provides that no person shall be subject to arbitrary detention or be deprived of his or her liberty except on such grounds and in accordance with such procedures as established bylaw. The concept of ‘arbitrariness’ is interpreted broadly to include ‘elements of inappropriateness, injustice and lack of predictability’. Any period of detention is required to be necessary and reasonable in all the circumstances, proportionate and non-discriminatory. Effective, independent and periodic review of detention by a court empowered to order release is also critical in ensuring compliance with international human rights standards. See, Human Rights Committee, Hugo van Alphen v. The Netherlands, Communication No. 305/1988, U.N. Doc. CCPR/C/39/D/305/1988 (1990). Prolonged stays in closed reception facilities are not appropriate. This is especially the case for persons who have been determined to be refugees or otherwise in need of international protection and for those who have specific needs.
Children, particularly unaccompanied and separated children require specific procedures and accommodations to ensure their rights and meet their needs. These include: the appointment of guardians to represent their interests, systematic ‘best interest’ determinations, assistance with access to asylum procedures and preparation of their claims, and alternative accommodation arrangements. Detention of children is permitted only as a measure of last resort, for the shortest possible period of time and in appropriate conditions.

Women: the identification of ‘women-at-risk’ should take place through screening procedures. Women should be provided with separate sleeping and washing arrangements in reception centres. Reception centres should be staffed by women in appropriate positions, including to conduct interviews.
Trafficked persons should be identified as a part of specialized screening procedures for this purpose. Attention should be paid to ensure that they are separated from traffickers, and to prevent traffickers and smugglers from accessing reception centres more generally. Trafficking victims should be provided assistance in preparing asylum claims, a reflection period to consider cooperation with law enforcement, special short- or long-term visas or migration options are often provided for in national legislation.

In addition to pre-existing physical, sensory, intellectual or psychosocial impairments, people may acquire or develop impairments during the migration process, including PTSD and victims of torture.

Persons with disabilities (physical and mental) should be identified during screenings in order to ensure the provision of needed assistance and provided with proper accommodations in the reception facility. **Basic assistive devices such as wheelchairs, canes, ramps and crutches should available.**

**Slides 10-12**

Challenges for States

The various challenges associated with hosting asylum-seekers, often in large numbers, clearly constitute a significant burden for any State. They include: the **economic burden** of offering asylum, **security concerns**, inter-State tensions, irregular migration, social and political unrest, and environmental damage. In some States, the challenge extends to preventing a **politicisation of the asylum issue** and development of anti-refugee sentiment, which has often led to acts of racism and xenophobia against asylum-seekers.

An additional problem lies in striking a balance between receiving people in a safe and dignified way, while discouraging misuse of asylum possibilities by those not in need of international protection who are seeking to bypass migration restrictions.
Another challenge for States is to clarify the link that may exist between reception conditions, systems abuse and smuggling, and to structure reception arrangements in such a way that they respect core rights and responsibilities without compounding migration dilemmas. A number of States have considered that reducing the length of time of the asylum procedures may represent the most effective way to address these concerns.

A key challenge for many States, particularly those receiving large numbers of asylum-seekers—often under circumstances where they are ill-equipped or under-resourced to absorb them even for short periods—is to mobilize the necessary solidarity and burden-sharing response from the international community.¹⁵

When addressing these challenges, it is important to recall that refugee & international human rights law apply to the reception of asylum seekers.

The challenges that migrants face will be discussed in the context of the international standards designed to address them, in Session 16.

« Asylum-seekers are persons who have applied for asylum and may be refugees. The fact of their possible or potential refugee status has meant that, in very many States, until status is finally determined, the individuals concerned have been accorded reception conditions somewhat different from those applied to other aliens. The conditions have tended to vary from country to country, influenced by a range of factors that include numbers of arrivals, socio-economic factors in the host State, demographic and security concerns at national and regional level, the degree of sophistication of the prevailing asylum systems, and even the mode of arrival. »³³

For refugees or other people in need of international protection, durable solutions will generally be geared towards resettlement in a third country or integration in the country of asylum. Depending on the arrangement and the particular circumstances in the country, some form of local solution should be provided, including, e.g., freedom of movement and opportunities for self-reliance, pending the viability of return to their country of origin.

The State with jurisdiction (including in cases of extraterritorial processing) is responsible for ensuring timely outcomes.

³³ UNHCR, Reception of asylum-seekers, including standards of treatment in the context of individual asylum systems, EC/GC/01/17, 4 September 2001.
In the best-case scenario, all of these services are provided to migrants in need of assistance within reception arrangements.

While migrants usually have access to means of communication, some find themselves in situations where they are in urgent need of humanitarian aid and protection. Increasingly restrictive migration policies have resulted in large numbers of processing and detention centres. In addition, trafficking and smuggling of persons are two of the fastest-growing international criminal activities. Women seeking jobs as domestic
workers or as factory workers, and those who are victims of sex trafficking, represent a significant percentage of the migration flux. They risk finding themselves cut off from their families and unable to communicate with the outside world. Some migrants and their families are particularly vulnerable and may need help restoring family links.

Some people are especially vulnerable. They include anyone who relies on family, the authorities or others for support. These people are particularly at risk if they are separated from their families or from care-givers. Examples of especially vulnerable people are unaccompanied children, elderly people, sick people and prisoners.

Children separated from adult family members are likely to be traumatized by the sequence of events, and are usually at greater risk than other children of suffering physical or psychological harm and of being orphaned or falling prey to unofficial adoption or trafficking.

Every year, the ICRC visits about half a million detainees in more than 70 countries worldwide. The ICRC works to monitor and improve conditions of detention, to ensure that detainees are treated with dignity and that their fundamental rights are respected. Regular visits to prisons enable the ICRC to keep track of the prisoners’ well-being and whereabouts, and to make recommendations to the authorities about any improvements in conditions or treatment that may be required. The rights to be visited by one’s family and to communicate with relatives are part of the fundamental rights of detainees in accordance with a number of international legal instruments. The ICRC transmits messages by and, organizes video calls and family visits to persons in detention.34

Data protection is provided in all situations. Care is taken with the use of personal data. The information is collected with the informed consent of the person concerned. Individual safety is the priority and no information is used or published that could cause harm. Access to databases containing personal information is restricted and transfers of sensitive data within the Family Links Network are secure.

www.familylinks.icrc.org

The ICRC’s Family Links website helps people restore contact with one another. This easy-to-use public site is a valuable tool for people affected by conflict or natural disaster – people often desperate for news of family members. The Family Links website has a global reach and data can be constantly updated. The information is not confidential and can be consulted by anyone, anywhere in the world, who has access to the internet.35

SESSION TWENTY-TWO: NATIONAL APPROACHES AND CAPABILITIES IN RELATION TO post-DISEMBARKATION

Session led by a facilitator.

SESSION TWENTY-THREE: IDENTIFICATION OF PERSONS WITH SPECIFIC PROTECTION NEEDS

OUTLINE: Upon initial reception, a comprehensive response to mixed arrivals requires the incorporation of screening procedures to identify specific needs. Following a brief presentation on the key aspects of profiling and screening, a group exercise will be conducted, involving practical case studies to elucidate how best to respond to this issue in real-world situations. It will be underlined that, among those with specific needs, asylum seekers and refugees, as persons in need of international protection, are to be channelled through appropriate determination processes to recognise their status, in accordance with relevant international obligations and best practice standards. The session will be practical and provide participants with tools and recommendations on how to best undertake these processes.

Slides 1-2
Mechanisms to differentiate between various categories of persons soon after they arrive in a host State can facilitate the management of mixed movements, especially those involving large-scale arrivals. Such mechanisms can ensure that asylum-seekers and other individuals with specific needs are quickly identified and their needs are addressed. The information gathered through these mechanisms can be used to facilitate individual processing, as well as to inform the development of more strategic responses to mixed movements in specific contexts.36

Reception arrangements provided as part of the Model Framework should include mechanisms to rapidly identify and distinguish among different groups of rescued persons. Persons found to be in need of international protection and assistance are to be separated from those identified as criminal perpetrators, such as traffickers and smugglers. Reception arrangements should also include mechanisms to manage the remains of persons who have perished at sea and ensure family tracing.

Solutions for refugees could, where appropriate, build on existing good practices supporting host States to facilitate self-reliance and local integration. Resettlement can also be part of an overall regional strategic effort to address rescue at sea incidents involving refugees, including as a burden-sharing tool. Given that many migrants in an irregular situation rescued at sea do not qualify for refugee status or complementary protection, it is necessary to establish within the Model Framework cooperative responses to facilitate the return of people not in need of international protection who are unable to stay in the country of disembarkation and/or processing.

