Safe and Secure:
How do Refugees Experience Europe's Borders?

Modern challenges to protection and the 1951 Refugee Convention

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Cover photo: Afghan immigrants gathered outside of the Greek parliament in Syntagma square, Athens, in silent protest to a bomb explosion that led to the death of 15-year-old Hamidollah, and the injury of his 11-year-old sister.

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A detention centre for refugees and migrants in Lampedusa. Aside from being a popular tourist attraction, this Italian vacation island has been a popular destination for refugees and migrants willing to risk their lives traveling from Africa to Europe in overcrowded, unseaworthy vessels to escape persecution and violence, or simply to find a better life.

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Introduction

"We took a boat from Turkey to Greece. On the sea a Greek military boat intercepted us. I don't know whether they were navy or border guards. The officers removed the engine from our boat and then abandoned us to our fate. Fortunately some fishermen found us and brought us to the next Greek island. But there we got arrested by the police and held without any procedure in detention."

Testimony of a young Eritrean refugee, interviewed by JRS Europe

This is the grim reality that many people face when they arrive to Europe in order to seek protection from violence, torture or other human rights violations. Interception, forced return to the country of origin or transit, and potential death by drowning are the hurdles they must clear. Even when they have managed to enter into European territory, they are arrested and held in detention centres like criminals.

According to statistics from the United Nations High Commissioner for Refugees (UNHCR)[1], the 27 European Union member states registered 123,400 asylum claims in the first half of 2011, 13 percent more than in the first six months of 2010. Among the top countries of origin are Afghanistan, Iraq, Somalia, Iran, Côte d'Ivoire, Eritrea and Syria – countries that have been beset with violence and extremely poor human rights records.
Sixty years after the formal adoption of the UN Convention Relating to the Status of Refugees of 28 July 1951, offering protection to people who have had to leave their homes in order to escape severe human rights violations is still not a matter of course.

The 1951 Refugee Convention, and other international and European legal instruments, clearly prohibits the immediate return of persons claiming to be a refugee. EU member states are obliged to determine why these persons have come to Europe. For that purpose, they must establish transparent procedures and investigate every single case. This, of course, takes time and resources. Some governments would prefer to treat all asylum seekers simply as irregular immigrants and send them back to where they came from. This violates not only international law, but also the very principles the EU claims to be based on: respect for human rights, solidarity and humanity.

Even within the EU asylum seekers cannot always feel safe. The so-called Dublin Regulation aims at a quick identification of the member state responsible for examining a certain asylum application, and at preventing individuals from making multiple

applications. The most frequently used criterion for this identification is the 'country of first entry': the member state that is responsible for examining an individual's asylum application is the one where s/he first arrived. But this rests on the assumption that asylum systems in every EU member state are one in the same. Reality shows that this is indeed not the case. Asylum procedures between member states differ widely in terms of quality, access and safeguards. As a consequence, asylum seekers in the Dublin system are forced to submit their applications in member states with poor asylum procedures. It is an unequal playing field, resulting in the denial of access to a fair and adequate asylum procedure. For an asylum seeker, it's the difference between safety in Europe, or possible return to persecution.

The purpose of this report is to show how refugees themselves experience these problems. We have asked some of the refugees that JRS staff and volunteers accompany to describe how they have experienced the external and internal borders of the EU. Their testimonies are combined with related texts that analyse the current legal and political problems with regard to refugee protection in Europe.

The first chapter is a contribution from Professor Guy S. Goodwin-Gill, one of the world's leading scholars in the field of refugee and migration law. We are grateful to him for allowing us to republish his lecture of February 2011 on access to protection in Europe.

Professor Goodwin-Gill's chapter is followed by the story of Sayeed Mujadadi, who had to endure an entire odyssey through the Dublin system. His story is linked to an analysis of the Dublin Regulation, which, as we shall see, is more of an "inner-European trap" than an instrument to ensure refugee protection.

The story of a Hakimi and her family, refugees from Afghanistan who could not find safety in Ukraine, their country of transit, opens the third chapter. There we describe the dreadful situation refugees face when they fail to enter Europe, and are left 'stranded' in a neighbouring country.

The fourth chapter is written by one who has been responsible within the Vatican for defining the Catholic Church's position on refugee matters: Archbishop Agostino Marchetto. An outspoken defender of the rights of refugees and migrants, the Archbischop's text reveals how the protection of refugees and migrants lie at the heart of Catholic Church teaching, and how these values are relevant for policymaking in Europe.

The report ends with a listing of recommendations to European policymakers that aim to improve EU

protection standards at the borders, the implementation of the Dublin Regulation and asylum procedures within the EU.

We dedicate this report to those whom we, the Jesuit Refugee Service, accompany every day: asylum seekers and migrants in detention centres, those living in destitution and those who stranded at the borders. We have helped some find solutions to their problems; for others we could not. We are grateful that a good number of them have become our friends.

We also dedicate this booklet to the memory of those who have lost their lives on their quest to find protection in Europe. The names of these persons, and the exact numbers of those who have crossed, are mostly unknown to us. Their memory drives our unrelenting efforts to ensure the protection of all refugees in Europe.

A boat carrying 493 fleeing migrants from Tripoli (Nigerians, Pakistanis, Bangladeshis, western Africans) could not make it to Lampedusa because of a technical problem. Italian Coast Guards and *Guardia di Finanza* boats rescued them out at sea and transferred them from the skiff to their vessels. Six Italian boats were necessary to carry everyone on shore. Each boat disembarked groups of one hundred at the port of Lampedusa.

The Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement

Guy S. Goodwin-Gill[2]

Introduction

First, let me begin with a particular word of thanks to the Government of Italy, for ensuring the topicality of my talk tonight...

But secondly, let me recall an event now nearly thirty years, when on 29 September 1981, President Ronald Reagan signed Executive Order 12324 on the 'Interdiction of Illegal Aliens' – the model, perhaps, for all that has followed.

Like many who were then working for the Office of the United Nations High Commissioner for Refugees, I was struck by the incongruity and the inconsistency between this measure and the resolute stand taken by the United States on the protection of Indochinese refugees in South East Asia, for whom first asylum, non-discrimination and at least temporary admission were considered the essential minimum.

With all that has happened since, and given today's obsession with so-called irregular movements of people; with smuggling, trafficking, asylum and the search for refuge, it probably sounds dated to talk of freedom of movement and the right of everyone to leave any country, including their own. But it is no more contradictory, I suggest, than for governments to talk of their respect for human dignity and human rights, while at the same time organising programmes of interception, interdiction and the return of people to territories and regimes where such respect is almost nonexistent, let alone less understood.

Freedom of movement, though, is still a human right, and the phenomenon of human migration, so important to the economies of so many States, continues to challenge the institutions of government.

It is not yet unlawful to move or to migrate, or to seek asylum, even if the criminalisation of 'irregular emigration' by sending States seems to be desired by the developed world. Even so, the range of permissible restrictions on freedom of movement and the absence of any immediately correlative duty of admission, other than towards nationals, makes the claim somewhat illusory. Perhaps Article 13(2) of the 1948 Universal Declaration of Human Rights was just a political gesture; perhaps the world today has in fact moved closer to what was then the Soviet position, that the right to freedom of movement should be recognised as only

exercisable in accordance with the laws of the State.

And yet there is still one dimension in which the individual's right to leave his or her country does in fact chime with an obligation of the State; and that is in connection with that other right, set out in Article 14(1) of the Universal Declaration, which is the right 'to seek and to enjoy' asylum from persecution. The principle of *non-refoulement* – the obligation on States not to send individuals to territories in which they may be persecuted, or in which they are at risk of torture or other serious harm – may not immediately correlate with the right of every one to seek asylum, but it does clearly place limits on what States may lawfully do.

Non-refoulement

For this rule is solidly grounded in international human rights and refugee law, in treaty, in doctrine, and in customary international law. It is an inherent aspect of the absolute prohibition of torture, even sharing perhaps in some of the latter's *jus cogens* character. It applies independently of any formal recognition of refugee status or entitlement to other forms of protection, and it applies to the actions of States, wherever undertaken, whether at the land border, or in maritime zones, including the high seas. Its essential characteristics are acts attributable to the State or other international actor, which have the foreseeable effect of exposing the individual to a serious risk of irreversible harm, contrary to international law. UNHCR's Executive Committee, indeed, has particularly emphasised the importance of fully respecting the principle of *non-refoulement* in the context of maritime operations: **'... Interception measures should not result in asylum-seekers and refugees being denied access to international protection, or in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened on account of a Convention ground, or where the person has other grounds for protection based on international law.'**

In addition, I would argue, there is a corresponding obligation on States not to frustrate the exercise of the right to seek asylum in such a way as to leave individuals at risk of persecution or other relevant harm, although I also accept that this begins to tread on the contested doctrine of abuse of rights. It is certainly difficult to construct an argument for legal liability in the absence of evidence of obligations clearly accepted by States, but as we can see in practice, the measures which a State takes to prevent the movement of people in search of refuge are often all but a short step away from violating established rules of international

law – rules whose indirect effect can also work to protect those in search of refuge.

As the Fifth Chamber noted in *Medvedyev v* France in 2008, however legitimate it may be, the end does not justify the use of no matter what means. And to this the Grand Chamber added that, while firmness must be shown to those who contribute to the scourge of drugs:
'Nevertheless, the special nature of the maritime environment relied upon by the Government in the instant case cannot justify an area outside the law where ships' crews are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction, any more than it can provide offenders with a "safe haven".'

The movement of people in search of refuge, employment, family, or for any number of other understandably human reasons, is a social reality with which States must learn to deal with according to law. People have always moved, and States themselves accept that there will be those who deserve international protection among them.
How, then, to identify those in need of refuge? What is to be done with those who have no justifiable claim to enter? How are they all to be treated in the meantime?

Looking at the interception and return measures adopted in the Mediterranean and off the west coast of Africa, however, one may rightly wonder what has happened to the values and principles considered fundamental to the Member States of the European Union.

The European Union

Precisely because there are those who do propose or debate measures in opposition to or in derogation from them, it is worth recalling that the Union is 'founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'; that the Union, 'recognises the rights, freedoms and principles set out in the Charter...', and that 'Fundamental rights, as guaranteed by the [European Convention] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.

Likewise, Article 78(1) of the Treaty on the Functioning of the European Union requires the Union to develop a common asylum policy with regard to 'any third country national requiring international protection and ensuring compliance with the principle of non-refoulement' – a policy which 'must be in accordance with the Geneva Convention... and other relevant treaties.'

In addition, recognition of the applicability of and need for compliance with international principles runs through the various regulations, directives and decisions adopted by EU institutions, and is expressly acknowledged also in the recent judgments of the Court of Justice.

So it is all the more surprising when governments, ministers and officials either pretend that the rules do not apply, or seek ways to avoid them being triggered.

In my view, the problems start at the beginning, just as they commonly do at the national level. A policy or goal is identified – in this case, reducing the number of irregular migrants, including asylum seekers, leaving the north African coast and heading for Europe – and then belatedly some attempt is made to bend implementation of the policy to fit in with principle and rule. A better approach, in my view, would be to begin with a clear understanding of the applicable law – the prohibition of discrimination, of refoulement, of inhuman or degrading treatment – and then to see what can be done by working within the rules.

