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Position paper on the Right to Access to International Protection

Recommendations of the National Red Cross Societies of the Member States of the European Union and the International Federation of Red Cross and Red Crescent Societies¹

Over the recent years, EU Member States² have made preventing, controlling and combating irregular migration a priority, implemented through the adoption of national policies and legislation. This is carried out within the policy fields of Freedom, Security and Justice, as attested by, among other texts, the Stockholm Programme of December 2009, or more recently, the European Council Conclusions of 23/24th June 2011.

Operational experience of Red Cross National Societies as well as many reports on the situation of migrants outside EU borders have shown that the action taken by numerous EU Member States to prevent the illegal entry of migrants has not only an effect on irregular migration, but also seriously affects potential asylum seekers who are on their way to seek international protection in EU countries³. Also within EU territory, Member States have undertaken action which has restricted access to protection. Many people fleeing persecution and human rights violations in their countries of origin are finding it increasingly difficult if not impossible to reach a safe country where they can apply for international protection as provided by international fundamental rights instruments such as the 1951 Refugee Convention, the Charter of Fundamental Rights of the European Union⁴ and the European Convention on Human Rights⁵.

As a consequence of the reinforced and externalised border controls EU Member States are not fulfilling their obligations under International Law, International Refugee Law and Human Rights Law as well as EU Asylum Law⁶. To avoid the application of these legal provisions on refugees and asylum seekers, states are showing a growing and worrying tendency to shift their border protection and border control mechanisms and the first contact with migrants and possible asylum seekers as far away from their borders and territories as possible. Countries of origin are motivated (and financially supported) by the EU and its Member States to contribute to migration control by curtailing their outflow of migrants or readmitting those who have been expelled by EU Member States. Transit countries are asked to better control their borders, and countries such as Morocco and Libya become buffer zones to contain migration from sub-Saharan Africa. In this process, migration control is delocalized, taking place far away from the geographical location of

¹ Including the Norwegian Red Cross as members of the Red Cross/EU Office

² Although this position paper primarily refers to EU member states, similar problems can also be encountered in other European states.

³ Migreurop: 'European Borders: Controls, Detention and Deportations', 2009/2010 report (e.g. pp. 7, 63); Norwegian Helsinki Committee (NHC), Norwegian organization for asylum seekers (NOAS), Aitima: 'Out of the backdoor: The Dublin II regulation and illegal deportations from Greece', October 2009 (e.g. p. 16);

European Union Agency for Fundamental Rights (FRA): 'Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner', 2011 (e.g. p. 20 para. 3);

UNHCR: 'Observations on Greece as a country of asylum', December 2009 (e.g. p. 4).

⁴ See Articles 18 and 19.

⁵ See Article 3.

⁶ Human Rights Watch: 'Rights on the Line – Human Rights Watch Work on Abuses against Migrants in 2010', December 2010 report; Human Rights Watch: 'Rights Displaced – Forced Returns of Roma, Ashkali and Egyptians from Western Europe to Kosovo', October 2010 report; Amnesty International: 'Greece: Irregular Migrants and Asylum-Seekers routinely detained in substandard conditions', July 2010 report.



EU borders.⁷ Another way for the EU and its Member States to prevent migration flows is to persuade (potential) migrants to stay in their countries of origin rather than moving on to European territory, e.g. by information and awareness raising campaigns.

It has further been reported that European border patrol units intercept vessels with migrants (among them substantial numbers of potential asylum seekers) on the high seas, well outside their territories, and force them to turn around and return to the country from which they came without examining their protection needs⁸. This happens despite the fact that the extraterritorial application of the 1951 Refugee Convention, especially the principle of non-refoulement, is widely accepted in International Human Rights Law.⁹

According to the principle of non-refoulement it is not allowed to expulse, deport or return persons to territories where they face the threat of persecution, torture or arbitrary violations of the right to life or irreparable harm¹⁰. It is also prohibited to return a person to a transit country where the person is at risk of being returned to another country where he/she faces persecution or other serious harm (chain refoulement). Respect for the principle of non-refoulement requires that before returning a person to the country from which he/she has crossed the border in an irregular manner, an individual assessment is made in order to determine if the person seeks or may be in need of international protection or if there are other reasons which prohibit a return¹¹.

During the first half of 2011 alone, an estimated number of more than 2,500 migrants lost their lives when trying to cross the Mediterranean Sea.¹² The real number of dead migrants in the Mediterranean is unknown. Similar humanitarian concerns have been reported at certain European land borders where potential asylum seekers have been pushed back across the borders without being given a chance to apply for asylum with tragic consequences for migrants themselves.¹³ Even more alarming are recent reports of European border patrol units ignoring migrants in obvious situations of distress, denying them the necessary lifesaving help and thereby risking or directly causing the loss of life of vulnerable people.¹⁴

⁷ Communication from the Commission to the Council and the European Parliament: 'The Hague Programme: Ten priorities for the next five years The Partnership for European renewal in the field of Freedom, Security and Justice', COM/2005/0184 (item 10, para. 4).