These traditional solutions may be complemented by temporary or permanent options offered by migration frameworks. Care is required to ensure that rapid processing and/or an increase in resettlement places for asylum-seekers or refugees rescued at sea does not create pull factors or lead persons traveling irregularly by sea to create «distress» situations in order to promote rescue.37

36 Portions of the text are excerpted from UNHCR, Chapter 5, Mechanisms for Profiling and Referral, http://www.unhcr.org/50a4c1209.pdf, and UNHCR, Protection Policy Paper Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing.

Providing general information to new arrivals helps to establish trust, manage expectations and orient them within their new environment. Inform new arrivals of their rights and obligations, and provide them with the contact details of all organizations that provide support services such as psychosocial and medical assistance.

Information leaflets are a useful tool to explain the obligations and basic rights of arrivals in the host country, the different processes and procedures available (including the right to seek asylum), and anticipated timeframes for processing. Information leaflets are also a simple way to provide clear, practical information about available legal and other support services, such as a list of lawyers offering pro bono services, telephone numbers of consulates, NGOs and/or toll-free hotlines for direct assistance.

Profiling provides an opportunity to collect information from individuals travelling as part of mixed movements at an early stage. While this information can be used to establish individual preliminary case profiles (as outlined below), when collated and analysed it also provides significant data on the overall group that can enhance the efficiency of subsequent responses to mixed movements, including asylum procedures and other processes, as well as broader strategy and policy development.

In order to facilitate the information-gathering process, individuals can be asked to respond to simple, standardized questions about their background and reasons for moving by filling out questionnaires. The accuracy and comprehensiveness of the information provided can be enhanced if trained staff are available to help people complete the questionnaires. In certain contexts, it may be more appropriate or effective to gather this information in a profiling interview, which may include specific questions adapted to the group and the context. Consistency and coherence between interviews can be best ensured if the staff conducting
the profiling interviews maintains a careful record of the information they provide to interviewees, and the responses and other statements made by the individuals concerned. This jointly developed profiling questionnaire provides a sense of the kind of data to be collected. It can be, and has been, adapted to specific country contexts.

These preliminary profiles are intended to identify both immediate needs that may require urgent attention and longer-term processes and procedures that may be available to provide the individual with an appropriate outcome. Profiles are not necessarily mutually exclusive and could include:

• asylum-seekers;
• asylum-seekers and refugees who have moved from their first country of asylum;
• persons who may be victims of human trafficking or torture;
• unaccompanied and separated children;
• women and girls at risk;
• stateless persons;
• persons with physical and mental disabilities and older persons;
• persons with other specific needs;
• persons seeking to join their families (in the host country or in a third country);
• persons whose movement is primarily motivated by economic concerns; or
• persons who voluntarily express a wish to return to their country of origin.

Profiling does not replace RSD, nor is profiling a *de facto* RSD procedure with or without limited procedural guarantees. If a person expresses in any manner a need for international protection, or there is any doubt whether an individual may be in need of international protection, referral to RSD is the required response.

Confidentiality and security guidelines apply to all personal information, including questionnaires and other records. Ensuring the confidentiality of information provided during profiling mechanisms, whether through a questionnaire or in informal interviews, also establishes an environment of trust and allows individuals to provide sensitive information without fear of negative repercussions.

Where appropriate, the information gathered during profiling and referral may be forwarded to government agencies, NGOs or international organizations for use in subsequent processes and procedures. Any transfer of information is subject to informed consent of the individual concerned. Individuals should also be informed that the information they provide during profiling may be used in subsequent procedures and that they should be as accurate and truthful as possible during the interview process.
After a person’s profile has been established, this assessment is discussed with the individual and s/he is counseled on all of the options available. This does not create any binding obligations for the individual. Instead, counseling aims to provide advice to individuals so that their expectations remain realistic and they can determine the most appropriate way forward. Counseling should be provided by trained staff and that staff retain a careful record of the information or advice provided to the interviewee, as well as any statements or explanations given by that individual. Profiling and referral is a non-binding process: it does not replace RSD, nor is it a de facto RSD procedure without or with limited procedural guarantees.

After counseling, a person can be referred – with his/her agreement – to one of a number of processes and procedures to meet any immediate needs, and/or for further consideration of his/her situation.

Profiling and referral can be carried out by “first contact” entry officials who have been trained in interviewing techniques and identification of needs, and who are familiar with available follow-up processes and procedures. Host government authorities should be part of profiling teams.

Encourage the development of teams with members who bring different expertise, (i.e. entry officials, NGOs and international agencies) to support the profiling and referral of large numbers of persons arriving as part of mixed movements.

Rapid-response teams could assist States facing large-scale arrivals. There may be value in establishing multidisciplinary teams for maritime arrival situations; such teams would address any immediate needs, provide information and refer arrivals to appropriate response mechanisms (profiling). The teams may include or benefit from the expertise of non-governmental organizations.
The location of reception centres depends on the entry points and modes of transport being used by migrants and refugees traveling as part of mixed movements to arrive in the transit or destination country. The advantage of organizing reception arrangements for new arrivals close to a border, port or other entry point is that it is more accessible to arrivals and authorities are better able to provide immediate assistance to them.

**Slides 13-14**

**Access to asylum procedures**
- Legal and physical access, facilities for submitting application
- Legal advice
- Interpretation
- Adequate time for preparation
- Claims registered and processed within reasonable time
- Child-friendly procedure for UASC

Measures to ensure that access to asylum procedures is effective (namely, that applicants have legal and physical access to asylum procedures and the necessary facilities for submitting applications) include availability of legal advice and interpretation, and adequate time for the preparation of claims. It is also important that asylum applications are registered rapidly and dealt with in a reasonable timeframe. For unaccompanied and separated children an adapted ‘child-friendly’ RSD procedure is advisable.
Providing asylum-seekers with effective access to a fair and efficient asylum procedure where their international protection needs can be properly assessed ensures that the non-refoulement principle is respected.

A fair RSD procedure, wherever undertaken, requires submission of international protection claims to a specialized and professional first instance body, and an individual interview in the early stages of the procedure. Recognized international standards further include providing a reasoned decision in writing to all applicants, and ensuring that they have the opportunity to seek an independent review of any negative decision, with any appeal in principle having a suspensive effect. It is important that information received from applicants is treated confidentially.

Refugee status may also be determined on a group basis. This is appropriate if most of those arriving in the group can be deemed to be refugees on the basis of objective information related to the circumstances in the country of origin leading to their forced displacement.

SESSION TWENTY-FOUR: EXERCISE - SCENARIOS ON WHICH TO APPLY GUIDELINES FOR SCREENING

A group of 58 migrants has just been brought into the port of an island on Ruritania on a coastguard patrol boat. The passengers were exhausted but relieved to have been rescued, after their awful journey during which two people have died. You are an official of Ruritania. You conduct screening interviews with the people who have arrived and gather the following information from two individuals among the group.

1. Eden

Eden, a 17 year old girl from Riverland, left her country because she “didn’t want to feel scared for the rest of her life for refusing to dress traditionally as was expected according to the social norms in her community/country, and wanted to be independent and work”. Eden headed east, eventually arriving in a neighboring country Verdana, where she was arrested.

“Words cannot explain what our life was like in prison,” Eden said of her six months in detention for entering the country without documents or a visa. “They kept us locked up 24 hours a day. There were 70 women in a 30-square meter room. Food was given to us once a day – plain rice and salty drinking water – and sometimes the guards only threw us a piece of bread straight from the door.” Tears began to stream down her face. “I could cope with this treatment, but the real nightmare began once the sun had set,” she said.
“We were under constant threat of being singled out and raped by the guards... I hated myself for having to live such a life and for not being able to find a solution.”

The day Eden was released from jail was not the day she became free. “A group of us was handed over to a factory owner,” she said. “We were sold for approximately 50 dollars each, like animals.” They were forced to work in the factory from dawn to dusk, without any pay. “The factory owner could do whatever he wanted to us, especially as far as the women were concerned,” she said in her low, flat voice. They were finally freed after their families sent money to the factory owner, three months later.

“I’m already dead,” she said, “and nobody will give my life back to me. I have also found out that I have become pregnant as a result of the rapes by the factory owner. In Riverland, my family and community will perceive me as a prostitute and I will become a social outcast. I hope that I can stay in this country and lead a normal life here, as I cannot return to Riverland and have nowhere else to go”. She also shows some signs of distress and confused thinking.

2. **Latifa**

Latifa is 19 years old, and a member of a religious minority in Zolaland. After her father’s death, the village elders encourage her to seek employment abroad to support her family of seven. Soon after she filled out an application at a local recruitment agency, Latifa was assigned to work as a domestic helper to a family of five in Bantana. She was promised $400 U.S. per month.