Of course, this approach is premised on the assumption that States generally seek to work within the rule of law. It will not likely influence the State determined to deal with the migrant and the asylum seeker arbitrarily, and without reference to principle. Such cases must be confronted head-on, by way of judicial and political mechanisms of control.

Borders

First, however, it helps to think about the geographical context in which interception operations by the EU and member states take place. Here we find States operating, nominally in the management of the EU's external borders, but actually in a physical domain where borders as we commonly understand them simply do not exist – at sea, on the high seas, or even in the contiguous zone or territorial waters of other States, in fact, at notional or virtual borders reconstituted on the basis of national and regional interest.

Seen from within the EU, these frontiers are flexible, allowing States to project a non-territorial conception of national interests into a common or even a contested space. Globalisation may have driven a horse and cart through some of the old assumptions regarding sovereignty in the territorial sense, but the fact that migrants and those in search of refuge may be obliged to cross the seas offers new opportunities for States now to project power and influence. This carries legal implications, however, in many ways no different from what would arise if one State were to seek to act within the territory of another.

The exercise of sovereign powers – and as the late Ian Brownlie noted in a related context, the extraterritorial exercise of sovereign powers is normally the business of naval vessels – is always accompanied by the responsibility of the State for such internationally wrongful acts as may be attributed to its organs.

It follows, therefore, that a common approach can be adopted in the matter of State responsibility to high seas interception, to interception operations conducted in the contiguous zone or territorial waters of another State, whether with or without consent, to practices of disembarkation of those intercepted, and even to the exercise of official functions, such as processing people on the territory of another State, for example, at air- or seaports.

From a State responsibility perspective, the only variable of interest, I suggest, is the possibility of joint responsibility, where one or more States or international organisations may be liable for conduct in breach of international law.

Migrants, refugees and asylum seekers at sea are not just flotsam and jetsam, adrift and open to control and dispersal by whomever finds them. The seas are regulated, though not perfectly, and those in distress at sea must be rescued, irrespective of their status. Refugees and asylum seekers may not fit easily within the established framework of practice regarding disembarkation, care and consular assistance, but the principles of protection are there to provide guidance.

As the International Maritime Organisation and others have already recognised, new rules dealing with the detail may be required. But this is in the nature of international law as a dynamic institution. In South East Asia in the 1970s and 1980s, solutions also had to be found, not to interception as we think of it today, but to the asylum seeker at sea, in search of refuge but too often in need of rescue. Under the auspices of UNHCR, an international response was organised, premised on fundamental principles which drew from the long-established rule of rescue, but with the addition of protection and solutions – *non-refoulement*, disembarkation, first asylum, minimum standards of treatment, and resettlement.

The Sea

Whenever a State elects to try to control the movements of people beyond its borders, a myriad of legal issues arise. In maritime areas, the State must tailor its activities to fit within an already regulated and structured regime – one that places high value on freedom of navigation, recognises the primary responsibility and interests of flag States, and allows coastal nations to exercise certain powers within

territorial waters and the contiguous zone.

But when the would-be intercepting State sets out to sea, it soon discovers that there are gaps in the legal regime, some of which can be exploited to advantage when looking for ways to manage irregular movements. The rule of non-interference with navigation and the limited recognition given to the right of visit, let alone that of search and seizure or control, are each premised, like so many of the rules, on the existence or presence or possibility of another's legal interest – that of the flag State or the coastal State. But if the State with a legal interest has no practical interest in protesting, or can be persuaded not to, or even to cooperate, then it might seem that there is no limit to what you can do.

Applicable law

That is a mistake, however, and the European Union for one has not been blind to the wider implications. The problem, though, lies not in formal recognition of protection principles but, as ever, in operationalising the rules – in making protection a reality at the point of enforcement.

On the plus side, stands a substantial body of legislation: the Frontex regulation itself; the RABIT amendment, with its express insistence on compliance with fundamental rights and conformity with member states' protection and non-refoulement obligations; and the Schengen Borders Code, Article 3 of which requires the Code to be applied, 'without prejudice to the rights of refugees... in particular as regards *non-refoulement*'.

Add to this is the April 2010 Council Decision supplementing the Code and dealing specifically with the surveillance of maritime borders and Frontex operations; it is currently being challenged by the Parliament on *vires grounds*, and it was also objected to by Malta and Italy, mainly for its proposal that in the last resort, rescue cases should be disembarked in the State hosting the Frontex operation. The decision's formulation of the applicable law in the matter of protection, however, is unremarkable, restating the principle of *non-refoulement* and the need to avoid indirect breach, but also providing for those intercepted to have an opportunity to set out reasons why they might be at risk of such a violation of their rights. On 12 February, the BBC reported movements from Tunisia, with some 3,000 (now 5,000 and rising) said to have arrived on the Italian island of Lampedusa over several days. It further reported that the Italian Interior and Foreign Ministers had requested, 'the immediate deployment of a Frontex mission for patrolling and interception off the Tunisian coast.'

Was this to ensure protection? Evidently not, for the previous day Interior

Minister Maroni had raised the well-tried spectre of terrorists and Al-Qaeda affiliates and common criminals using the confusion to enter Europe.

Was there any evidence to support this assertion? Evidently not, and it is hard to imagine that such anti-social elements would voluntarily submit to the compulsory fingerprinting and other checks awaiting anyone arriving irregularly in Europe today. But the point is that protection obligations and the fundamental rights said to be common to the EU and its member states were not paramount, or perhaps even present, in the political mind.

Interceptions so far

What do we know about either unilateral or Frontex-led interception operations so far? Not as much as we might expect as citizens of a democratic Union bounded by the rule of law and basic principles of good governance, such as transparency and accountability.

We do know that Spain and Frontex have run operations off the West African coast for the past several years, and that Spain has relevant bilateral agreements with Cape Verde, Mauritania and Senegal. We know that the objectives of such operations have included the identification of passengers, returning them to ports of departure, deterring passage through interceptions in territorial waters and the contiguous zone, and cooperation with coastal State authorities in preventing departures. We are told that a local enforcement officer is always on board the relevant EU vessel, and that this officer is 'responsible' for any decision to divert boats and passengers back to land.

Who were they, the intercepted? Where did they come from? Why were they on the move? What happened next? Nobody knows.

Experience in other theatres of operation, however, clearly allows the inference that among them were those in need of international protection. The countries of origin of those intercepted in the Mediterranean under Operations Nautilus and Chronos included refugee source countries such as Eritrea, Somalia and Ethiopia. Moreover, the majority of those who had succeeded in making landfall in an earlier period were granted one or other form of protection.

Little enough is known, too, of those intercepted and returned to Libya by Italian or joint Italian/Libyan patrols, under the 2008 Treaty of Friendship, Partnership and Cooperation and the 2009 Additional Technical-Operational Protocol. Significant numbers have certainly been stopped and sent back (and this success was recently relied on by Malta in explaining its refusal to participate in joint patrols with Frontex).

In its submission to the European Court of Human Rights in the case of *Hirsi v. Italy*, UNHCR noted, in particular, that these agreements do not define the categories of those to be re-admitted and 'lack specific safeguards for persons in need of international protection'. After setting out what it knew of the modalities of specific 'push-back' operations in the Strait of Sicily, UNHCR then reported confirmation by the Italian Government that neither an identification process nor any interview had been carried out. UNHCR's own interviews of returnees, however, indicated that those pushed back included numbers requiring protection.

UNHCR has a limited presence in Libya, which means limited access to its refugee determination procedure. Conditions in reception and detention centres are often of 'very low standard', and beatings and ill treatment have been reported. A re-admission agreement is also said to have been concluded between Libya and Eritrea, which may well increase the risk of refoulement, particularly given the overall unpredictability of the situation. UNHCR concluded that,
'Libya does not at this point have either the legal framework or institutional capacity to ensure the protection of asylum-seekers and refugees. The already fragile asylum situation in Libya risks being further exacerbated by the "push-back" practice.'

What role for Frontex?

Exactly what Frontex does in an interception context has been questioned. Human Rights Watch has claimed that Frontex has been involved in facilitating interception, though this has been denied. Amnesty International and ECRE note that Frontex has stated that it does not know whether any asylum applications were submitted during interception operations, as it does not collect the data.

How, then, should we approach what appears to be wilful ignorance? In the Roma Rights Case in 2004, discrimination on racial grounds was alleged in the conduct of immigration procedures by British officials at Prague Airport, which were intended to prevent potential asylum seekers leaving for the United Kingdom. There, too, the authorities did not keep any records of the ethnic origin of those they interviewed. Finding on the evidence that the government had acted in violation of relevant legislation, the House of Lords called attention to the importance of gathering information, 'which might have helped ensure that this high-risk operation was not being conducted in a discriminatory manner...'

Given the secrecy attached to interception operations, and the fact that no data is gathered or retained, it is reasonable to infer that some level of Frontex involvement has occurred, and that, absent evidence to the contrary,

the relevant principles of international and EU law have not been observed.

Responsibility

Where does responsibility lie for maritime interceptions, and for the treatment thereafter of those who are disembarked or returned to the port of departure or other port? These two issues – interception and treatment – may be separable, but they are nonetheless characterised by common principles of responsibility.

The applicable law is indisputable. Even the Schengen Borders Code locates itself firmly among the international obligations of States, including those relating to refugee protection, and in the fundamental rights common to the European Union and its members. The European Commission accepts that the Code is to be applied extraterritorially, not just at the land borders. Even if didn't, international law would answer this question in the affirmative, for international law looks not just to where the impugned act takes place, but also to the actor or actors to whom it is attributable and, above all, to consequences and effects.

There is not a *priori* reason for the inapplicability of international protection obligations on the high seas or in the maritime zones of third States.

A principal point of focus is the nature and content of the primary obligation at issue, in this case, the duty of the State to refrain from acts and omissions which have the foreseeable consequence of exposing individuals to the serious risk of treatment contrary to Article 3 of the European Convention or of other relevant prohibited conduct. In this context, jurisprudence and doctrine have clearly detached certain obligations from territory; they have located responsibility in the acts of individuals or organs, and thereby primarily in the principle of attribution.

The concept of jurisdiction, however, also remains important as a threshold criterion of responsibility for human rights violations, and much has recently been written on this problematic issue. 'Jurisdiction' is a term most usually used against a general international law background, where it signifies the legal competence of the State – judicial, legislative and administrative – 'often referred to as sovereignty'. But as Ian Brownlie noted, jurisdiction is also understood to include enforcement or prerogative jurisdiction, namely, '... the power to take executive action in pursuance of or consequent on the making of decisions or rules.' Interception operations are a typical example of such enforcement or prerogative jurisdiction.

However, both responsibility and attribution will likely be contested. Frontex and individual States thus tend to give weight to the presence on board

EU vessels of local enforcement officers, whose responsibility to decide on return and local disembarkation is somehow thought to discharge any responsibility of the intercepting State. Italy stresses the joint nature of patrols and the treaty basis for Libya's responsibility for the migrants, while also apparently going out of its way to avoid any actual physical contact with those intercepted. Frontex again suggests that 'merely' advising the source country of the location of vessels to be intercepted falls short of any act that might generate international responsibility.

