Joint Briefing on the European Commission Proposal for a Regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union

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1. Introduction

Ever more restrictive border controls and entry policies in the EU, force people attempting to gain access to the territory of an EU Member State into increasingly dangerous journeys, often putting their lives at risk. As a result, in recent years, many asylum seekers, refugees and other migrants have lost their lives in the Mediterranean Sea trying to reach the southern shores of the EU. In January 2012, the United Nations High Commissioner for Refugees (UNHCR) and the Parliamentary Assembly of the Council of Europe (PACE) estimated that more than 1,500 refugees, asylum seekers and other migrants drowned or went missing in 2011 while attempting to cross the Mediterranean Sea.[1]

The EU's border agency Frontex has been increasingly involved in coordinating and now, following the entry into force of Regulation (EU) No 1168/2011 amending Council Regulation (EC) No 2007/2004, also in initiating and carrying out joint operations at sea.[2] In an attempt to provide clearer common rules and operational procedures, and "with due regard to ensuring protection to those in need who travel in mixed flows",[3] the Council adopted a decision in 2010 providing a set of binding and non-binding rules relating to interception and rescue at sea as well as disembarkation.[4] Following an action brought by the European Parliament seeking the annulment of the above-mentioned Council decision before the Court of Justice of the European Union (CJEU),[5] the Court annulled the decision, inter alia, on the ground that it introduced new essential elements in Regulation (EC) No 562/2006 (Schengen Borders Code, hereinafter SBC)[6] in excess of its powers under the "comitology" procedure.[7] The Court held in particular that "the adoption of rules on the conferral of enforcement powers on border guards" may interfere with the fundamental rights of the persons concerned, and therefore "entails political choices falling within the responsibilities of the European Union legislature".[8] At the same time, the CJEU decided to maintain the "effects" of the decision until its replacement by new rules within a reasonable time.[9]

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[1] Quoted in Fundamental Rights Agency, Fundamental Rights at Europe's southern sea borders, 2013, at p. 30 and in *Lives lost in the Mediterranean Sea: Who is responsible*, report of Ms Strik to the Parliamentary Assembly of the Council of Europe, Doc. 12895, 5 April 2012. See Resolution 1872(2012) of the Parliamentary Assembly of the Council of Europe on the case in which failure to react to distress calls in the Mediterranean sea caused the death of 63 people fleeing Libya.

[2] Article 3(1), Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011 L 304/1.

[3] European Council, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, section 5.1, *OJ* 2010 C 115/1.

[4] Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (hereinafter 2010 Council Decision supplementing the Schengen Borders Code), OJ 2010 L 111/20.

[5] The European Parliament pleaded that the Council Decision exceeded the limits of the implementing powers laid down in Article 12(5) of the Schengen Borders Code (SBC), in so far as they did not constitute "additional measures governing surveillance" in general, but specific rules on reinforcing border surveillance and/or refusal of entry at the external sea borders, including granting border-guards far-reaching enforcement powers, and extending the territorial scope of the SBC to "contiguous zones and the high seas", while not ensuring the rights granted to persons intercepted on the high seas to claim asylum and associated rights according to Article 13 SBC.

[6] Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ 2006 L 105, as amended by Regulation (EC) No 296/2008, OJ 2008 L 97; Regulation (EC) No 81/2009, OJ 2009 L 35; Regulation (EC) No 810/2009, OJ 2009 L 243 and Regulation (EU) No 265/2010, OJ 2010 L 85.

[7] See an explanation of "comitology" procedure here http://europa.eu/legislation_summaries/glossary/comitology_en.htm.

[8] CJEU, Case C- 355/10, *European Parliament v. Council of the European Union*, Judgment of 5 September 2012, paras. 76 and 77.

[9] CJEU, Case C- 355/10, *European Parliament v. Council of the European Union*, Judgment of 5 September 2012, paras. 89 and 90.