Upon her arrival in Bantana, Latifa’s employer confiscated her passport and informed her that she was not permitted to leave the residence unless accompanied. For several months, the only time Latifa was allowed outside was so that she could hang the laundry to dry.

Nonetheless, Latifa tried her best to adhere to her employer’s demands and fulfil her obligations. She worked approximately 19 hours per day, and tried to remain positive even after her salary had been withheld for three consecutive months. When she finally received her salary, she only received $200 U.S. per month, rather than the $400 U.S. that had been agreed upon in the original contract. Latifa requested her pay in full, but her employer explained that he had deducted $200 U.S. per month to cover the cost of her room and board. He also reminded her that he had possession of her passport. Later that night, while the rest of the family was sleeping, her employer raped her.

The next day, she ran away from her employer’s home. As her passport remained with her employer, she was afraid that she would be arrested by the police for lack of documentation. Desperate, she finds a smuggler who agrees to make arrangements for her to travel on a boat to nearby Ruritania.

Latifa would like to return to Zolaland to resume her life there, but does not know how to return there as she has no travel document and little money.

**Questions**

Based on the available information, please complete the Profiling Questionnaire, to the extent possible, (see below) and assess the type(s) of assistance / referrals that are recommended for each case.
**PROFILING QUESTIONNAIRE**

For first contact and referral purposes only
Not for actual status determination and not to be used to limit claims or rights in later processes

A. Interview

<table>
<thead>
<tr>
<th>PROFILE</th>
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<tr>
<td><strong>1 Name</strong></td>
<td><strong>2 Sex</strong></td>
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<tr>
<td><strong>3 Age</strong></td>
<td><strong>4 Nationality / place of habitual residence</strong></td>
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<tr>
<th><strong>5 Traveling alone or with family or others?</strong></th>
<th><strong>Circle if applicable</strong></th>
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<tbody>
<tr>
<td>Travels with parent(s)</td>
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<tr>
<td>Travels with family member(s)</td>
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<tr>
<td>Travels with adult non-family member+</td>
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<tr>
<td>Travels alone</td>
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<tr>
<td>Does not demonstrate knowledge of the accompanying adult+</td>
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<tr>
<td>Travels with non family member(s) and does not know exact destination+</td>
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</tbody>
</table>

Name(s) and relationship of accompanying family member:

<table>
<thead>
<tr>
<th><strong>6 Documentation</strong></th>
<th><strong>7 Medical Conditions</strong></th>
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</thead>
<tbody>
<tr>
<td>(Indicate if docs retained by agents / employers+)</td>
<td>Pregnant woman</td>
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<td></td>
<td>Disability (please specify)</td>
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<td></td>
<td>Possible mental health issues</td>
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<td>Other (please specify)</td>
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<thead>
<tr>
<th><strong>MIGRATION PROCESS</strong></th>
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<tbody>
<tr>
<td><strong>8 When did you leave your place of origin?</strong></td>
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<tr>
<td><strong>9 Why did you leave your place of origin?</strong></td>
<td><strong>Circle relevant option(s):</strong></td>
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<tr>
<td>Educational opportunity / Visit family or friend / Family reunification / Work opportunity / Marriage / False promise or Deception+ / Flight from harm or fear of harm* / Indiscriminate violence*/ armed conflict*/ disruption of public order*</td>
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</table>

If other, please specify:
10 How did you leave your place of origin? Circle relevant option(s):

Self/ Facilitated or assisted+ / Involuntary (kidnapping, coercion, sold by family, sold by non-family+) / Adoption / Other

If other, please specify:

11 Did you spend any time in transit place(s) / country(ies)?

Yes    No

If yes, please specify in chronological order:

1 *Possible indication that the individual may be a person of concern to the asylum authorities / UNHCR and that they should be notified. + Possible indication that the individual may be a trafficked person, and that the relevant authorities / IOM should be notified.

12 Did you engage in any activity in transit place(s) / country(ies)?

Yes    No

If yes, please specify (circle relevant option):

Agricultural work / Begging / Child care / Construction / Domestic work / Factory work / Fishing / Low-level criminal activities / Mining / Entertainment / Prostitution / Restaurant and hotel work / Study / Small street commerce / Trade / Transport Sector / Other

If other, please specify:

13 Where did you live?

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<tr>
<th>PROSPECTS</th>
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<tbody>
<tr>
<td>14 Do you intend to stay here?</td>
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<tr>
<td>15 Do you intend to move to another country? (circle one):</td>
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<tr>
<td>If yes, please specify:</td>
</tr>
<tr>
<td>16 Do you want to return to your country of origin?</td>
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<tr>
<td>17 What do you think will happen to you if you return to your country of origin?</td>
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</tbody>
</table>

Please circle all those that apply:

Detention / Prosecution / Physical violence+ / Sexual Gender-based violence + / Fear of retaliation+ / Fear of return* / Inability to return* / Other (Please specify) ........................................

Observations (please provide brief explanation of each indicator circled above):
### B. CASE ANALYSIS

**PROFILE INDICATED**

18 Please tick all those that are INDICATED (even if not entirely proven; this is not a final status determination):

<table>
<thead>
<tr>
<th>Category</th>
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<tbody>
<tr>
<td>Asylum-seeker</td>
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<td>Victim of Trafficking</td>
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<tr>
<td>Minor (Please indicate if: unaccompanied</td>
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<tr>
<td>Woman at Risk</td>
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<td>Older People at Risk</td>
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<td>Victim of Violence or Trauma</td>
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<td>Health or disability</td>
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<td>Other (please specify)</td>
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<td>Explain briefly:</td>
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**REFERRAL FOR ASSISTANCE**

19 Will the individual be referred for assistance?  
Yes  No

If yes, please tick the appropriate box(es) below:

<table>
<thead>
<tr>
<th>Categories of persons with needs</th>
<th>Asylum-seeker</th>
<th>Victim of Trafficking</th>
<th>Woman at Risk</th>
<th>Minor</th>
<th>Older person at Risk</th>
<th>Other</th>
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<tbody>
<tr>
<td>Emergency relocation</td>
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<td>Reception services</td>
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<td>(accommodation, hygiene kit, clothing, food...)</td>
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<tr>
<td>Immediate medical attention</td>
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<td>Referral to asylum process</td>
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<tr>
<td>Family tracing / Reunification</td>
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<td>Best interests Determination</td>
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<td>Other (please specify):</td>
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Urgent Action Required:
COURSE DAY: SIX

PART IV: DURABLE SOLUTIONS, REGIONAL COOPERATION AND COORDINATION

SESSION TWENTY-FIVE: DURABLE SOLUTIONS AND ALTERNATIVES TO IRREGULAR MIGRATION

PURPOSE: Introduction to options to ensure outcomes and solutions for people arriving by sea, in accordance with their specific rights and needs. These include durable solutions, temporary protection or stay arrangements for those recognized as refugees or as otherwise being in need of international protection, together with assisted voluntary return and reintegration (AVRR) of people not in need of international protection, as well as alternative migration options.

CONTENT / LEARNING OBJECTIVES:

- An overview of durable solutions for people who are recognized as refugees or as otherwise being in need of international protection will provided, including voluntary return, local integration, and resettlement. The nature and availability of the solutions will depend on the opportunities and constraints inherent in each situation. The concept of ‘comprehensive solutions’ for refugees, including labour mobility and labour migration schemes, as well as examples of such options in other regions, will also be touched upon. The particular situation of stateless persons and minors whose parents could not be identified will be addressed as well.

- The use of temporary protection or stay arrangements, as pragmatic tools of international protection, particularly as responses to humanitarian crises or mixed population movements for boat arrivals and rescue at sea scenarios, will be discussed.

- For persons found not to be in need of international protection and without compelling humanitarian reasons to stay in the host country, as well as persons who have not sought asylum and do not appear to be at risk of persecution or ill treatment in case of return, the option of return to the country of origin through IOM’s Assisted Voluntary Return and Reintegration (AVRR) scheme will be discussed and an overview of the AVRR programme will be presented.

- Additionally, access to alternative legal migration options (i.e. regularization in the host country or legal onward movement to another country, for the purposes of work, education or family reunion) will be introduced. While such an option is generally only available to individuals with a specific profile or in specific circumstances, there may nevertheless be situations in which such alternative, temporary or longer-term migration options can be accessed. Examples of such avenues that are available in practice in countries in the region will be shared.

- Some countries have also established initiatives to ensure that the specific needs of

certain groups, such as victims of trafficking and other especially vulnerable persons, to remain in its territory. Relevant examples will also be discussed. The potential role of civil society organisations and diaspora community groups in this context will be introduced (e.g. regarding private sponsorship programmes).