These justifications are misconceived, as even a passing glance at the jurisprudence of the European Court of Human Rights or the law of State and international organisation responsibility would show.

Interception operations are initiated and coordinated by the EU agency, Frontex, and collaboratively or individually by EU member states. Directly or indirectly, they affect the rights of individuals, some or many of whom may be in need of international protection. Within the terms of the International Law Commission articles on State responsibility, particularly Articles 4 and 6, interceptions continue to be carried out in the exercise of governmental authority by the State, or in the equivalent exercise of its executive competence by the EU's agency. Nothing in the evidence of practice to date reveals any break in the chain of liability. Neither the presence on board of a third State official, nor the use of joint patrols in which actual interception is undertaken by a third State, disengages the primary actor from responsibility for setting the scene which allows the result, if nothing more. In each case, the EU agency or member state exercises a sufficient degree of effective control; it may not be solely liable for what follows, but it is liable nonetheless.

Responsibility in these circumstances is underlined by principles clearly laid down by the International Court of Justice over sixty years ago, in the Corfu Channel Case. There, in addition to reminding States of what may flow from elementary considerations of humanity, the Court placed considerable weight on the presumed knowledge of the presence of mines which could be attributed to the coastal State, and on that State's singular failure to warn of the danger – 'grave omissions', in the words of the Court, which engaged its international responsibility.

In the present situation, presumed knowledge lies with the intercepting EU organs and individual member states. It concerns danger, not in international waters this time, but in the coastal State itself – the risk of ill treatment contrary to international law and the danger of refoulement.

This historically solid approach to the principles finds endorsement in the recent judgment of the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece* (2011). The Court expressly acknowledged the competence of member states to take steps to prevent unlawful immigration, but emphasised once again the necessity to comply with international obligations, and to pay particular regard to Article 3. The Court also gave weight to the fact that the applicants were asylum seekers, and therefore members of 'a particularly underprivileged and vulnerable population group in need of special protection'. Its concern was, 'whether effective guarantees exist that protect the applicant against arbitrary refoulement, be it direct or indirect...' In view of,

'The irreversible nature of the damage which may result if the risk of torture or ill-treatment materialises, the effectiveness of a remedy within the meaning of Article 13 imperatively requires close scrutiny by a national authority... independent and rigorous scrutiny of any claim that there exists substantial grounds for fearing a real risk of treatment contrary to Article 3..., as well as a particularly prompt response... [and] also... access to a remedy with automatic suspensive effect...'

Particularly important in the Court's approach to the issues were the many and various published reports regarding the treatment of refugees and asylum seekers in Greece, which are expressly referred to, including as evidence of the risk of refoulement. Also relevant were reports on the risk to which the applicant and persons similarly situated were exposed in their country of origin, and the evidence of practice in Belgium granting protection in such cases.

The Court concluded, in regard to the treatment of refugees and asylum seekers in Greece, that:

'... The general situation was known to the Belgian authorities and ... the applicant should not be expected to bear the entire burden of proof', and that Belgium had not only knowledge but also the means (under the Dublin Regulation) to refuse transfer.

Transposing this approach to the case of maritime interceptions, the failure of both States and Frontex to make distinctions where international law requires distinctions to be made, or to record and retain data relating to passengers' nationality, reasons for departure and possible protection needs, simply strengthens the reasonableness of the inferences to be drawn from the facts – that interceptions at sea are resulting in the summary return of individuals in need of protection, in breach of international obligations.

The very fact that there has been no effective investigation

or no investigation at all into the circumstances and fate of those returned by way of interception is an additional factor which may also allow the inference of violations of Convention-protected rights – an approach endorsed by the European Court of Human Rights in a long series of cases.

What lessons?

The jurisprudence of the European Court of Human Rights is of obvious relevance to the European Union and its member states as they wrestle with the challenges of a globalising world economy. The Court has shown its awareness of the broader goals involved in extraterritorial control measures, whether undertaken in the campaign against the trade in narcotics, or in relation to irregular migration; and it has accepted that the protection of fundamental rights afforded by Community law is equivalent to that provided by the Convention system.

However, as the Court emphasised in *Medvedyev*, 'the end does not justify the use of no matter what means'; and as it remarked in *M.S.S.*, 'States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of the protection afforded by...' the 1951 Convention and the European Convention.

Extrapolating from the Court's jurisprudence, it is not that hard to see how interception measures might be structured in compliance with fundamental rights. Perhaps the first and major problem, though, is that of mind-set – the point that I made at the beginning; namely, the problem common to many governmental institutions of placing policy before human rights.

The object and purpose of EU operations in maritime areas, therefore, should be first and foremost to ensure protection, and secondarily to manage and prevent irregular migration.

Statements of principle, fundamental rights and international obligations are essential, but clearly they are not sufficient to ensure compliance. Even President Reagan's Executive Order 12324 provided that 'no person who is a refugee will be returned without his consent', and called for 'strict observance of... international obligations concerning those who genuinely fear persecution in their homeland.' The problem then, as now, is that such statements must be translated into operational detail; only then will interception operations begin to take account of asylum seekers as a vulnerable group in need of special protection. What is needed, therefore, is for EU agencies to be given and for EU member states to assume a protection mandate, premised on the above goals, but which also, in its detail,

incorporates other principles derived from general international law and from the jurisprudence of the European Court of Human Rights.

These include, in particular, the principle of effectiveness of obligations, and the incorporation in the regulatory framework of the principles of necessity, proportionality, legal certainty and rigorous scrutiny.

The Court underlined in *Medvedyev* that legal certainty requires that powers to be exercised and their consequences must be clearly defined in the law and reasonably foreseeable in their application. The law, be it Union or national, must thus make express provision regarding, not only the circumstances permitting intervention, but also the possible consequences, such as custody and control over individuals, deprivation of liberty, restrictions on freedom of movement, disembarkation or other measures affecting or potentially affecting rights.

Clearly, agreements with other States are an essential legal basis for stop, search and seizure of vessels flying or entitled to fly their flag, for operations in their territorial waters or contiguous zone, and for the purpose of securing return or disembarkation. However, although necessary, such agreements are not sufficient for the legality overall of interception operations.
Any such agreements must also satisfy minimum formal and substantive requirements. They cannot be secret, but must be published and ideally subject also to parliamentary scrutiny. They must make provision for protection, including the determination of refugee status, for access to asylum or other solution, and for treatment in accordance with international law. They must be subject to international supervision in their application, ideally by UNHCR in the exercise of its protection responsibilities.

In the absence of effective and verifiable procedures and protection in countries of proposed return, the responsibility to ensure protection remains that of the EU agency or member state. In practice, this will require that they identify all those intercepted, and keep records regarding nationality, age, personal circumstances and reasons for passage. Given protection as the object and purpose of interception operations, an effective opportunity must be given for objections and fears to be expressed; these must then be subject to rational consideration, leading to the formulation of written reasons in explanation of the next steps. Where this entails return to or disembarkation in a non-EU State, a form of judicial control is required as a necessary safeguard against ill treatment and the abuse of power – exactly what form of judicial control calls for an exercise of juristic imagination. In the nature of things, such oversight should

be prompt, automatic, impartial and independent, extending ideally to the monitoring of interception operations overall.

Finally, the scheme of interception and protection will have to be knowledge-based and, through training and oversight, sensitive to protection needs. It must also be integrated into the Common European Asylum Policy, in particular, so that solutions can be found for those determined to be in need of international protection.

Most of the above represents the minimum due process to be expected of a Union founded on the rule of law, respect for fundamental rights and the implementation of international obligations. It obviously presents challenges for EU States anxious about

irregular migration. I suggest, however, that it is manageable – and this is the common condition – once principles and fundamental rights are internalised and the necessary commitments are made.

Se non ora, quando?

If this is not done, then the old mistakes will continue to be made; the price will be the harm done to human beings seeking their right to protection outlined in international law.

The test by which to measure the success of interception is not to be written in numbers alone, be it of those rescued or simply prevented from arriving in Europe. It has also to be written in consequences, and in protection – and that is a task yet to be accomplished.

A makeshift camp setup by Afghan refugees in Patras' city of Peloponese. Many seek to go onwards to Italy.

The Dublin odyssey of Sayeed Mujadadi

Sayeed Mujadadi[3] is a 20-year-old man from Herat, Afghanistan. He fled the war after armed groups had kidnapped him and his cousin. He came to Europe via Greece, where he applied for refugee status.

He stayed in Greece for about three months, but the authorities did not proceed with his case. He went to Hungary but was, for reasons that are unclear, deported to Serbia in October 2009. As he would not have been safe in Serbia, he returned to Hungary and lodged a new asylum application in order not to be deported. Instead of considering his application, the Hungarian authorities only took his fingerprints and sent him to a detention centre. He managed to escape two weeks later and made his way to Belgium, where his uncle has been living for about ten years with a Belgian nationality.

In December 2009 Sayeed arrived to Belgium and submitted a new asylum application. Since his fingerprints were already in the system, the Hungarian authorities – acting on Belgium's request – accepted responsibility for his case under the Dublin Regulation. Sayeed was thus transferred back to Hungary on 29 April 2010. He no longer felt safe there because of what he experienced before. He paid €8.000 to traffickers and left Hungary for Ukraine, because his Belgian lawyer had told him that if he stayed outside the European Union for more than three months, he would have a chance to continue his asylum procedure in Belgium. In Ukraine he remained in the hands of the traffickers for about four months. He came back to Belgium in November 2010 and filed another request for asylum with the Immigration Office.

Despite having evidence of his long stay in Ukraine, including documents from a hospital, the Belgian Immigration Office proceeded to transfer Sayeed back to Hungary, who again accepted responsibility. In February 2011 he was sent to the detention centre "127bis" in Steenokkerzeel, located near Brussels National Airport, to await his transfer to Hungary. When JRS Belgium visited him in the centre, he desperately said: *"Since I'm in Europe, I'm detained all the time. In Afghanistan I was never detained. Now they want to send me back to Hungary where I will be detained again for many months."*

Two attempts to put him on a flight to Hungary failed, one because a court issued a temporary suspension order. Yet despite all the efforts of his lawyer and JRS Belgium, Sayeed was eventually removed to Hungary in April 2011, where he was immediately arrested and detained in the Nyirbátor detention facility. The last that was

heard from Sayeed was that he abandoned his asylum claim because he was overwhelmingly desperate. He is still detained without knowing what the authorities will do with him. In sheer despair he sent this email to JRS:

"I just cancelled my asylum here because the situation is so critical. No respect, nothing. I did not come here to be treated like an animal. … I am sorry but I hate this country. It just gave me pain. … It's about seven months that I am in jail. I am going to lose my mind. … Please do something if you can, I am really getting mad. … I'll not be deported back to Afghanistan but the situation is so bad here. I don't know why it is like this. They call themselves Europeans but don't respect any human rights."

The Dublin Regulation: An Inner-European Trap

Sayeed Mudjadadi's odyssey gives an insight into the dire reality of how asylum seekers can be treated in Europe. The following text will describe the legal framework under the so-called Dublin Regulation. We will briefly describe the development and content of this regulation and then analyse several problems that arise from its application.