Following from the CJEU ruling, the proposal for a Regulation establishing rules for the surveillance of the external sea borders in the context of Frontex operations aims to replace the 2010 Council Decision. While the current Commission proposal builds to a great extent on the annulled Council Decision, it also purports to take account of legal and judicial developments concerning the protection of human rights, including the amended Frontex Regulation and the judgment of the Grand Chamber of the European Court of Human Rights (ECtHR) in the case of *Hirsi Jamaa and Others v. Italy*.[10] Changes to the Council Decision were also motivated by the "need to ensure clarity as regards the concepts of interception and rescue" and were based on "the practical experiences of Member States and the Agency when implementing this decision".[11]

Amnesty International, the European Council on Refugees and Exiles and the International Commission of Jurists (hereinafter the undersigned organizations) acknowledge that the Commission proposal contains a number of improvements to the 2010 Council Decision, including the introduction of more extensive provisions on the protection of human rights and the principle of *non-refoulement* (Article 4), and a clearer definition of "a situation of uncertainty", "situation of alert" and "situation of distress" (Article 9). It is notable that the proposal explicitly requires that "the existence of a distress situation shall not be exclusively dependent on or determined by an actual request for assistance", implying an obligation for participating units to take active measures to ensure the safety of the persons concerned, and reflecting existing international law obligations in this regard. The proposal also usefully affirms the fact that the concept of border surveillance under EU law clearly includes measures to ensure that search and rescue operations can be carried out effectively during sea operations, as it is mandated by the international law of the sea.[12] Finally, contrary to the Council Decision, the provisions contained in the Regulation would be fully binding on Member States for operations conducted under the auspices of Frontex.

Despite these positive elements, the undersigned organizations consider that other aspects of the Commission's proposal fail to meet the requirements of international law, including refugee law, human rights law, the law of the sea and EU law. This briefing presents our key concerns, including in respect of how the proposed Regulation potentially contravenes the principle of *non-refoulement* as established in international human rights law and jurisprudence (section 2); the lack of clear guarantees to ensure access to a fair and effective asylum procedure in practice (section 3); the risk of the proposal legitimizing the practice of "push-backs" at sea; and the lack of arrangements to address legitimate concerns arising from the disembarkation in EU Member States and third countries whose asylum systems are affected by systemic deficiencies (section 4/5).

At the outset, the briefing briefly discusses the relevance of the ECtHR's main findings in the case of *Hirsi Jamaa and Others v. Italy* (hereinafter *Hirsi*) with respect to the *non-refoulement* obligations of EU Member States and Frontex in the context of operations at sea. The undersigned organizations stress that, under this judgment, and in accordance with international law, including international human rights law, operations constituting what are sometimes referred to as "push-backs" are prohibited as they constitute violations of the prohibition of collective expulsion, and seriously risk breaching the principle of *non-refoulement*.

[10] EctHR, *Case of Hirsi Jamaa and Others v. Italy*, Application No 27765/09, Judgment of 23 February 2012.
[11] COM proposal, Explanatory Memorandum, para. 5.1.
[12] See for instance the United Nations Convention on the Law of the Sea (UNCLOS), Article 10, the 1974 International Convention for the Safety of Life at Sea (SOLAS) and the 1979 International Convention on Maritime Search and Rescue.

The case of *Hirsi Jamaa and Others v. Italy*

The case of *Hirsi Jamaa and Others v. Italy* concerned the May 2009 interception by the Italian authorities, on the high seas and within the Maltese search and rescue zone, of 24 Somali and Eritrean nationals who were part of a group of about "200 migrants" who left Libya with the aim of reaching the Italian coast. The group was transferred from their vessel to Italian military ships and forcibly transferred back to Libya under the *Treaty on Friendship, Partnership and Cooperation between Italy and Libya*. They were sent back and handed over to the Libyan authorities without being identified and informed of their real destination, without access to legal assistance, and without having had an opportunity to submit reasons militating against their being sent back to Libya, or to challenge the decision to be returned by lodging a complaint with a competent authority and obtaining a thorough and rigorous assessment of their requests before the removal measure was enforced. The Italian government asserted that the transfer had occurred in accordance with bilateral agreements with Libya; further, it sought to circumvent Italy's responsibilities under the Convention by referring to its obligations under those agreements.

The Grand Chamber handed down its landmark judgment in this case in February 2012. The importance of this judgment with regard to States' obligations under the European Convention on Human Rights (ECHR) when conducting border control operations at sea cannot be overstated.

First, the Court re-affirmed that States are under an obligation to secure the rights and freedoms under the Convention to any individual who comes within the jurisdiction of the State Party, including when States, albeit operating extraterritorially, exercise control and authority over that individual. The Court ruled that "Italy cannot circumvent its jurisdiction, and evade its obligations under the Convention, by describing the events at issue as rescue operations on the high seas. In particular, the Court cannot subscribe to the Government's argument that Italy was not responsible for the fate of the applicants on account of the allegedly minimal control exercised by the authorities over the parties concerned at the material time" (§79). As a result, the Court unambiguously affirmed that human rights obligations of States under the Convention, including the non-derogable prohibition of *refoulement,* apply on the high seas, *i.e.* extraterritorially, wherever the State concerned exercises control and authority over the individuals concerned.