- A Q&A session and discussion will follow for participants to ask any questions and enter into a dialogue with specialists. This will also provide an opportunity for participants to share national experiences and practices in this context.
Durable solutions for refugees have traditionally been comprised of three essential options: voluntary return, resettlement and integration in the country of asylum. Absence of durable solutions for refugees will eventually become a protection concern, and hence the search for durable solutions constitutes an element of providing international protection.

For most refugees, voluntary return is the most desirable option. Voluntary return is the return in safety and dignity to the refugees’ country of origin, based on their free and informed decision. When prevailing conditions allow such a return, it is considered the most beneficial solution. Where these conditions are not met, however, returns may not be sustainable and refugees could seek to return to the country of asylum. The refugee’s decision to repatriate should not be coerced by factors such as the asylum situation in the host country, lack of or reduction in assistance, or threats to family or property in his or her country of origin.

Due to conflict and persecutions millions of refugees around the world live without any hope of ever returning home. Where return is not an option, settling in the country of asylum and integrating into the local community offers a durable solution to their plight and the chance to build a new life. Local integration is a complex and gradual process with legal, economic, social and cultural dimensions. It imposes considerable demands on both the individual and the receiving society.

Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them – as refugees – with
permanent residence status. The status provided ensures protection against *refoulement* and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals. Resettlement also carries with it the opportunity to eventually become a naturalized citizen of the resettlement country. Resettlement is a mechanism for refugee protection, a durable solution and an element of responsibility sharing with refugee-hosting countries.\(^{40}\) It should be noted that less than 1% of refugees are resettled globally.

A comprehensive approach can only be implemented in close cooperation among countries of origin, host States, UNHCR and its partners as well as refugees. A comprehensive approach may follow a formal Plan of Action with the goal of “solving” a particular situation, or instead reflect a concerted effort to coordinate the three durable solutions from the outset of a displacement situation with a view to preventing protracted situations from developing.

When looking at voluntary return, it is important to identify the indicators that may determine that it could be an option in the near or foreseeable future. For example, are peace talks underway in the country of origin, or is there a likelihood they will be in the near future? Have

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there been any spontaneous returns of refugees or internally displaced persons? Has the security situation in the country of origin improved? Are the minimum safeguards as to treatment upon return and conditions required to promote voluntary return being met in the country of origin? Is continued asylum for those who remain refugees ensured?

Safe and dignified return requires a meaningful commitment by the country of origin to help reintegrate its own people. The international community also plays an important role in ensuring that those who make the brave decision to go home can rebuild their lives in a stable environment, including in post-conflict situations. In this regard, UNHCR organizes “go-and-see” visits for refugees, compiling updated information on their country and region of origin, engaging in peace and reconciliation activities, promoting housing and property restitution, and providing return assistance and legal aid to returnees. Through the “4Rs” approach: return, reintegration, rehabilitation and reconstruction, the connection between humanitarian assistance and longer-term development work a smoother transition between relief efforts and development.

The term “in safety and with dignity” means the return in, and to conditions of physical, legal and material safety with full restoration of national protection. Refugees should ideally be able to return to their place of residence.

Returns should takes place under conditions of legal safety (such as amnesties or public assurances of personal safety, integrity, non-discrimination and freedom from fear of persecution or punishment upon return), physical security (including protection from armed attacks, and mine-free routes or at least demarcated settlement sites), and material security (access to land or means of livelihood).

Physical safety must be assured by the national authorities, which may need support from the international community. Insecurity can be a general threat, but returnees may also be specifically targeted. In such cases, the capacity of national authorities to protect them and uphold law and order needs to be considered carefully. Furthermore, even where the overall security situation has improved, there may be pockets where physical security cannot be assured. The presence of landmines, for example, may pose threats in specific localities.

Particularly in post-conflict situations, legal and judicial systems may need to be recreated or reformed in order to remove legal and administrative barriers to return. Examples of this are to ensure that returnees’ personal and civil status (including citizenship) is recognized, and to make provision for the return of property, or for adequate compensation where possible. Another type of legal safety measure for returning refugees is amnesty against prosecution for having fled, for example, for avoiding military conscription. Amnesties may cover a range of crimes, but perpetrators of war crimes or crimes against humanity should not be amnestied.

Material safety implies non-discriminatory access to means of survival and basic services, such as food, water, health care and education. These services must be accompanied by means of self-reliance to ensure that reintegration is sustainable.

In practice, dignity means that refugees are not mistreated, are able to return unconditionally or spontaneously at their own pace, are not arbitrarily separated from family members, are
treated with respect and full acceptance by their national authorities, and that they have full restoration of their rights.41

Example of voluntary repatriation on the region

On 25th and 26th October 2016, seventy-one refugees (representing 20 families) participated in the first voluntary repatriation from Thailand to Myanmar organized bilaterally between the two governments with support from UNHCR and other agencies.

Having spent many years in Nupo and Tham Hin camps, refugees returned to seven states, nine townships and eighteen different villages, where they are currently settling themselves with the support of township authorities and local social support networks.

While most returnees returned to Kayin, others returned to Yangon, Kachin, Bago, Mon, Tanintharyi and Rakhine. This historic event came after years of preparation by the respective governments, UNHCR, NGOs, CBOs, refugee committees and other refugee stakeholders. Refugees in Nupo, Tham Hin and other camps approached UNHCR in late 2015 to express their intention to return home. After initial protection counseling by UNHCR in April 2016, the list of potential returnees was shared with the governments of Myanmar and Thailand for their approval, or “green light”. This is an important step in the facilitated voluntary return process and is a key UNHCR benchmark in supporting refugees’ return.

In September 2016, the Myanmar Government sent a delegation to visit Nupo and Tham Hin camps to verify the refugees’ nationality and issue them with Certificates of Identity (CoI), or temporary travel documents. In October, following a bi-lateral meeting between the two governments, the “green light” was given to facilitate the return of this first group. UNHCR quickly informed the families and reconfirmed their intention to return. UNHCR also shared relevant information related to the assistance package and other pre-departure information such as the transport arrangements and documentation processing.

UNHCR does not advise refugees whether to return – this decision rests with them as individuals – but UNHCR helps them to make well-informed decisions based on information available. Out of the original list of 96 individuals hoping to return, 25 decided to withdraw due to individual concerns including a preference to wait until the planting season and school holidays. Prior to facilitating return, UNHCR ensured that four benchmarks were met: (1) voluntariness; (2) no immediate protection risk; (3) “green light” by Myanmar Government; and (4) UNHCR or partner access to return areas.

Voluntary Repatriation from the Royal Thai Government Temporary Shelters to Myanmar 11th November 2016 at the Thailand-Myanmar Friendship bridge before the departure - 26 October 2016 The facilitated voluntary repatriation was led by the two governments, with the support of UNHCR and its partners, the International Organization

for Migration (IOM), Handicap International (HI) and the World Food Programme (WFP). NGOs and camp committee members also helped to support the return preparation, including ensuring that they had the necessary documentation regarding health, education and training received in the camps, as well as providing some non-food items (NFIs). In addition to protection counseling provided by UNHCR, the following assistance package was offered to verified returning refugees:

- Mine-risk awareness session organized by Handicap International;
- Cash assistance in 4 components:
  1. Transport grant to support travel from the Thai border to the return location in Myanmar (THB 1,800 per person);
  2. Reintegration grant (THB 1,800 per person);
  3. Household support grant (THB 3,600 per adult and THB 1,800 per child)
  4. Food support for 3 months (THB 1,100 per person supported by World Food Program)
- Mosquito nets;
- WASH kits (distributed by ARC in Nupo and IRC in Tham Hin);
- Organized transport from the temporary shelters to the transit location across the border

In addition, the Myanmar Government organized additional support for returning families. For the family returning from Tham Hin temporary shelter, they were transported to the Htee Kee border-crossing point where they were met by authorities and accompanied to their return location in Myitta Township in Tanintharyi region. The family intends to start a small business selling ice-cream and roti. All their children are attending schools in Myitta Town and the education certificates issued by their school in Tham Hin helped them to integrate into the local school. The family has also begun the process of applying for a household list and civil documents. For the families from Nupo temporary shelter, they were transported to the Myawaddy border-crossing point (Friendship Bridge) in Mae Sot. After a brief ceremony organized by the governments, they were accompanied across the border to a center for migrants in Myawaddy, where some stayed for up to 3 days. While at the center, they were provided with meals, accommodation, NFIs and medical screening. UNHCR Myanmar confirmed that all returnees have safely reached their return destinations and have begun the process of settling in. During the month of November, UNHCR Myanmar staff will monitor the return of all 20 families. These updates will be shared with refugees in the Thailand.
Local integration is a legal, economic and socio-cultural process aiming at providing the refugee with the permanent right to stay in the country of asylum, including, in some situations, as a naturalized citizen. Local integration follows the formal granting of refugee status and includes assistance to settle in order for the refugee to live independently within the community. The 1951 Convention gives refugees a solid basis on which they can progressively reclaim their social and economic independence in order to proceed with their lives. These include inter alia the right to freedom of movement, access to the labour market, education, health care and other social services. Not least, the 1951 Convention provides for facilitated naturalization procedures in the country of asylum.