From Schengen to Dublin

The Schengen Agreement and its subsequent law led to the abolition of border controls within Europe. States did not want asylum seekers and other groups of migrants to benefit from the newfound freedom of movement within the Schengen Area. The Convention Implementing the Schengen Agreement, adopted by the Schengen States in March 1995, had already included several articles on asylum law. These articles, in turn, were replaced by the Dublin Convention, which entered into force on 1 September 1997.[4]

At the European Council Summit in Tampere, Finland, in October 1999, the EU member states agreed on the establishment of a *Common European Asylum System* (CEAS) that would be based on the complete implementation of the 1951 Refugee Convention and the 1967 New York Protocol. The principles laid down in the Dublin Convention were meant to be part of this new system. Consequently, on 18 February 2003, the Council of the European Union adopted what is now widely known as the "Dublin Regulation".[5]

This regulation allocates responsibility

to a single member state for processing an asylum application. Similar to its predecessor, the Dublin Convention, it establishes a hierarchy of criteria for identifying the responsible state and aims at ensuring that every asylum claim within the 'Dublin Area' (i.e. the EU plus Iceland, Norway and Switzerland) is examined by a state. It also aims to prevent multiple asylum claims and secondary movements of asylum seekers within the common area. In order to assist with the identification of third country nationals who have lodged claims in other member states, the EURODAC Regulation requires states to record the fingerprints of all individuals having lodged an asylum claim or having irregularly entered their territories, and to forward these to a central database in order to enable comparison.[6]

A widely used criterion is the 'country of first entry': the state that is responsible for examining an individual's asylum application is the one where s/he first arrived. Thus if an individual enters the EU through Greece and makes his way to Belgium, the Belgian authorities may return him to Greece since it is his country of first entry. States should also consider, among other things, family unity and possession of visa or residence permits when deciding who will examine an individual's application. States may assume responsibility for any application for humanitarian reasons.

States view the Dublin Regulation as a cornerstone of the EU asylum system. In 2009, a total of 46.058 requests were made by one 'Dublin state' to another to accept transfers of asylum seekers. Despite all of these requests, only 11.816 transfers were actually done.

There are wide discrepancies among the member states. Germany, the Netherlands and Switzerland transferred many more asylum seekers than they received; Greece, Italy and Poland received many more than they transferred.[7] More recent numbers from the entire Dublin Area are currently not available. But Germany, for instance, reported to have transferred 2.156 persons to another 'Dublin State' in the first three quarters of 2010 (the majority, 445, to Poland), and received 1.005 transfers from other 'Dublin states' (the majority, 172, from France).[8] The Norwegian National Police Immigration Service transferred 1.226 persons to other EU countries in the first half of 2010: 554 of them to Italy, 196 to Greece and 191 to Sweden.[9]

Asylum systems in Europe are not one in the same

The Dublin Regulation rests on the assumption that asylum systems in every EU country are one in the same – that an asylum seeker in Belgium would

get the same treatment as one in Bulgaria. Reality shows that this is not the case. Asylum procedures between countries differ widely in terms of quality, access and safeguards. This discrepancy shows itself in protection rates across the 'Dublin states'.

During the first quarter of 2011, about 31 percent of first instance decisions in Norway, and 21 percent in the UK, resulted in the granting a refugee status; it was only 4.7 percent in the Netherlands and 1.8 percent in Belgium.[10] Subsidiary protection rates ranged from 26 percent in the Netherlands to one percent in Germany. The majority of asylum claims by Russian nationals were rejected in Belgium in the first instance, while in France the majority of the same group obtained refugee status.

A study conducted by the UN High Commissioner for Refugees (UNHCR) shows that EU countries have different ways of interpreting the legal norm on what constitutes a "serious and individual threat" to a person's life. In some countries it is applied to an extremely small percentage of people fleeing situations of violence and armed conflict overall.[11] Obtaining protection in a 'Dublin state', therefore, is very much a 'lottery'.[12]

A second problem is that asylum seekers in the Dublin system are forced to submit their applications in member states with poor asylum procedures. The best-known case is Greece, where serious problems in the asylum process and poor reception and detention conditions are known to exist.[13] The European Court of Human Rights has even condemned Greece for having violated the prohibition of torture (Article 3), and the right to an effective remedy (Article 13) of the European Convention on Human Rights because of the many deficiencies in their asylum procedure and the awful detention conditions for asylum seekers.[14]

In January 2011 the Court acknowledged the link between poor national asylum and reception conditions and the Dublin Regulation. It ruled against Belgium for sending an asylum seeker to Greece despite having ample documentation of the serious deficiencies in the Greek asylum system.[15] Since then EU member states have limited – and even refrained – from transferring asylum seekers to Greece. But these measures are only temporary and focused on one country. The situation in Malta, Italy or Hungary is rarely taken into consideration, and Dublin transfers to these places have not been suspended despite the fact that asylum procedures and reception conditions in these countries show many deficiencies as well.[16]

Lack of safeguards and judicial remedies

The Dublin Regulation does not

elaborate in detail the right of an asylum seeker to challenge a transfer decision. There are few opportunities for the asylum seeker to express why the transfer should be suspended, especially in cases where the country s/he might be transferred to has inadequate asylum procedures. Article 19(2) of the Regulation makes it possible for an asylum seeker to challenge a Dublin transfer decision at a court. National law, however, can exclude these appeals from having a suspensive effect. In these countries, an asylum seeker may be subjected to a Dublin transfer even if a court has not yet decided on the person's appeal against the transfer. This can result in an asylum seeker being returned to a country where s/he might face human rights violations.

The underlying principle is what EU policy makers like to call "mutual trust": Every member state shall have confidence in all other member states to handle asylum claims properly and in accordance with EU norms. The debate on the treatment of asylum seekers in Greece, however, has clearly shown that the "mutual trust" principle is not always applicable. In their January 2011 judgment mentioned above, the European Court of Human Rights has ruled that no state, when deciding whether to return an asylum seeker to another state under the Dublin system, can simply rely on the "mutual trust" principle and ignore the actual situation in the receiving country. To the contrary, the Court said that a state must refrain from enforcing returns under the Dublin Regulation if in the receiving country the person in question is unlikely to be given access to a fair asylum procedure and adequate protection. Access to an *effective* judicial remedy is, therefore, indispensable, and exclusion from access to such a remedy can amount to a violation of Article 13 in conjunction with Article 3 of the European Convention on Human Rights.

At the time of this writing there are cases pending before the Court of Justice for the European Union that address similar questions. Article 47(1) of the EU Charter of Fundamental Rights guarantees the right to an effective remedy before a court. As the Advocate General, Ms Trstenjak, has argued in her Opinion before the Court of Justice in the case *N.S. v. Secretary of State for the Home Department (UK)* that a national law prohibiting the in-depth assessment of a complaint against a Dublin transfer violates Article 47(1) of the Charter.[17]

Added to this, the regulation does not oblige member states to fully inform asylum seekers about Dublin procedures, nor to personally interview asylum seekers. As a consequence many asylum seekers insufficiently informed about Dublin procedures, its specific details and potential outcomes.

The complexity of Dublin procedures means that even national authorities may misinform asylum seekers, worsening the already difficult situation they are in.

Asylum seekers usually need professional legal assistance if they want to challenge a transfer decision. But they rarely have the financial means to pay for a lawyer. Under the Dublin Regulation, states are not obliged to provide for free legal assistance. The consequence is that asylum seekers are often left alone in a very complex and bureaucratic procedure they do not fully understand.

Care for vulnerable persons and detention

Vulnerable persons, including those with special medical needs or unaccompanied minors, rarely see their needs met within the context of a Dublin procedure. Though the regulation obliges a state to assume the responsibility for an unaccompanied minor if s/he has a relative living in this state, the minor might be returned if such a relative cannot be named, irrespective of whether the receiving state can provide sufficient care for the child. In these and other cases states may use the humanitarian and/or sovereignty clauses in the regulation – but this is completely left to their sole discretion.[18]

Member states commonly detain asylum seekers who are in Dublin procedures. An individual can be detained for months while member states decide who is responsible for examining the asylum application. The Dublin Regulation does not contain any legal provisions regulating the use of detention, making it difficult for asylum seekers to challenge a detention decision and to have their basic human rights upheld.

Dublin procedures are inherently stressful for asylum seekers. In a situation of detention, the stress is amplified. In our 2010 study on detention, we found that asylum seekers in Dublin procedures reported alarming mental health ailments relating to severe depression and anxiety. Persons with pre-existing vulnerabilities such as torture trauma, medical illnesses and even families with children are especially prone to the deteriorative effects of Dublin procedures and detention.[19]

Pressure on families

Asylum seekers tell us that family separation is one of the most negative effects of the Dublin Regulation. There are situations where governments pick apart families by transferring one member and leaving the rest behind. Moreover, member states define 'family units' in strict terms, leaving aside alternative notions of family composition in different cultures

where extended family networks are common. People who flee violence and persecution may need to rely upon their family for support. In some cases there are even families that are founded during the flight to safety.

Negotiating a new Dublin Regulation

In 2008 the European Commission published a proposal to legislatively amend (or "recast") the current regulation.[20] Their proposal seeks to streamline transfer and responsibility procedures, and to strengthen safeguards for asylum seekers. Currently the proposal is being debated between the European Parliament and Council, who must agree on a final text before it becomes law. Member states are reluctant to accept many of the Commission's proposals, especially legal provisions that would narrow their ability to detain asylum seekers.

Another point of contention is whether to introduce a rule that would temporarily suspend all Dublin transfers to states that experience emergency conditions. The rule of "first entry" has resulted in big numbers of asylum claims being processed in the southern European states like Greece, Italy, and Malta.

Under this proposed rule, Dublin transfers to countries like Greece, where evidently no proper asylum system is in place, would be temporarily suspended. This idea has won support from the European Parliament. Member states, however, have strongly rebuffed the Commission. They are afraid that such a rule would weaken the "mutual trust" principle and pave the way for the eventual abolishment of the Dublin Regulation.

The Polish Presidency of the EU (Jul-Dec 2011) has attempted to break the deadlock by proposing a "temporary emergency mechanism" that is linked to an "early warning" process. Under this proposal, the Commission – with the support of the European Asylum Support Office (EASO) – would closely monitor asylum procedures in several member states. If these monitoring mechanisms reveal serious deficiencies in one member state or another, the respective government would be invited to develop a plan for overcoming the deficiencies and to express what help they would need from the EU. Transfers would only be suspended if the deficiencies amount to "strong and disproportionate pressure" for the asylum infrastructure in the respective member state. Such an emergency measure would last for six months, extendable by another six.