⁸ Human Rights Watch: 'Pushed back, pushed around: Italy's forced return of boat migrants and asylum seekers, Libya's mistreatment of migrants and asylum seekers', September 2010 report;
Human Rights Watch: 'No Refugee – Migrants in Greece', November 2009 report;
Amnesty International: 'Libya of tomorrow: What hope for human rights?', 2010 report (Chapter 5);
United Nations High Commissioner for Human Rights: 'The situation of migrants and asylum-seekers fleeing recent events in North Africa' (A/HRC/18/54), September 2011 (e.g. p. 7).

⁹ Submission by the Office of the United Nations High Commissioner for Refugees in the Case of *Hirsi and Others v. Italy* (Application no. 27765/09), pp. 9, 10 with further references.

¹⁰ See Article 33 of the Convention Relating to the Status of Refugees July 28th 1951 and the Protocol relating to the Status of Refugees, Oct. 4th 1967; Article 3 ECHR; Article 19 of the Charter of Fundamental Rights of the European Union; Article 3 of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

¹¹ European Union Agency for Fundamental Rights: 'Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner', 2011 (pp. 19, 20).

¹² See UNHCR: <http://www.unhcr.org/4e69fec09.pdf>, <http://www.unhcr.org/mt/index.php/news-and-views/2011-world-refugee-day/380-commemorating-refugees-who-lost-their-lives-at-sea>.

¹³ European Union Agency for Fundamental Rights: 'Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner', 2011 (e.g. p. 20);

Amnesty International: 'The Dublin II Trap – Transfers of Asylum-Seekers to Greece', March 2010;
Human Rights Watch: 'No Refugee – Migrants in Greece', November 2009 report (e.g. p. 9).

¹⁴ The Guardian: May 8th 2011, 'NATO Units left 61 African migrants to die of hunger and thirst'; Reuters: May 9th 2011, 'NATO, France deny failing to save Libya migrants', <http://www.reuters.com/article/2011/05/09/us-libya-nato-migrants-idUSTRE74836P20110509>; The Council of Europe's Parliamentary Assembly is working on an enquiry into these and other allegations. http://assembly.coe.int/ASP/NewsManager/EMB_NewsManagerView.asp?ID=6899.



Agreements between EU Member States and neighbouring countries in certain cases even (e.g. in North Africa¹⁵) provide European border patrol units with the possibility to operate within the territory of the neighbouring state (often supported by the forces of the neighbouring state) and to intercept migrants already there – even further removed from the implementation of EU refugee protection law and standards. Humanitarian concerns are further aggravated by the increasing institutionalisation of these border control mechanisms and practices through the build-up of competences and capacities of the EU border control agency "Frontex"¹⁶. In this context, „Integrated Border Management“ and „Operation Poseidon“ which Frontex carried out to assist with the protection of Greek borders against immigration, might be mentioned as examples.

In conclusion, the efforts of EU Member States to prevent, control and combat irregular migration, as described briefly above, often take place without paying regard to the rights of asylum seekers, to the principle of non-refoulement and other international obligations and without consideration for the usually very poor legal and human rights situation for asylum seekers and refugees in the partner countries with which EU Member States cooperate in their border protection efforts. Thereby EU Member States have effectively been denying many migrants their right to access to international protection and to a fair status determination procedure.

The Red Cross EU Office therefore, in line with the Fundamental Principles of the RC/RC Movement, specifically the Principles of Humanity and Impartiality, and considering the humanitarian mission of the RC/RC to help vulnerable people,

1. reminds all EU Member States, the EU and their agencies of their obligations under EU and International Law, International Refugee Law and Human Rights Law
2. further reminds all EU Member States, the EU and their agencies that they are obliged to apply this law not only within their territories, but wherever and whenever they exercise effective control over potential asylum seekers
3. stresses that it is entirely unacceptable to deny necessary humanitarian assistance to persons who are in distress and in need of help and urges all EU Member States, the EU and their agencies to provide all vulnerable migrants with all necessary support and help to effectively protect their lives, dignity and health
4. urges all EU Member States, the EU and their agencies to meticulously apply all provisions of EU and International Refugee and Human Rights Law with regard to all potential asylum seekers and to effectively guarantee their right to seek asylum and to a fair asylum procedure in accordance with the rule of law
5. encourages all EU Member States, the EU and their agencies to consider establishing safe and effective ways to enter European territory legally in order to seek asylum within the EU to avoid human suffering and numerous deaths along EU borders.

¹⁵ The 'Treaty of Friendship, Partnership and Co-operation' and the 'Additional Technical-Operational Protocol', signed in August 2008 between Italy and Libya (texts have not been made publicly available); 1992 readmission agreement between Spain and Morocco and 2007 readmission agreement between Spain and Morocco (allows Spain to repatriate unaccompanied Moroccan children; see <http://www.unhcr.org/refworld/docid/47a87c0cc.html>).

¹⁶ European Union Agency for Fundamental Rights: 'Coping with a fundamental rights emergency – The situation of persons crossing the Greek land border in an irregular manner', 2011 (e.g. p. 20).