If local integration is to be a viable solution, it requires (i) agreement by the host country concerned; and (ii) an enabling environment that builds on the resources refugees bring with them, both of which implicitly contribute to the prevention of further displacement. Local integration should be seen as a gradual process that takes place through three interrelated dimensions:

**Legal**: refugees are granted a progressively wider range of rights (similar to those enjoyed by citizens) leading eventually to permanent residency and, in some situations, to naturalization;

**Economic**: refugees gradually become less dependent on aid from the country of asylum or on humanitarian assistance and become increasingly self-reliant to support themselves and contribute to the local economy;

**Social and cultural**: the interaction between refugees and the local community allows refugees to participate in the social life of their new country without fear of discrimination or hostility while not obliged to abandon their own culture. 42

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Resettlement is the transfer of refugees from the country in which they have sought asylum to another State that has agreed to admit them as refugees and to grant them permanent settlement and the opportunity for eventual citizenship. Resettlement is not a right, and there is no obligation on States to accept refugees through resettlement.

A foundation of resettlement policy is that it provides a durable solution for refugees unable to voluntarily return home or remain in their country of refuge. Resettling refugees who do not have immediate protection concerns in the country of refuge, but who have no prospects for voluntary return or local integration, provides them with a durable solution. Exceptions can be made for non-refugee stateless persons for whom resettlement is considered the most appropriate durable solution, and also for the resettlement of certain non-refugee dependent family members to retain family unity.

The principal responsibility for providing international protection for refugees lies with States and is in the interest of the entire international community. Respect by States for their international protection responsibilities towards refugees is strengthened through international solidarity and the refugee protection regime is enhanced through committed international cooperation in a spirit of effective responsibility and burden-sharing among all States.

While strategic use of resettlement as a responsibility sharing tool can be promoted by a single State, coordination with other resettlement countries and UNHCR is likely to maximize derivative benefits. Such coordination may involve negotiation of mutually agreeable arrangements between the international community and the State of first asylum, possibly requiring a multi-year commitment by the international community, as well as assistance to further local integration or enhance life for refugees in first asylum countries.
Refugees may be denied basic human rights in a country of refuge. Their lives and freedom may be threatened or they may have vulnerabilities or specific needs that render their asylum untenable. The authorities in the country of refuge may be unable or unwilling to provide effective protection or address specific needs. In such circumstances, timely relocation through resettlement becomes a principal objective, and an important means of protecting refugees.

Resettlement submission categories:

**Legal and/or physical protection needs** of the refugee in the country of refuge (this includes a threat of *refoulement*);

**Survivors of torture and/or violence**, where return or the conditions of asylum could result in further traumatization and/or heightened risk; or where appropriate treatment is not available;

**Medical needs**, in particular life-saving treatment that is unavailable in the country of refuge;

**Women and girls at risk** who have protection problems particular to their gender;

**Family reunification** when resettlement is the only means to reunite refugee family members who, owing to refugee flight or displacement, are separated by borders or entire continents;

**Children and adolescents at risk**, where a best interests determination supports resettlement;

**Lack of foreseeable alternative durable solutions**, when other solutions are not feasible in the foreseeable future, when resettlement can be used strategically, and/or when it can open possibilities for comprehensive solutions.

Self-reliance is not a durable solution in and of itself, but rather an important precursor to all three durable solutions. Increasing the self-reliance of refugees can be accomplished through various means, including through income-generating, agricultural or community development projects. Self-reliance projects often benefit local communities as well, allowing refugees to become agents of development.
The difficulties inherent in addressing mixed migration flows have blurred the boundaries between international understandings of refugees as forced to flee, and the “voluntary” migrant. States have become increasingly concerned with securing their borders against irregular migration, leading to a consequent shrinkage of asylum space. Individuals who qualify for refugee status or for another form of international protection may themselves have “mixed motivations” that cut across the conceptual dichotomy between “forced flight” and “voluntary migration”. The international community has also come to recognise the possibility of changing motivations, particularly among long-term forced migrant populations, in which, as a result of educational or employment opportunities, ‘what began as forced migration may transmute into other forms of movement’.

Incorporating labour migration schemes into the framework of durable solutions reflects the contemporary realities of global mobility, shrinking asylum space in the global North and regional state fragility in the global South. Labour migration could be particularly useful in addressing protracted refugee situations where the effectiveness of the three traditional solutions has been limited. Incorporating labour migration with in a solutions framework could correct the “sedentary bias,” which has led to the historic assumption that ‘continued mobility on the part of refugees and former refugees represents a failure of the integration or reintegration process’. The normality of human mobility can be recognised and placed at the centre of refugee solutions, increasing refugees' own agency and ability to choose the solution most appropriate to their own particular circumstances.

Regularised labour migration should not replace the traditional citizenship-focused durable solutions of resettlement, local integration or return. It is clear that the restoration of citizenship is a vital component of any durable solution, and one which labour migration alone cannot provide. Experts have also expressed concern that embracing labour migration as a “solution” will erode rather than enhance the protection space available to refugees.43

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There are an estimated 12 million stateless people worldwide.

The right to a passport and the unrestricted right to enter and reside in a State, are only extended to citizens. Because States often also limit the enjoyment of a broader range of rights to nationals, those who are not nationals of any State may not be able to enjoy these rights anywhere. As a consequence, stateless persons can have problems accessing formal employment, identity and travel documents, housing, medical care and education, even though they may have been born and lived their entire lives in a particular country.

**De facto statelessness** describes persons who possess a nationality but where that nationality is ineffective. Traditionally the term has been used to describe a person who, outside his/her country of nationality, is denied protection, i.e. the diplomatic and consular protection/assistance of his/her country, for example by being denied a passport or return from abroad.

Stateless persons may be refugees, (the standards of treatment set out in the 1951 Convention apply to them). But, not all stateless persons are refugees. The 1951 Refugee Convention refers to stateless persons who meet the criteria of the refugee definition. Relatively few States have acceded to or ratified these Conventions to date, although they still provide valuable guidance in terms of standards to be applied.

The right to a nationality as a fundamental right is set out in the Universal Declaration of Human Rights. Resettlement of non-refugee stateless persons is challenging however, due to the criteria of resettlement States. UNHCR’s ExCom Conclusion No. 95 (2003) encourages States “to cooperate with UNHCR on methods to resolve cases of statelessness and to
consider the possibility of providing resettlement places where a stateless person’s situation cannot be resolved in the present host country or other country of former habitual residence, and remains precarious.”

If a child is granted asylum or permitted to stay, possible durable solutions are either local integration or resettlement in a third country, normally on the grounds of family reunification. If the child is found not to qualify for asylum, either as a refugee or on humanitarian grounds, an assessment of the solution that is in the best interests of the child should follow as soon as practicable after the negative result of his/her application is confirmed. The identification of the most appropriate solution requires that all the various aspects of the case be duly considered and weighed. One way in which this objective may be ensured is by the establishment of multidisciplinary panels in charge of considering on a case-by-case basis which solution is in the best interests of the child, and making appropriate recommendations.

In order to make appropriate arrangements for return, tracing and home assessment would be of particular importance. Effective assessments may require that home assessment or tracing be conducted in the country of origin. This entails tracing the child’s family and clarifying the family situation, by, for example, making an assessment of the ability of the child’s family in the country of origin to receive the child and to provide appropriate care. It may also entail gauging the need for eventual material assistance to the family concerned. Information collected through tracing and home assessment can often provide a firm basis for a best interest decision with regard to the child’s future. Such information could be gathered through existing NGOs, which may already have presence in the country of origin and are equipped to do such activities.

The best interests of an unaccompanied child require that the child not be returned unless, prior to the return, a suitable care-giver such as a parent, other relative, other adult care-taker, a government agency, a child-care agency in the country of origin has agreed, and is able to take responsibility for the child and provide him/her with appropriate protection and care.