The Polish Presidency's proposal allows for too many steps to be taken before the "emergency mechanism" can be triggered. As governments and EU institutions organise evaluations, write

reports and develop plans, asylum seekers would still be returned to a country where they might not have access to a fair asylum procedure and adequate reception facilities. Such a process would neither meet obligations under human rights law: As the European Court of Human Rights has ruled, in every individual case where it can be shown that the return of a person to another Dublin state would result in a breach of a right enshrined in the European Convention on Human Rights, the return must immediately be stopped. Assessing an individual's specific needs can never be replaced by a general evaluation report. The only realistic solution may be that member states allow asylum seekers to contest Dublin return decisions at domestic courts, and that such legal actions have a suspensive effect. This might be accompanied by an "emergency mechanism" where member states decide in general to suspend return operations to a certain country. But such a mechanism cannot replace an individual's access to legal protection.

Nevertheless, EU Home Affairs Commissioner Cecilia Malmström has backed the Polish proposal and argued for member states to show flexibility, lest the entire Dublin system be endangered. But at a Justice and Home Affairs Council meeting on 22-23 September 2011, member states have again rejected any idea of inserting a suspension mechanism into the Dublin Regulation. The report of the meeting said: "The discussion showed that the new idea for an evaluation mechanism was generally welcomed. A majority of member states, however, continued to refuse the idea of an emergency mechanism – even if accompanied by an asylum evaluation mechanism."

The next months are crucial: If member states continue to block the negotiations on a new Dublin Regulation, there will be no *Common European Asylum System* by 2012. Should this occur, it will be up to the courts to decide what states are allowed to do.

The necessity of change

According to JRS, the Dublin system does not work for one major reason: the asylum systems of EU member states are too different from each other. As a consequence, some of Europe's asylum seekers face an unfair system where they are forced to apply for asylum in a country with sub-standard procedures.
We can infer two major cracks in the Dublin system. Firstly, it penalises a relatively small percentage of asylum seekers who are caught not because of the efficiency of the system, but because of their unfortunate circumstances. The severity of this penalty is worsened by the lack of knowledge the asylum seeker has of the Dublin system, and by the sense that they are being punished for

seeking protection in Europe. The penalisation of the asylum seeker prevents the establishment of trust, which is needed to make asylum and immigration procedures function well. Moreover, it inhibits any opportunity for successful integration into European society should the person be granted refugee status.

The second crack in the Dublin system is its reinforcement of irregular immigration. Strictly applied, the Dublin Regulation forces asylum seekers to utilise irregular means of entry into Europe in order to avoid being transferred to a member state with a weak asylum system, or to preserve family ties. It is a system that does not have the necessary flexibility to consider the wide range of human needs that asylum seekers possess. Its inflexibility encourages circumvention of the system, which carries many risks for asylum seekers, such as interception during irregular entry, reliance on human smugglers and traffickers or detainment as an irregular migrant. These impressions give rise to three major policy recommendations for the Dublin system: temporary suspension, re-allocation and a stronger humanitarian clause.

- The first argues that as long as asylum and reception conditions remain unequal in Europe, then there should be a mechanism for the suspension of transfers to member states with inadequate asylum systems. Even the European Commission admits that the unevenness of Europe's asylum reception conditions and procedures is the primary cause for the dysfunction of the Dublin system.[21]

- The second argues that the Dublin Regulation must be amended to provide for the re-allocation of asylum seekers to other EU countries for asylum processing, if the country of first entry is not up to task. Any system of re-allocation should take into account the preferences of the asylum seeker, in particular their familial/cultural connections, skills, employment experience and their linguistic capacities. Any system of re-allocation should prioritise the protection needs of the asylum seeker over the logistical or political expediency of the Dublin system.

- The third argues for a strengthened humanitarian clause in the Regulation that would more strongly oblige member states to accept a person's application based on his or her protection needs. Asylum seekers should also be informed of the clause's existence, and have the opportunity to ask for its implementation.

While the Dublin system will remain active for the foreseeable future, it is easy to see that it rests on shaky foundations. The Dublin system would

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An asylum seeker from Ukraine is looking out through the bars of the detention centre in Medvedov, Slovakia.

only be logical if a Common European Asylum System were already in place. However without the support of the latter, the former can never work. Many practitioners feel that the regulation could be improved through the EU legislative process. Yet there is also the sense that any improvement made to the regulation would only serve as a 'bandage' unless the asylum 'playing field' is made truly even.

Finally, it is the over-arching concern of JRS that access to asylum and protection should always be ensured by EU and member state law. The three policy considerations described above do not apply as long as this fundamental human right is unrecognised and not enforced. As evidenced by the experiences of JRS, the current Dublin system does not sufficiently meet this standard. Any future adaptations to the system that continue to neglect this standard will be fundamentally flawed.

Refugee family finds no protection in Ukraine

Hakimi Marina is a 38-year-old Afghan mother of four. She came to Ukraine fleeing from war and danger in Afghanistan, but her journey was not a direct one. "I went to Pakistan, then to Iran, Turkmenistan and then to Tajikistan," she recounts. This was in 1998, and in Tajikistan refugees were being deported to Afghanistan. Fearing this, she and her family decided to leave for Russia.

Hakimi remembers the journey: "We were driven in two separate cars. In the first, there was my son and my husband's mother, sister and brother. My son was two years old. I was in the second car with my husband, sister and six-month-old daughter. The first group crossed the border into Russia. Our group was stopped by the police and deported to Tajikistan, and then to Afghanistan." Tragically she was separated from her oldest son.

Back in Afghanistan, Hakimi and her husband faced harassment from the Taliban. "They had problems with me because I was deported from Russia. They told me: 'you are a communist!'"

United States and coalition forces had by now gained control of Afghanistan. One night, ISAF forces came to their house in search of Taliban fighters.

Hakimi's husband told the soldiers that their neighbours were in the Taliban; soon after the neighbours were arrested. Some time later, someone fired gunshots at her husband while he was working. He didn't know who had done it. At 11:00pm that night, Hakimi's daughter heard the doorbells ring. Her husband went outside and saw a group of Taliban, armed, with concealed faces. They were taking people away. "The Taliban are very dangerous people," says Hakimi, "they kill." The family spent all night awake; in the morning they went to a friend's house and stayed there for ten days.

They decided to leave Afghanistan once more. By now, Hakimi was parted from her son for two years. "I am his mother. I am sick because my son has lost me." Thinking of her son, Hakimi and the family left for Moscow, and then proceeded to Ukraine. It was now 2009. In Ukraine, her husband contacted his mother and brother, who encouraged the family to meet them in Germany, where they now lived.

The journey proved to be very difficult. The police intercepted them at the Ukraine-Polish border. Instead of being allowed to enter the EU and join their relatives in Germany, the family was returned to Ukraine. "The police caught

me and I began shouting. My children saw my crying, thinking that maybe I would die. I had to be hospitalised and given an injection", says Hakimi. The police took the family to Lutsk city jail. "This was a hard time, especially for my children. While other children were playing outside and going to school, mine were in jail for one month."

Afterwards they were transferred to a detention centre, where they stayed for six months. "The detention centre was like a jailhouse", remembers Hakimi. Her husband was kept in a separate cell, and not allowed to keep contact with her and the children. "We feared he was on a flight, deported."

At one point Hakimi's daughter became sick; they went to the hospital, leaving the other children behind. Her husband inquired, "Where is my wife and daughter?" A guard asked him, in Russian: "Do you want a problem?" Not knowing the language, the husband answered, "Yes". Two soldiers and an officer came and took her husband away. "In a closed room they beat him for 10-20 minutes on his back and legs. My husband didn't cry out so that the children wouldn't hear. When the guards opened the door, my children saw their father. It was very bad time for them."

Returning from the hospital, Hakimi was allowed a five-minute visit with her husband. She saw that he was very sick and worn from the beating. "Then he was taken away and put in solitary confinement for ten days. He had only three small meals each day. He couldn't see his children."

After six months, Hakimi and her family were released from detention and sent to the JRS accommodation centre in Lviv, Ukraine. This was a positive change: "Now I am glad. Thank God. My children can go to school." But all was not yet well: Hakimi had sent two asylum applications to the authorities, but both were rejected.

Her son visited from Germany. For Hakimi, too many years had passed since their last encounter. "The last time I saw him he was two. Now he was 14 and big. A man. I held him and cried. He saw my other son and daughter for the first time. Everyone was so happy." Their happiness was short lived, since the son eventually had to return to Germany. "He is very sad", says Hakimi, "he is always thinking about his family."

Despite having experienced great difficulties, Hakimi holds on to a dream of a future where the entire family can be together in a safe place. "I want to live together with my older son. I am a mother, and a mother loves her children. I want to have a house, a good life for my children." But given EU policies, and the readmission agreement with Ukraine, a family reunification is not likely to happen in near future.

An Afghan boy joins others in protesting a bomb attack that killed a 15-year-old Afghan teenage boy.

Stranded at the Border: Migrants as Victims of Europe's Policies

Hakimi and her family are among those who, in rising numbers, are stranded at the Eastern borders of the EU or on the southern shores of the Mediterranean. For years the EU and its member states have made every endeavour to close the borders to "unwanted" immigrants, without putting in place any system of identification and assistance for persons in need of refugee protection. The EU instead prioritises cooperation with countries of transit in order remove the "unwanted" as quickly as possible. One form of this cooperation is the conclusion of so-called *readmission agreements*.

In parallel with the EU, several member states have developed

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bilateral contacts and concluded such agreements with certain transit countries. The most notorious cases are the close relations of Spain with Morocco, Mauritania with Senegal, and of Italy with both the toppled Gaddaffi regime and the new transitional government in Libya. This cooperation results in indiscriminate "push-backs" that violate the rights of potential asylum seekers under the 1951 Refugee Convention and other human rights law instruments.

Access to protection: a right but not a reality

According to statistics published by the EU Border Agency, FRONTEX, the number of reported irregular border crossings and submitted asylum applications is increasing despite the tightening of border controls, and the exceedingly dangerous conditions of travel.[22]

The frontiers of Europe are littered with failure: Many have either lost their lives at sea, or are returned to countries

of transit where they find themselves trapped in precarious situations.[23]

Tighter border controls and the denial of entry to Europe affect persons in need of refugee protection. FRONTEX statistics for the second quarter of 2011 show dramatically increasing numbers of Somali, Pakistan and Côte d'Ivoire nationals who were detected while trying to irregularly cross EU borders. Reports from Amnesty International and Human Rights Watch, among others, detail the atrocious human rights situations in these countries, and especially in the Horn of Africa.

Tougher borders belie people's actual need for protection. In 2009, for example, Malta recognised 65 percent of arrivals by sea as being in need of international protection.[24] Most of these persons originated from Somalia and Eritrea. A tightening of border controls without complementary measures for identifying persons in need of protection runs the real risk of refusing protection to victims of human rights violations.

Despite all promises, such complementary effective protection mechanisms have not yet been put into place. Hope lies with the recently established European Asylum Support Office (EASO); the role, competences and tasks of this new authority are still undefined. The same goes for the relationship between FRONTEX and EASO. At the moment it is unclear whether EASO will play a significant role at Europe's borders. On the other hand, FRONTEX does not have a protection mandate. Hence, the risk of breaching the principle of *non-refoulement* during FRONTEX and other border operations is far from being eliminated.

EU readmission agreements

The case of Hakimi and her family reveals the reality of return policies and the EU's cooperation with countries of transit and origin. Details of this cooperation are often laid down in readmission agreements.