In identifying a solution, all circumstances, should be taken into consideration. As a guiding concept, principles of family reunification and best interests are usually compatible. Thus, reunification with parents will generally be in the best interests of a child. However, where best interests and family reunification principles are incompatible, the best interests of the child should take precedence. Circumstances may exist that call into question the appropriateness of a child reuniting with his/her parents or other principal caregiver.
Examples include where there are substantiated allegations of sexual abuse or similarly serious considerations.  

As soon as the child has been recognized refugee status or permitted to stay on humanitarian grounds, long-term placement in a community should be arranged. Should return be considered as the most appropriate durable solution, the return will not be carried out unless, prior to the return, a suitable care-giver such as a parent, other relative, other adult care-taker, a government agency, a child-care agency in the country of origin has agreed, and is able to take responsibility for the child and provide him/her with appropriate protection and care.

Special efforts must be made to ensure the provision of appropriate counseling for a child who is to be returned. This is particularly important in case of individual reluctance, as well as family pressure not to return. If possible, the child should be encouraged to communicate with his/her family members prior to return.

The possibility of using the expertise of international agencies could be explored, notably for initiating/maintaining contacts both with the child’s family and with the authorities in the country of origin and establishing an assistance programme for the family, when deemed necessary and appropriate.

Many different perspectives will need to be taken into account in identifying the most appropriate solution for a child who is not eligible for asylum. Such multidisciplinary approach may, for example, be ensured by the establishment of panels in charge of considering on a case-by-case basis which solution is in the best interests of the child, and making appropriate recommendations. The composition of such panels could be broad-based, including for instance representatives of the competent governmental departments or agencies, representatives of child welfare agencies (in particular that or those under whose care the child has been placed), and representatives of organizations or associations grouping persons of the same national origin as the child.

Siblings should be kept together in conformity with the principle of family unity.

Children seeking asylum should not be kept in detention. This is particularly important in the case of unaccompanied children.

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The child should be registered with appropriate school authorities as soon as possible.\textsuperscript{45}

**Slides 16-17**

The law and standards concerning the granting of asylum and complementary protection were covered in the session on international refugee law on Day 1.

For those not falling under the 1951 Convention, or for mass fluxes of refugees, States have given permission for persons fleeing from, for example, generalized conflict, to stay on their territory, albeit with a different status. Whatever the particular name given to the status by a State, this is referred to as a “complementary” form of protection, in that it is complementary to the protection granted under the 1951 Convention.

The lack of a universally accepted definition of \textit{“complementary protection”} can lead to its confusion with the concept of temporary protection. \textit{Temporary protection} is generally used to describe a short-term emergency response to a significant influx of asylum-seekers, and was initially developed by several European States as a response to the large-scale movement of people fleeing the conflict in the former Yugoslavia in the 1990s. By contrast, complementary protection is not an emergency or provisional device. It is, rather, a basis for States to provide protection from return as an alternative to refugee recognition under the 1951 Convention/1967 Protocol.

Persons eligible for Convention refugee status or complementary protection may in an emergency situation receive temporary protection instead. However, persons granted temporary protection should still be able to pursue individualized status determination procedures subsequent to lifting of temporary protection if they so wish. Temporary protection and stay arrangements are not intended to substitute for other protection mechanisms that respond adequately to the situation at hand, nor are they intended to replace existing regional temporary protection schemes that would be applicable and/or more suitable.

Temporary protection/stay arrangements (TPSAs) are pragmatic “tools” of international protection, reflected in States’ commitment and practice of offering sanctuary to those fleeing humanitarian crises. TPSAs are complementary to the international refugee protection regime.

being used at times to fill gaps in that regime as well as in national response systems and capacity, especially in non-Convention States. TPSAs are especially relevant in regions where there are few States parties to the 1951 Refugee Convention relating to the Status of Refugees (1951 Refugee Convention) and/or the 1967 Protocol, or regional refugee or other protection instruments, or where these instruments are difficult to or do not apply because of the character of the movements.

The activation and scope of TPSAs are based on categories, groups or scenarios, allowing for a flexible and immediate response to the crisis in question. TPSAs are particularly suited as a response to:

(i) large-scale influxes of asylum-seekers or other similar humanitarian crises;
(ii) complex or mixed cross-border population movements, including boat arrivals and rescue at sea scenarios;
(iii) fluid or transitional contexts [e.g. at the beginning of a crisis where the exact cause and character of the movement may be uncertain, or at the end of a crisis, when the motivation for departure may need further assessment]; and
(iv) other exceptional and temporary conditions in the country of origin necessitating international protection and which prevent return in safety and dignity.\(^{46}\)

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\(^{46}\) Portions of the text are excerpted from Guidelines on Temporary Protection or Stay Arrangements, available at: http://www.refworld.org/docid/52fba2404.html.
Assisted Voluntary Return and Reintegration (AVRR) aims at the orderly and humane return and reintegration of migrants who are unable or unwilling to remain in host countries and wish to return voluntarily to their countries of origin. The successful implementation of AVRR programmes requires the cooperation and participation of a broad range of actors, including the migrants, civil society and the governments in both host countries and countries of origin. Voluntariness remains a precondition for all its AVRR activities.

Reintegration can be considered sustainable when returnees have reached levels of economic self-sufficiency, social stability within their communities, and psycho-social well being that allows them to cope with (re)migration drivers. Having sustained reintegration, returnees are able to make further migration decisions a matter of choice, rather than necessity.

Potential beneficiaries of AVRR include:
- individuals whose application for asylum was rejected or withdrawn
- stranded migrants
- victims of trafficking, and
- other vulnerable groups, including unaccompanied migrant children, or those with health-related needs.
Note: reintegration assistance depends on the respective AVRR project and resources made available by donors.
IOM’s policy considerations when developing and implementing AVRR programs include:

- safeguarding dignity and rights of migrants in operating returns, while seeking adherence to applicable international principles and standards
- preserving the integrity of regular migration structures and asylum procedures
- enhancing dialogue and cooperation between origin, transit and host countries involved in the return process and reinforcing the responsibility of countries of origin towards their returning nationals
- addressing, to the extent possible, the root causes of irregular migration
- advocating for the adoption of comprehensive approaches towards voluntary return, including post-return reintegration assistance; and,
- working with national and international partners in both host country and country of origin, to promote international dialogue and implement capacity-building for AVRR initiatives.

IOM also provides post-arrival assistance to migrants whose return is not booked or organized by IOM or its recognized partner(s), including non-IOM returnees (migrants who returned through voluntary return schemes implemented by state or non-state actors) and forced returnees.

Slide 24

Additionally, access to alternative legal migration options (i.e. regularization in the host country or legal onward movement to another country, for the purposes of work, education or family reunion) will be introduced. While such an option is generally only available to individuals with a specific profile or in specific circumstances, there may nevertheless be situations in which such alternative, temporary or longer-term migration options can be accessed. Examples of such avenues that are available in practice in countries in the region will be shared.
Alternative pathways are channels of migration that are not necessarily designed for refugees, but which can be used by refugees, in order to avoid using costly and often dangerous routes through the asylum channels. They complement standard resettlement programmes. These pathways include labour, international study and family migration, as well as humanitarian visas and private sponsorship schemes.

Using general labour migration channels for refugees requires policy instruments and employer incentives to enable refugees to compete with other migrant workers. Incentives should be in line with general labour standards for native workers, to avoid undermining public support and efforts to integrate refugees already in the country. The rules governing access to skilled migration channels could be reviewed for undue obstructions to access, and quotas could be relaxed or removed for skilled refugees.

Of all alternative pathways for refugees, student programmes elicit the greatest public support in destination countries, particularly in the academic community. Such programmes must, however, meet a number of challenges, such as ascertaining candidates’ levels of education in the selection process and adapting services to beneficiaries’ special needs. Although student scholarship programmes for refugees are the most expensive option, they have a valuable role to play in building a highly qualified workforce for post-conflict situations. Measures can be taken to both increase access to existing scholarships and expand access to existing opportunities.

States can reduce visa fees or waive country of return requirements; government can incorporate universities into private sponsorship models. Preparatory/foundation courses can aid prospective students attain the academic and language skills necessary for mainstream admission. Distance/online learning can fill this function and/or offer direct opportunities for accredited qualifications.

The establishment of vocational training colleges in countries of first asylum can promote labour market-relevant skills for host populations and refugees. They might be developed with private sector partners that can help forge a pathway from education to employment for refugees and hosts. Student mobility schemes can be expanded and developed in new regions to enable temporary placements.

Family migration is the alternative pathway that can create the most places for displaced people in need of protection.

Humanitarian visas are used to enable people to lawfully enter a destination country to file a formal asylum application.
Under **private sponsorship programmes**, private stakeholders share the costs of resettlement and other alternative pathways.