The readmission agreement between EU and Ukraine was signed on 18 June 2007 and entered into force on 1 January 2008. It is one of 13 that have been concluded by the EU with third countries since 2002. These agreements regulate the readmission of own nationals and, under certain circumstances, of nationals of other countries who are irregularly staying on the territory of one of the contracting parties. The most recent agreement to be concluded was with Georgia. Another agreement, with Turkey, received political consent at the Justice and Home Affairs Council meeting of 24-25 February 2011,[25] but has yet to be presented to Parliament and Council for ratification. Agreements with Morocco and Cape Verde are still being negotiated; meanwhile, the Commission has received a mandate for negotiations with China and Algeria.

In parallel, EU member states conclude their own bilateral readmission agreements with third countries, such as Italy has done with Libya and Tunisia.

Dubious legal basis for readmitting 'third country nationals'[26]

The conclusion of EU readmission agreements has a legal basis in Article 79 (3) of the Treaty of the Functioning of the European Union (TFEU) that reads: "The Union may conclude agreements with third countries for the readmission to their *countries of origin or provenance* of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States" (emphasis added). This article does not, however, provide a sufficient legal basis for the EU to conclude agreements that envisage the readmission of migrants to their *countries of transit*. It is, therefore, at least an open question whether the Union has exceeded their competences when concluding agreements that not only provide for readmission of own nationals of each contracting party but also of nationals of third countries who had passed the territory of a contracting party in transit ("Third Country National clause" or "TCN clause").

In February 2011, the European Commission presented an evaluation of the existing readmission agreements.[27] The evaluation reports that a TCN clause often blocks the negotiations and "is actually rarely used" by member states.[28] With regard to human rights safeguards, a TCN clause is very problematic because the legal status of third country nationals in the state they are returned to is often unclear, and they often do not have possibilities to claim even their basic human rights. Therefore, TCN clauses should be left out of all negotiation mandates and withdrawn from already existing agreements.

The application of the non-refoulement principle

Article 6 (1) of the Treaty on the European Union (TEU) classifies the Charter of Fundamental Rights[29] as EU primary law and refers, with regard to the specific interpretation and application of the Charter, to Title VII (Articles 51 to 54) within it. Article 51 of the Charter, in turn, defines its scope of application. It confirms that its provisions target the institutions, bodies, offices and agencies of the EU and to the member states. When initiating and conducting border control operations, or concluding and applying readmission agreements, EU institutions and member states are likewise bound by the Charter.

Under Article 18 of the Charter, the right to asylum is guaranteed with due respect for the rules of the 1951 Refugee Convention and the EU Treaties.

One of the central elements of the 1951 Refugee Convention is the prohibition of direct or indirect expulsion or return of a refugee to a persecuting state. This *non-refoulement* principle is laid down in Article 33 of that Convention. Even though the precise scope of this principle is the subject of dispute, it must be assumed that it grants refugees not only protection against direct deportation to the persecuting state, but also protection against "chain deportation": where a transfer is made to a state in which there is a risk of further deportation to the persecuting state.

This is especially important where, under readmission agreements, "accelerated procedures" are applied in which persons who are apprehended at the border – including airports – can be easily returned. Currently there is no safeguard against returns which are incompatible with the *non-refoulement* principle and therefore with EU law. Any and all return procedures, including "accelerated procedures", must enable a person to seek effective judicial remedy against the return decision by stating that s/he would be in danger of becoming a victim of persecution within the meaning of the 1951 Refugee Convention.

Safeguards for human rights

In accordance to human rights law and to the jurisprudence of the European Court of Human Rights, states must refrain from returning a migrant to another country if the person is in danger of being subjected to human rights violations.[30] This also concerns the right for the respect and protection of human dignity that is enshrined in Article 1 of the Charter, and of the prohibition of torture and inhuman or degrading treatment contained in Article 4. Moreover, in accordance to Article 19(2) of the Charter, a migrant must not be removed to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment. All "push-back" operations and the application of readmission agreements must, therefore, be suspended if there is a danger of human rights violations. Readmission agreements that are currently in place do not provide for an effective protection of the human rights of returned migrants. While some of the agreements contain a "non-affection clause" saying that the agreement would not affect any other obligations under international law, this is not sufficient as a safeguard. As one scholar put it: "(A) right has not been fulfilled until arrangements are in fact in place for people to enjoy whatever it is to which they have the right".[31] The right not to be subjected to torture, for instance, must not only be written down in law but concrete safeguards for its respect in practice must be put into place.

No readmission agreement foresees any such arrangement. In the words of the Commission: "The situation of the person subject to readmission has not been regulated".[32] Consequently there is no guarantee for the respect of the *non-refoulement* principle, of the prohibition of torture and other forms of inhuman or degrading treatment and of the civil, economic or social rights of the affected persons. This is especially worrisome in the context of returns to countries with poor human rights records, such as Pakistan, the Russian Federation and Ukraine.
This gap is all the more alarming when not only citizens of the other contracting party are returned but third country nationals as well, whose possibilities to claim their rights in the country of readmission are reduced even more.

Human rights safeguards must urgently be improved. Mechanisms and guarantees for the protection of human rights should apply to all border control operations as well as to all readmission agreements, including those that have already been concluded.

Transparency and democratic control

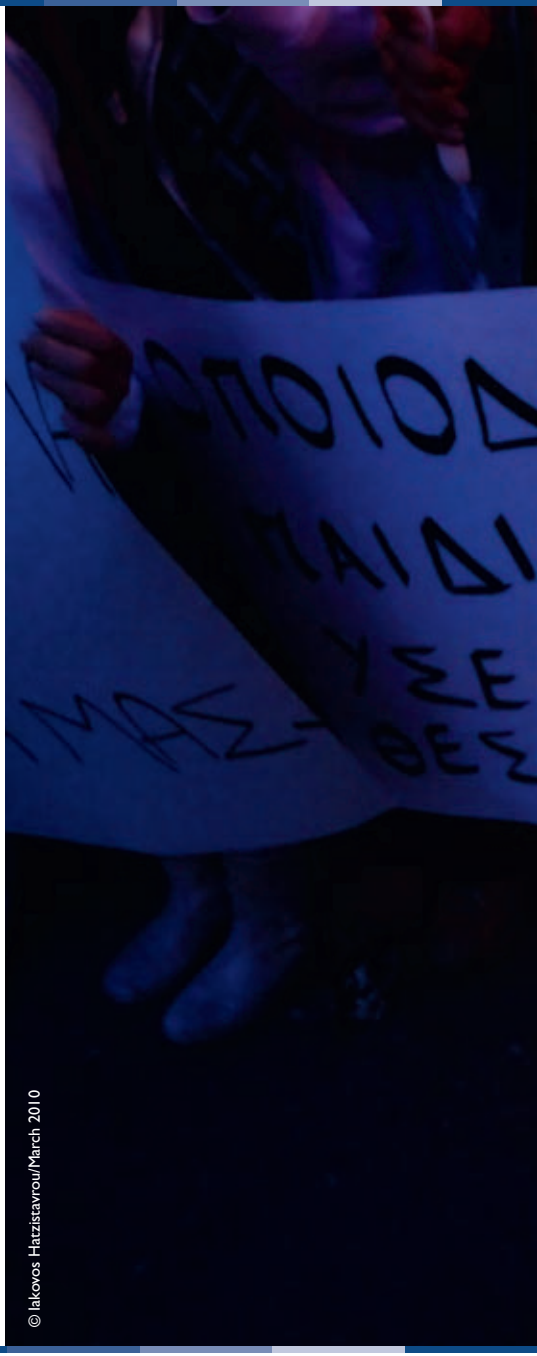
Recent media reports describe how the Italian government has signed a bilateral agreement with the National Transitional Council of Libya.[33] Reportedly it says that the previous readmission agreement, concluded in 2008 between the Berlusconi government and the Gaddafi regime as part of the Italian-Libyan "Friendship Treaty", can be applied again. Another readmission agreement was recently concluded between Italy and Tunisia. Both agreements, however, have never been published or brought to the European Parliament for approval. Hence there is no chance, neither for civil society organisations nor the public in general, to execute democratic control over the content and the application of these agreements.

Negotiations on the EU level are opaque. In February 2011 the Justice and Home Affairs Council, as mentioned earlier, gave political consent to the Commission's readmission agreement with Turkey. Yet the text, as all previous negotiations with the Turkish authorities, has yet not been disclosed to the public.

The secrecy on the part of EU and member states is unsettling because both Libya and Turkey have had poor human rights records, especially with regard to the rights of migrants and refugees. In a recent report, Amnesty International revealed cases of torture and other inhuman treatment of migrants in the hands of the Libyan transitional government who were accused of having been mercenaries fighting for Gaddafi.[34] And in Turkey, as the European Court of Human Rights case law shows,[35] the human rights of migrants and asylum seekers are often far from being respected.

In order to improve democratic control, the Commission and the member states should ensure that negotiations are conducted in a transparent manner, and final texts of readmission agreements are disclosed to the public.
In their evaluation report, the Commission proposes to invite relevant international agencies and NGOs to meetings of the Joint Readmission Committees (JRC). The Commission must clarify how often these actors are to be invited, and what shall happen with the information they provide. Likewise, the powers of the JRC must be specified. If it does not have the means to impose real and effective improvements with regard to human rights guarantees, then consultation with this body would seem futile.

Most important is the installation of a post-return monitoring mechanism. As a first step, the Commission has proposed a pilot project to be set up in which an international NGO is commissioned to monitor the treatment of returnees. Whereas we welcome the idea in principle, the proposal is not detailed enough. The monitoring NGO must be given all necessary competences, including access to all places where returnees are held. The financing of the NGO's operation must be clarified as well as the use of the information that is obtained from such monitoring.



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An Afghan girl holds a silent vigil for peace in front of the Greek parliament.

The Response of the Catholic Church

Archbishop Agostino Marchetto[36]

I am grateful for the opportunity to commemorate the 60th anniversary of the 1951 Convention on the Status of Refugees. I gave my best to defend this Convention during the almost 10 years of my mission as Secretary of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People.

Allow me to recall that the Holy See is a State Founder and member of UNHCR. As this is not the case for other organisations of the UN, it indicates the special attention that the Church has for this persecuted portion of the human family. Because of this I thought of calling to mind *the church's love for refugees and other forced migrants*, which has been expressed several times in the past.

A sign of love

"If anyone says, 'I love God' and hates his brother, he is a liar; for he who does not love his brother whom he has seen, cannot love God whom he has not seen" (1 Jn 4:20).

There is no room for doubt, in fact, in these words taken from the first letter of John. Our Pope explains this as the "unbreakable bond between love of God and love of neighbour". These two are so closely connected with each other, "that to say that we love God becomes a lie if we are closed to our neighbour or hate him altogether... Love of neighbour is a path that leads to the encounter with God, and ... closing our eyes to our neighbour also blinds us to God" (*Deus Caritas est* – henceforth *Dce* – no. 16).