States and regional organisations can work to remove remaining legal and practical obstacles preventing regional mobility frameworks from providing wider protection, for instance by removing the ability of member states to unilaterally declare exceptions to free movement rules, and making residency affordable and accessible where the law allows.

States can also work with international institutions to further develop mobility opportunities within regional frameworks, and (simplified) pathways to regularisation or naturalisation for those already living outside of the country of asylum.\(^47\)

**Slides 25-28**

Some countries have also established initiatives to ensure that the specific needs of certain groups, such as victims of trafficking and other especially vulnerable persons, to remain in its territory. Relevant examples will also be discussed. The potential role of civil society organisations and diaspora community groups in this context will be introduced (e.g. regarding private sponsorship programmes).

![Special visa regimes - VoTs](image)

The Trafficking Protocol, discussed on Day 3 provides for temporary stay for victims of trafficking, in order to create a legal space for unauthorized migrant victims to come forward to report and seek protection from trafficking. Such visas allow victims of trafficking to normalize their immigration status, at least temporarily. The implementation of these visas can be challenging for States given that the line between voluntary migrants who participate in smuggling schemes and unwilling trafficking victims can sometimes be blurred.

MOVE: In the US, the Trafficking Victims Protection Act added a private right of action for trafficking victims against their traffickers.

Although not binding for the Asia-Pacific region, the Council of Europe Convention on Action against Trafficking in Human Beings provides an excellent model of international best practice, providing for a reflection period for the victim to autonomously decide to cooperate with the authorities in criminal investigations in proceedings. During this period victims are entitled to the full range of assistance programs, as discussed on Day 4.

The Council of Europe Convention on Action against Trafficking in Human Beings also provides for the issuance of renewable residency permits, to allow cooperation with authorities or due to the victims’ personal circumstances.
**SESSION TWENTY-SIX: GROUP DISCUSSION: GOVERNMENTS APPROACHES TO DURABLE SOLUTIONS**

Session to be lead by a facilitator

**SESSION TWENTY-SEVEN: REGIONAL COOPERATION AND COORDINATION: IDENTIFYING BEST PRACTICES**

PURPOSE: Emphasis will be on collaborative schemes and models for multilateral cooperation from different regional settings will be presented.

CONTENT / LEARNING OBJECTIVES:

- Introductory remarks on the importance of international cooperation and coordination strategies to administer irregular movements of people by sea in manageable and equitable ways, in a spirit of solidarity, respecting international obligations and sharing of effective practices. The focus will on fostering cross-regional exchanges and enhancing opportunities for mutual learning.

- An overview of several regional cooperation initiatives and IOM support will then be provided, with experiences in North Africa and the Gulf of Aden being examined for instance the Regional Mixed Migration Secretariat and Mixed Migration Task Forces as examples. The objective will be to share with participants examples of concrete tools, such as strategic plan, templates, referral models, organigrams, projects management schemes, etc. that can serve as illustration for the development of similar mechanisms in

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the South-East Asian context.

- The Djibouti conference and Model Regional Framework (MRF) will then be presented, 49 dealing with irregular movements by sea in a comprehensive manner, including the situation of asylum seekers and refugees. Ideally, this part of the session will be led by a country that has decided to implement the MRF, explaining the opportunities and challenges they face.

- A Q&A session will follow at the end for participants to ask any questions and enter into a dialogue with the specialists on the matter. The possibility of discussing first-hand regional and sub-regional experiences / practices in this context will be offered for participants to engage in a mutual-learning exchange on the issue.

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Slides 1-2

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Global migration governance is a complex system of formal and informal regimes, laws and institutions operating at the international, regional, sub-regional, or inter-regional levels, involving a broad range of States and non-state actors. The lack of global governance gives rise to a need for multi-stakeholder consultative forums in which to build trust, consensus and position convergence. As a phenomenon with a regional/international dimension, irregular migration cannot be tackled by one country alone, nor through a country-by-county approach. It requires close working relationships between countries, in particular at the regional level. Regional cooperation can be developed through multilateral forums for dialogue, information sharing and policy development, as well as responsibility sharing arrangements. Regional cooperation should be complementary to, and not a substitute for, responsibilities that clearly lie at the nation level.

Such cooperation is necessary, not only between States, but also among other stakeholders including relevant international organizations and NGOs in order to address mixed movements in an effective and coherent way.
Every mixed movement situation is different and the relevant partners in any particular situation will be determined by several factors, such as the travel routes (implicating different States), the profiles of persons on the move (implicating agencies with different areas of expertise), and the mandate and resources of government ministries, international organizations and NGOs with an actual or potential presence in the affected State or region.

By bringing together countries along the whole migration continuum – countries of origin, transit and destination - regional cooperation fosters the development of a comprehensive approach to migration management and effective solutions to mixed migration challenges.

TFPP develops early warning capabilities of officials and their capacity to coordinate action at an operational level in the event of a large influx of irregular migrants. It will also recommend, among others, measures to harmonize detection, search and rescue, disembarkation and shelter management through the sharing of best practices of national, bilateral and regional experience in dealing with mass displacements.

The roles of the TFPP include:

- Oversee maintenance of registers of national contact points of operational officials involved in responding to migrants and refugees; and relevant international agency and civil society contact points;
- Support development of operating procedures at national and bilateral levels with a view to harmonizing these arrangements at sub-regional and regional levels to ensure predictable and functional responses in the event of another mass displacement;
• Recommend measures to harmonize detection, search and rescue, disembarkation and shelter management by formulating, among others, a protocol for joint registration and identification of irregular migrants at the earliest point of interception and where displacement occurs;

• Enhance early warning capabilities at national level and coordination at operational level by producing, among others, systematic and regular reports on movements;

• Develop a capability inventory in the region that can be deployed by states in the event of a large influx of irregular migrants and refugees.

The establishment of the Regional Mixed Migration Secretariat (RMMS) was a response to key recommendations from the Regional Conferences on Mixed Migration in the Gulf of Aden, attended by agencies and authorities from the region (held in Yemen in 2008 and Djibouti in 2009). At that time, the phenomenon of mixed migration of complex flows was emerging with high levels of human rights abuse and limited understanding of the dynamics behind it and no dedicated entity focusing on analysis and research around the phenomenon. A meeting in Djibouti in March 2011 served to specifically consult on and discuss the establishment of the RMMS. In June 2011 the Secretariat Coordinator was hired and by mid-July 2011 the Secretariat formally commenced its work.

The overall objective of the Regional Mixed Migration Secretariat (RMMS) is to support agencies, institutions and forums in the Horn of Africa and Yemen sub-region to improve the management of protection and assistance response to people in mixed migration flows within and beyond the Horn of Africa and across the Gulf of Aden or Red Sea in Yemen.

The RMMS reinforces data and information collection and sharing, research, analysis and aims to positively impact migration and refugee policies throughout the region. It aims to have a positive technical impact as the main actors working with refugees, asylum seekers and migrants will be better informed about mixed migration trends and policies.
Although RMMS was initially established with a primary concentration on protection aspects on the so-called ‘eastern route’ (mixed migration flows from Somalia and Ethiopia and through Somalia, Ethiopia and Djibouti to Yemen and Saudi Arabia), it currently collects data, conducts research and provides analysis on other flows as well, in particular the ‘western flow’ from the Horn of Africa towards Libya and crossing the Mediterranean into Europe and the ‘southern’ flow through Kenya and Tanzania to the Republic of South Africa and beyond. In this regard the RMMS does not limit itself to the Horn of Africa region in terms of policy development and analysis. The concept of RMMS is not restricted to the region either, but very applicable in any areas where there is a dearth of data and analysis on mixed flows and/or where there is a need for an independent think tank to operate.

DRC and RMMS have started to publish mixed migration summaries and will embark on mixed migration research initiatives in a number of other regions. Mixed migration publications from other regions can be found here.

The Regional Mixed Migration Secretariat (RMMS) is a unit co-located within the Danish Refugee Council’s regional office (Horn of Africa and Yemen) in Nairobi, Kenya. The RMMS’ work is guided by a multi-agency Steering Committee, currently consisting of the IOM, UNHCR, DRC, the Swiss Agency for Development and Cooperation (SDC), Intersos, IGAD and the EU delegation to Kenya. The Steering Committee meets on a bi-annual basis and offers strategic support to the work of RMMS.50

Regional consultative processes play a particularly useful role in facilitating dialogue amongst key partners at the regional level. Although generally non-binding and informal in nature, they are important forums for exchanging information, addressing issues of mutual concern, identifying priorities, and developing coordinated responses. Regional consultative processes lay the groundwork for developing common policies and strategies by complementing bilateral approaches, and facilitating open cooperation and exchange on sensitive issues that lead to concrete results. They are typically State-led, but often include international organizations (in particular UNHCR and IOM) as members, observers or chairs. Here is a list of several regional processes in alphabetical order.

The Bali Process on People Smuggling, Trafficking in Persons and Related Transnational Crime is a regional initiative to advance practical cooperation in the Asia and Pacific region. The process started in 2002 when representatives of 38 States in the region attended the first Bali Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime. Fifteen observer States from outside the region also participated. The specific objectives of the Bali Process are:

- To develop more effective information and intelligence sharing between participating States
- To improve cooperation among regional law enforcement agencies to deter and combat people smuggling and trafficking networks
- To enhance cooperation on border and visa systems to detect and prevent illegal movements
- To increase public awareness
- To enhance the effectiveness of return as a strategy to deter people smuggling and trafficking
- To increase cooperation in verifying the identity and nationality of illegal migrants and trafficking victims
- To promote the enactment of national legislation to criminalize people smuggling and trafficking
- To provide appropriate protection and assistance to victims of trafficking, in particular women and children
- To tackle the root causes of illegal migration, including by increasing opportunities for legal migration between States
- To assist countries to adopt best practices in asylum management, in accordance with the Convention relating to the Status of Refugees.

Slides 8-9

The Djibouti conference and Model Regional Framework (MRF)^51 is recalled which deals holistically with irregular movements by sea, including the situation of asylum seekers and refugees. Ideally, this part of the session will be led by a country that has decided to implement the MRF, explaining the opportunities and challenges they face.

A Q&A session will follow at the end for participants to ask any questions and enter into a dialogue with the specialists on the matter. The possibility of discussing first-hand regional and sub-regional experiences / practices in this context will be offered for participants to engage in a mutual-learning exchange on the issue.

SESSION TWENTY-EIGHT: CITY SHARE METHODOLOGY - DEVELOPMENT OF SUB-REGIONAL/REGIONAL ACTION PLANS

OUTLINE: The purpose of this exercise will be to design and develop in small groups a regional/sub-regional action plan and a set of SOPs specific to a particular issue. A facilitator will distribute a set of coloured cards among groups with particular themes, including detection, search and rescue, international protection, disembarkation, law enforcement and control, post-disembarkation arrangements, and durable solutions. Participants will then develop a comprehensive action plan on the particular theme assigned to them. The idea is for participants to collectively cover all the different elements of the comprehensive approach to irregular maritime movements underpinning this training programme.
Scenario:

After the training received in Bangkok, 19-22 January 2015, the authorities of Alphastan, Altavia, Arsiland and Betastan seek your assistance as expert consultants to develop a sub-regional plan for them to coordinate efforts regarding the management of irregular movements of people by sea. They would like you to develop the basic framework for a sub-regional Action Plan to regulate maritime interventions comprehensively, providing clear guidance on how / when to use interdiction powers, cooperate through joint patrols, coordinate rescue operations, and provide for orderly and foreseeable disembarkation arrangements. The final goal is to avoid incidents such as those that have occurred in recent times, involving diplomatic disputes and loss of life at sea, while tackling migrant smuggling and trafficking in human beings via the maritime route.

On the basis of what you have learned at the workshop and relying on pre-existing materials from other regions of the world confronted with similar problems, discuss within your expert group and agree upon:

- Key elements that a comprehensive action plan should include (provide reasons);
- Key principles that should underpin such a plan;
- Key operational arrangements that need to be included in the plan for it to work in practice. Please, provide, at least:
  - 1 example regarding joint law-enforcement operations at sea (e.g. on coordination of interdiction / investigation of illicit activities at sea);
  - 1 example concerning search and rescue (e.g. on coordination of SAR services); and
  - 1 example on disembarkation of survivors at sea (e.g. on identification of best port to disembark survivors);
- Key partners, actors and institutions with whom the plan should be designed and implemented for successful and sustainable cooperation arrangements;
- Key lessons that can be learnt from a cross-regional perspective. Please, refer to the list of reference documents listed below.

Reference documents:

- Jakarta Declaration on Addressing Irregular Movement of Persons, 20 August 2013.
- Khartoum Process, Declaration of the EU-AU Ministerial Conference on the Horn of Africa Migration Route, 28 November 2014;
- Sana’a Declaration, Regional Conference on Asylum and Migration, 11-13 November 2013;
- Djibouti Conclusions, Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea, 8-10 November 2011;
• UNHCR Central Mediterranean Sea Initiative on EU Solidarity for Rescue-at-Sea and Protection of Refugees and Migrants, Action Plan, 13 May 2014.
## Glossary of Terms

<table>
<thead>
<tr>
<th><strong>Term</strong></th>
<th><strong>Definition</strong></th>
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<tbody>
<tr>
<td>Asylum seeker</td>
<td>A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments. In case of a negative decision, the person must leave the country and may be expelled, as may any non-national in an irregular or unlawful situation, unless permission to stay is provided on humanitarian or other related grounds.</td>
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<tr>
<td>Forced migration</td>
<td>A migratory movement in which an element of coercion exists, including threats to life and livelihood, whether arising from natural or man-made causes (e.g. movements of refugees and internally displaced persons as well as people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects).</td>
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<tr>
<td>Irregular migration</td>
<td>Movement that takes place outside the regulatory norms of the sending, transit and receiving countries. There is no clear or universally accepted definition of irregular migration. From the perspective of destination countries it is entry, stay or work in a country without the necessary authorization or documents required under immigration regulations. From the perspective of the sending country, the irregularity is for example seen in cases in which a person crosses an international boundary without a valid passport or travel document or does not fulfil the administrative requirements for leaving the country. There is, however, a tendency to restrict the use of the term &quot;illegal migration&quot; to cases of smuggling of migrants and trafficking in persons.</td>
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<td>Migrant</td>
<td>IOM defines a migrant as any person who is moving or has moved across an international border or within a State away from his/her habitual place of residence, regardless of (1) the person’s legal status; (2) whether the movement is voluntary or involuntary; (3) what the causes for the movement are; or (4) what the length of the stay is.</td>
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<tr>
<td>Migration:</td>
<td>The movement of a person or a group of persons, either across an international border, or within a State. The term encompasses any kind of movement of people, in which there is a change in the person’s habitual residence, regardless of its regularity; whether it is voluntary or involuntary; whatever its causes are and its duration is.</td>
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<td>Mixed Migration:</td>
<td>The principal characteristics of mixed migration flows include the irregular nature of and the multiplicity of factors driving such movements, and the differentiated needs and profiles of the persons involved. Mixed flows have been defined as ‘complex population movements including refugees, asylum seekers, economic migrants and other migrants’. Unaccompanied migrant...</td>
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</table>
children, environmental migrants, smuggled persons, victims of trafficking and stranded migrants, among others, may also form part of a mixed flow.

| Refugee | A person who, "owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinions, 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. (Art. 1A(2), Convention relating to the Status of Refugees, Art. 1A(2), 1951 as modified by the 1967 Protocol). In addition to the refugee definition in the 1951 Refugee Convention, Art. 1(2), 1969 Organization of African Unity (OAU) Convention defines a refugee as any person compelled to leave his or her country "owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality." Similarly, the 1984 Cartagena Declaration states that refugees also include persons who flee their country "because their lives, security or freedom have been threatened by generalised violence, foreign aggression, internal conflicts, massive violations of human rights or other circumstances which have seriously disturbed public order." |
| Repatriation | The personal right of a refugee, prisoner of war or a civil detainee to return to his or her country of nationality under specific conditions laid down in various international instruments (Geneva Conventions, 1949 and Protocols, 1977, the Regulations Respecting the Laws and Customs of War on Land, Annexed to the Fourth Hague Convention, 1907, human rights instruments as well as customary international law). The option of repatriation is bestowed upon the individual personally and not upon the detaining power. In the law of international armed conflict, repatriation also entails the obligation of the detaining power to release eligible persons (soldiers and civilians) and the duty of the country of origin to receive its own nationals at the end of hostilities. Even if treaty law does not contain a general rule on this point, it is today readily accepted that the repatriation of prisoners of war and civil detainees has been consented to implicitly by the interested parties. Repatriation as a term also applies to diplomatic envoys and international officials in time of international crisis as well as expatriates and migrants. |
| Smuggling | The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident" (Art. 3(a), UN Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, 2000). Smuggling, contrary to trafficking, does not require an element of exploitation, coercion, or violation of human rights. |
| Trafficking in persons | The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation (Art. 3(a), UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, 2000). Trafficking in persons can take place within the borders of one State or may have a transnational character. |