Mankind, one family

Moreover, St. Paul, migrant Apostle to the Gentiles,[37] unhesitatingly asserted at the Areopagus in Athens that "God who made the world and all that is in it ... made from one the whole human race to dwell on the entire surface of the earth" (*Ac* 17:24,26). This implies that "because of its common origin *the human race forms a unity*" (*Catechism of the Catholic Church*, 360). Further on in his discourse, St. Paul affirmed that all human beings have their being in God "as even some of your poets have said, 'For we too are his offspring' ... therefore we are the offspring of God..." (*Ac* 17:28-29).

Therefore, in a particular way, refugees and other forced migrants have been, are and will always be in the heart of the Church. She expressed and showed this on numerous occasions especially during the last century.[38] Already in 1949, Pope Pius XII manifested his anxiety for the Palestinian refugees in his Encyclical Letter *Redemptoris Nostri*.[39] Three years later, in 1952, he published

the Apostolic Constitution *Exsul Familia*,[40] considered as the *magna charta* of the pastoral care of migrants and refugees. In 1963, Pope John XXIII drew attention again to the suffering and the rights of refugees and other forced migrants in his Encyclical Letter *Pacem in Terris* (nos. 104-108). The Second Vatican Ecumenical Council and successive interventions of the Magisterium dealt with this phenomenon, considered as a sign of the times, through a number of specific pastoral responses.[41]

Finally, in 1970, Pope Paul VI instituted the Pontifical Commission for the Pastoral Care of Migration and Tourism, which became the Pontifical Council for the Pastoral Care of Migrants and Itinerant People in 1988, with the issuance of the Apostolic Constitution *Pastor Bonus*. The said Council was entrusted, among others, with the pastoral care of all those "who have been forced to abandon their homeland, as well as those who have none".[42]

In 1981, just a few years after the beginning of his pontificate, Pope John Paul II asserted that what the Church undertakes in favour of refugees and other forced migrants is an integral part of her mission in the world.[43]

On his part, Benedict XVI spoke in favour of refugees barely a month after his election as Supreme Pontiff in April 2005, on the occasion of the celebration of UN World Refugee Day. He emphasised "the strength of spirit demanded of those who have to leave everything, sometimes even their family, to escape grave problems and dangers".[44] The Christian community, which "feels close to all who are experiencing this painful condition", tries its best "to encourage" and show them "its interest and love".[45] This is done through "concrete gestures of solidarity so that everyone who is far from his own country will feel the Church as a homeland where no one is a stranger".[46]

Fundamental Christian principles to be safeguarded in defending the cause of refugees

Human and Christian dignity

God's revelation in Christ and the Church assign a central role to the significance of the dignity of the individual person, including political and environmental refugees, displaced and trafficked people and other forced migrants.[47] This is based on the conviction that all people are created according to the image of God (*Gn* 1:26-27). In fact this is the basis of the Christian vision of society according to which "individual human beings are the foundation, the cause and the end of every social institution".[48] Every person is priceless, human beings are worth more than things, and the

gauge of the values any institution holds is whether it threatens or enhances the life and dignity of the human person.

Already in 1961, the Encyclical *Pacem in Terris* stated "every man has the right to life, to bodily integrity, and to the means which are suitable for the proper development of life; these are primarily food, clothing, shelter, rest, medical care, and finally the necessary social services" (no. 11).

It can be deduced that if a person does not enjoy a humane life in his or her country, he or she has the right, under certain circumstances, to move elsewhere, since every human person has an inherent dignity that should not be threatened.[49] "The Magisterium has likewise always denounced social and economic imbalances that are, for the most part, the cause of migration, the dangers of an uncontrolled globalisation in which migrants [in general] are more the victims [rather] than the protagonists of their migration" (*EMCC*, 29).

The need for a family

At the same time, the Church has always called for the reunification of families separated by the flight of one or more of its members due to persecution. She knows that refugees and other forced migrants, like any other person, need a family for their proper growth and harmonious development. In fact, in his Message for the World Day of Migrants and Refugees in 2007, Benedict XVI remarked:

I feel it my duty to call your attention to the families of refugees, whose conditions seem to have gone worse in comparison with the past, also specifically regarding the reunification of family nuclei… Everything must also be done to guarantee the rights and dignity of the families and to assure them housing facilities according to their needs.[50]

Charity, solidarity and assistance

Charity is the gift of God revealed in Jesus Christ: it is in this love that the Christian serves his neighbour (*Dce*, 18), for fraternal communion is born from the "word of God-who-is-Love" and this gift received from God is at the heart of "that force that builds community … [and] brings all people together without imposing barriers or limits" (*Caritas in Veritate* – henceforth *CiV* – no. 34).

Solidarity, on the other hand, is the sense of common belonging, given already by human reason, that we all form one human family in spite of our national, racial, ethnic, economic, and ideological differences, and that we are also dependent on each other. This implies a responsibility: we are indeed our brothers' and sisters' keepers, wherever they live. Openness to the needs of others includes our relationship to the foreigner, who can consider himself rightly as "God's

messenger who surprises us and interrupts the regularity and logic of daily life, bringing near those who are far away" (*EMCC*, 101).

Pope John Paul II affirmed that the principle of solidarity "is frequently stated by Pope Leo XIII, who uses the term 'friendship', a concept already found in Greek philosophy. Pope Pius XI refers to it with the equally meaningful term 'social charity' ".[51] Solidarity "is undoubtedly a Christian virtue… It has been possible to identify many points of contact between solidarity and charity, which is the distinguishing mark of Christ's disciples (*Jn* 13:35). In the light of faith, solidarity seeks to go beyond itself, to take on the specifically Christian dimension of total gratuity, forgiveness and reconciliation".[52] Hence, the concept opens itself to charity, which includes God's grace. In *Caritas in veritate* (no. 1), Pope Benedict XVI describes charity as "an extraordinary force that leads people to opt for courageous and generous engagement in the field of justice and peace. It is a force that has its origin in God".

Solidarity calls us to stand together especially with the poor and powerless who are our brothers and sisters. Therefore "welcoming refugees and offering them hospitality is for everyone a rightful gesture of human solidarity, so that they do not feel isolated as a result of intolerance and indifference".[53] This applies to meeting both immediate and long-term needs.[54]

For their part, refugees and other forced migrants must have "a respectful behaviour and an openness towards the host country" and be faithful in the observance of its laws.[55] To assist in this process, "pastoral workers with competence in cultural mediation are called upon to help bridge the legitimate requirements of order, legality and social security with the Christian vocation to welcome others with practical expression of love".[56]

A call for international cooperation

Through the centuries, the Church has manifested in many ways God's love towards mankind in the context of the existing times and circumstances. Today in an increasingly interdependent world, this testimony, which is ever ancient and ever new, remains her task and must acquire global dimensions.

Everyone has the responsibility to respond personally to the call to globalise love and solidarity and be a primary actor in this regard. Those who are powerful or influential need to feel responsible for the weaker and be ready to help them. The Catholic Church believes, in any case, that the effort towards international solidarity, **…based on a broader concept of the common good, is the way which can guarantee everyone a truly better future. In order for this to happen, it is**

necessary for a *culture of solidarity and interdependence* to spread and deeply penetrate the universal conscience and in this way sensitise public authorities, international organisations and private citizens to the *duty of accepting and sharing* with those who are poorest.[57]

Aware of the gravity of the refugee situation and the inhuman conditions in which many of them live, the Church, over and above her own commitment, considers it her task to make public opinion aware of this serious problem. She strongly believes that this tragic situation cannot and should not persist.

In fact, in his address to the UN High Commissioner for Refugees, John Paul II said:
The Church believes that it is also her duty to exhort the authorities to change this situation… it is necessary to repeat that this is an abnormal situation, that it is necessary to give a remedy to their causes, by trying to convince nations that refugees have a right to freedom and to human dignity in their country. It is also necessary to appeal more and more for hospitality, admittance into countries that can receive refugees.[58]
All this is also applicable, *mutatis mutandis*, to other forced migrants.

The Catholic Church insists on the protection of human rights also of internally displaced persons who have not crossed the frontiers of their country of origin. This "requires the adoption of specific and appropriate juridical instruments and of mechanism of coordination on the part of the international community, whose legitimate interventions cannot be considered as violations of national sovereignty".[59]

In 2001, the Holy See once more appealed for global responsibility towards refugees at a highly significant ministerial conference of 140 Signatory States of the 1951 Convention on the Status of Refugees. As the Holy See Representative, I affirmed:
Our task is to make solidarity a reality. It implies acceptance and recognition of the fact that we, as one human family, are interdependent. It calls us to international cooperation in favour of the poor and powerless as our own brothers and sisters … Effective responsibility and burden sharing among all States is therefore indispensable to promote peace and stability. This should be an inspiration for the human family of nations to reflect on the challenges of today and find the required solutions in a spirit of dialogue and mutual understanding. Our generation and future generations demand this so that refugees and internally displaced persons will benefit from it.[60]

A SPIRITUAL ASSISTANCE

In 1992, echoing the voice of the Popes, the Pontifical Council for the Pastoral Care of Migrants and Itinerant People,

jointly with the Pontifical Council *Cor Unum*, published a document entitled *Refugees, a Challenge to Solidarity*.[61] The publication clearly states "the Church offers her love and assistance to all refugees without distinction" (no. 25), and to carry this out.

The responsibility to offer refugees hospitality, solidarity and assistance lies first of all with the local Church. She is called on to incarnate the demands of the Gospel, reaching out without distinction towards these people in their moment of need and solitude. Her task takes on various forms: personal contact; defence of the rights of individuals and groups; the denunciation of the injustices that are at the root of this evil; action for the adoption of laws that will guarantee their effective protection; education against xenophobia; the creation of groups of volunteers and of emergency funds; pastoral care (no. 26).

In the preceding year, Pope John Paul II called to mind the various dimensions that characterise the Church's mission towards migrants and refugees as follows: "Although dealing respectfully and generously with their material problems is the first duty to be fulfilled, one must not forget their spiritual formation, through specific pastoral programmes which take into account their language and culture".[62]

Therefore, in her service of charity to migrants, refugees, internally displaced and trafficked people and other forced migrants, the Church constantly attends to their sufferings and material needs without forgetting other necessities. Since the time of the Apostles, in fact, it has always been clear that the social service of the Church is certainly concrete, yet at the same time it is spiritual (*Dce*, 21).

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Refugees from Kachin state in Burma, an ethnic minority, celebrate their resettlement to Romania with JRS.

Recommendations

Decision makers in the European Union have repeatedly committed themselves to make Europe a "space of freedom, security and justice" where human rights of refugees and migrants are fully respected. Article 18 of the EU Fundamental Rights Charter grants the right to asylum in accordance with the 1951 Refugee Convention. In order to mark the 60th anniversary of the 1951 Refugee Convention, the EU Justice and Home Affairs Council meeting, in a solemn declaration, "reaffirm[ed] its commitment to this unique instrument as the foundation of the international regime for the protection of refugees" and reiterated "its commitment to further developing the *Common European Asylum System* based on high protection standards combined with fair and effective procedures".[63]

The refugee testimonies in this report show that these commitments have not yet been fulfilled. Border control operations, the Dublin Regulation, cooperation with countries of transit – neither of these measures result in more protection, but rather in putting refugees' lives in danger.

The European Union and its member states must urgently change their policies in order to meet their obligations.

With regard to asylum procedures:

- Existing EU and national legislation in all member states should include mechanisms that effectively identify persons in need of protection and ensure the necessary protection to be granted.
- The refugee definition as laid down in the 1951 Refugee Convention should be applied in all member states. Refugees should be granted all rights enshrined in the Convention.
- Persons who do not fulfil the criteria of the refugee definition, but would be in danger of becoming victims to human rights violations if returned, should be granted proper protection including a chance to integrate into their host societies.

With regard to the situation at the borders and in neighbouring countries:

- The mandate of the EU Border Agency (FRONTEX) should ensure access to protection for those who claim that they are in need of it. A clause should be inserted into its governing regulation that explicitly calls for the termination of a FRONTEX operation in cases where a country to which apprehended migrants shall be returned to cannot be considered as safe.
- Mechanisms should be set into place that would allow for the effective and detailed control of FRONTEX activities by external actors, such as the European Parliament, but also the general public.

- The very precarious and unsafe situation of forced migrants in the neighbourhood of the EU – in Libya, Morocco, Algeria and Ukraine – should be taken into consideration. Cooperation on immigration control between the EU and its member states with countries of transit on must not result in preventing asylum seekers from access to asylum procedures and protection in Europe.
- Readmission and other cooperation agreements with third countries, whether concluded by the EU or a member state, must contain a human rights clause protecting the fundamental rights of all migrants including their economic, social and cultural rights.
- Forced returns to countries with which readmission and other cooperation agreements exist must be monitored in order to ensure that the human rights of returnees are protected.
- Forced return to a third country must be immediately stopped if the human rights of the affected migrants cannot be effectively protected.

With regard to the Dublin Regulation:

- Member states must provide asylum seekers with appropriate safeguards such as judicial remedy with suspensive effect, possibilities for personal interviews, complete information on Dublin procedures in an understandable language and access to legal assistance.
- The Dublin system must have built-in mechanisms to suspend transfers, on humanitarian grounds, to member states that cannot provide for an appropriate and safe asylum procedure.
- There needs to be a stronger human element within the Dublin system. Asylum seekers should be able to exercise greater personal control, since it is their fate that is being dealt with. Asylum seekers should be allowed to go to member states where they can thrive and integrate into society, and where they can feel safe.
- 'Family unity' should be used as a binding criterion for accepting responsibility to examine an asylum application, and the scope of 'the family' must be broadened to include extended relatives and familial networks.
- Asylum seekers should not be detained during their asylum procedure. Dublin procedures are inherently complex, and in a detention centre it is all the more difficult to understand them. People with vulnerable conditions should not be subject to the harmful environment of detention.

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[23] For examples see JRS Europe, *No Other Option: Testimonies from Asylum Seekers Living in Ukraine*, June 2011; JRS Europe, *Protecting refugees and asylum seekers stranded in Libya*, March 2011.

[24] Office of the Prime Minister of Malta, *Annual Reports of Government Departments 2009*, p.858.
[25] See Council conclusions on EU-Turkey Readmission Agreement and related issues, 24 Feb 2011.

[26] The use of the term "third country national" in this context can result in confusion. The Treaty on the Functioning of the European Union applies the term to every national of a country that is not a EU member state. The readmission agreements, on the other hand, and the Commission in their evaluation report, apply the term to persons who are neither EU citizens nor nationals of the other contracting party of the agreement. In the context of the readmission agreement with Pakistan, for instance, a Pakistani is not a third country national, but an Afghan citizen is.

[27] Communication from the Commission to the European Parliament and the Council: Evaluation of EU Readmission Agreements. COM(201) 76 final, 23 Feb. 2011 (in the following pages referred to as "Evaluation report").

[28] *Ibid* p.9.

[29] OJ EU no. C 303, 14 Dec. 2007, p. 1.

[30] Settled case law of the European Court of Human Rights, see, for instance, judgment of 15 Nov 1996 *(Chahal v United Kingdom, Reports of Judgments and Decisions 1996 V)*.

[31] Shue, Henry: *Basic Rights. Subsistence, Affluence, and U.S. Foreign Policy*. Princeton, NJ: Princeton University Press, (2nd edition) 1996, at p. 16.

[32] European Commission, Evaluation of EU readmission agreements Evaluation, p. 10.

[33] See, e.g., El Watan, 12.10.2011: Accord conclu entre l'Italie et le CNT Libyen.

[34] Amnesty International, Press release, 13 Oct. 2011: New Libya 'stained' by detainee abuse.

[35] See, e.g., ECtHR, judgment of 15 Febr. 2011, no.46134/08 *(Moghaddas v Turkey)*.

[36] Secretary emeritus of the Pontifical Council for the Pastoral Care of Migrants and Itinerant People.

[37] Benedict XVI, *Message on the occasion of the World Day of Migrants and Refugees* 2009: *Acta Apostolicae Sedis*, C (2008) 805.

[38] Pontifical Council for the Pastoral Care of Migrants and Itinerant People, Instruction *Erga migrantes caritas Christi*, nos. 20-23: *AAS* XCVI (2004) 772-774.

[39] Pius XII, *Encyclical Letter Redemptoris Nostri: AAS* XLI (1949) 161-164.

[40] Apostolic Constitution *Exsul Familia*: AAS XLIV (1952) 649-704.

[41] *Gaudium et Spes*, no. 4, 27, 84, l.c., 1027-1028, 1047-1048, 1107-1108 and, e.g., Benedict XVI, *WDMR 2006 "Migrations: a Sign of the Times": AAS* XCVII (2005) 981-983; *EMCC*, Part I.

[42] John Paul II, Apostolic Constitution on the Roman Curia *Pastor Bonus*, Art. 149: *AAS* LXXX (1988) 899.

[43] John Paul II, *Speech at the Refugee Camp in Morong, Philippines*, 21 February 1981, no. 3: *L'Osservatore Romano*, 22 February 1981, p. 3

[44] Benedict XVI, *Angelus*, 19 June 2005: O.R. Weekly Edition in English, 22 June 2005, p. 1.

[45] *Ibid.*

[46] *Ibid.* On a similar occasion the following year, Pope Benedict stated "the hope that the rights of these people will always be respected." (*Angelus*, 18 June 2006). He also expressed the "heartfelt wish that these brothers and sisters of ours … may be guaranteed asylum and the recognition of their rights" and invited "the leaders of Nations to offer protection to those who find themselves in such delicate situations of need" (*Appeal at the General Audience*, 20 June 2007). The Supreme Pontiffs naturally speak on behalf of the forcibly displaced not only on the occasion of UN World Refugee Days, but also and especially through their annual Messages for the Catholic celebration of the World Day of Migrants and Refugees. This fortunate

tradition dates back to the beginning of the XX century, even though at that time the Messages had not yet acquired a universal dimension. However, Paul VI pointed out that "it is not enough to recall principles, state intentions, point to crying injustice and utter prophetic denunciations; these words will lack real weight unless they are accompanied for each individual by a livelier awareness of personal responsibility and by effective action" (Paul VI, Apostolic Letter *Octogesima Adveniens*, no. 48: *Insegnamenti* IX [1971]1199).

[47] John XXIII, Encyclical Letter *Mater et Magistra*, no. 220: *AAS* LVIII (1961) 453; *Gaudium et Spes,* no. 66, *l.c.*, 1087-1088.

[48] *Mater et Magistra*, no. 219, *l.c.*, 453; cf. *EMCC*, 40-43, *l.c.*, 783-785.

[49] *EMCC*, 21, *l.c.*, 773: "Later on the Second Vatican Council worked out important directives for this particular pastoral work. It called on Christians in particular to be aware of the phenomenon of migration (*GS*, 65 and 66) and to realise the influence that emigration has on life. The Council reaffirmed the right to emigrate (*GS*, 65), the dignity of migrants (*GS*, 66), the need to overcome inequalities in economic and social development (*GS*, 63) and to provide an answer to the authentic needs of the human person (*GS*, 84). On the other hand the Council recognised the right of the public authorities, in a particular context, to regulate the flow of migration (*GS*, 87)"; *ibid.*, note 17, *l.c.*, 773. Our considerations here, however, are directly concerned with forced migrants, due to persecution or other forces beyond their control.

[50] Benedict XVI, *WDMR* 2007, 18 October 2006: *Insegnamenti di Benedetto XVI*, II, 2 (2006) 458-461; Pontifical Council for the Pastoral Care of Migrants and Itinerant People, Plenary Session on the theme "*The migrant family*", 13-15 May 2008: *People on the Move*, XL/107 (August 2008).

[51] John Paul II, Encyclical *Centesimus Annus*, no. 10: *AAS* LXXXIII (1991) 805-806.

[52] Encyclical *Sollicitudo rei socialis*, no. 40: *AAS* LXXX (1988) 568.

[53] Benedict XVI, *Appeal at the General Audience,* 20 June 2007.

[54] John Paul II, *Speech to the participants in the Third World Congress on the Pastoral Care of Migrants and Refugees*, Vatican City, 5 October 1991, no. 3 – O.R. Weekly Edition in English, 14 October 1991, p. 9: "The long-term planning of policies which promote solidarity must be accompanied by attention to the immediate problems of migrants and refugees who continue to press against the borders of the nations which enjoy a high level of industrial development ... It will be necessary to abandon a mentality in which the poor – as individuals and as peoples – are considered a burden, as irksome intruders … The advancement of the poor constitutes a great opportunity for the moral, cultural and even economic growth of all humanity … it is not enough … to open one's doors … and allow them to enter; one must also make it easier for them to become a real part of the society which receives them. Solidarity must become a daily experience of assistance, sharing and participation."

[55] Pontifical Council *Cor Unum* and Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Refugees, a Challenge to Solidarity*, no. 26, *Enchiridion Vaticanum* 13 (1991-1993) 1033.

[56] *EMCC*, 42. Cf. the whole Section of the Instruction on "Welcome and Solidarity", nos. 39-43.

[57] *Third World Congress*, no. 3, *l.c.*

[58] John Paul II, *Address to the UN High Commissioner for Refugees,* 25 June 1982, no. 7: *O.R.* Weekly Edition in English, 9 August 1982, p. 6.

[59] *Refugees*, no. 21, *l.c.*, 1031.

[60] Agostino Marchetto, Holy See Representative, *Statement at the 2001 Ministerial Conference*: *O.R.*, 16 December 2001, p. 2.

[61] Pontifical Council *Cor Unum* and Pontifical Council for the Pastoral Care of Migrants and Itinerant People, *Refugees*, *l.c.*

[62] *Third World Congress*, no. 4, *l.c.*

[63] EU Declaration on the 60th Anniversary of the 1951 Refugee Convention. Adopted at the 3121st Justice and Home Affairs Council meeting, Luxembourg, 27 and 28 October 2011.

Hakima Marina, an Afghan refugee in Ukraine.
Her story is on page 30 of this report.

Back Cover photo:
Somali refugees in Athens, Greece. According to the Somali community in Greece, refugees number around 1500. Housing is one of the biggest problems. Here Somalis live in dilapidated housing that is spread over several homes, often without water or electricity, with up to 10 people living in a small room. Problems intensify when there are small children.
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