Secondly, in finding a violation of Article 3 ECHR as well as Article 13 in conjunction with Article 3, the Court attached great importance to the absence of basic procedural guarantees on board the Italian vessels, without which compliance with the principle of *non-refoulement* and the right to an effective remedy cannot effectively be guaranteed. The Court reaffirmed that in all circumstances, including in the context of interception on the high seas, the remedy required by Article 13 must be effective in practice as well as in law. This implies that an applicant's complaint alleging that his or her removal to a third State would expose him or her to treatment prohibited under Article 3 ECHR must be subject to independent and rigorous scrutiny by a competent authority and that the remedy must have suspensive effect. In the case of *Hirsi*, the Court pointed in particular to the fact that "the applicants had no access to a procedure to identify them and to assess their personal circumstances before they were returned to Libya" and that there were "neither interpreters nor legal advisers among the personnel on board [the Italian military ships]" (§202). Furthermore, the failure to provide the persons intercepted with information about their destination, or with any access to relevant procedures to challenge their forcible return to Libya was highlighted by the Court in the following terms: the Court "reiterates here the importance of guaranteeing anyone subject to a removal measure, the consequences of which are potentially irreversible, the right to obtain sufficient information to enable them to gain effective access to the relevant procedures and to substantiate their complaints" (§204).

Thirdly, the Court explicitly stated that the obligations of States under Article 3 ECHR apply regardless of whether the person intercepted has explicitly applied for asylum. According to the Court, it was for the Italian authorities, faced with a situation in which human rights were being systematically violated, to "find out about the treatment to which the applicants would be exposed after their return" (§133) and to ascertain "how the Libyan authorities fulfilled their international obligations in relation to the protection of refugees" (§157).

Finally, the Court found for the first time that Article 4 of Protocol 4, prohibiting the collective expulsion of aliens, applies to cases involving the removal of aliens to a third State carried out extraterritorially. As the main purpose of this provision is to prevent States from removing aliens without examining their personal circumstances and enabling them to put forward arguments against their removal, here too the Court attached great importance to the lack of any identification procedure and in this respect, noted in particular, the absence of personnel to conduct individual interviews, interpreters and legal advisers on board the military ships (§183 – 186).

2. **Scope of the prohibition on *refoulement***

The principle of *non-refoulement*, prohibiting States from transferring anyone, whether directly or indirectly,[13] to a place where he or she would have a well-founded fear of persecution[14] or would face a real risk of other serious violations of human rights,[15] is a fundamental principle of international law and one of the strongest limitations on State control over entry and stay in their territory and on State exercise of control or authority extraterritorially. It has its origin in international refugee law[16] but it also has a central place in international human rights law, as well as the EU Charter of Fundamental Rights (hereinafter EU Charter).[17] While under international refugee law the principle of *non-refoulement* applies only to those presumptively entitled to international protection, *i.e.* asylum-seekers, as well as to recognized refugees and others entitled to other forms of international protection, under international human rights law, as enshrined in several universal and European instruments, including the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter United Nations Convention Against Torture or CAT), the ECHR and the EU Charter (Articles 4 and 19(2)), it applies to both nationals and non-nationals, including migrants, whatever their immigration status. Furthermore, the principle of *non-refoulement* applies both territorially and extraterritorially when an EU actor or a Member State exercises control and authority over a concerned person, as explained below.

The undersigned organizations are concerned that, as currently referenced throughout the present draft Regulation, the interpretation of the principle of *non-refoulement* advanced by the drafters appears to be overly restrictive. In light of this, the undersigned organizations are concerned that the present draft Regulation would allow violations of States' *non-refoulement* obligations under international law.

Recital 5 obliges any measure undertaken under the Regulation to be in full respect of "the rights of refugees and asylum seekers, including the principle of *non-refoulement*". The referencing of the principle solely in connection with refugees and asylum seekers could be interpreted as suggesting that only these categories of people are entitled to benefit from the protection against *refoulement*. In the view of the undersigned organizations, this risks consolidating in EU law a misinterpretation of a core principle of international human rights law that, as demonstrated above, is meant to cover **everyone** subject to the jurisdiction of the Member States, regardless of their status.

In addition, Recital 5 states that "Member States and the Agency are bound by the provisions of the asylum *acquis* [...] with regard to applications for asylum made in their territory, including at the border or in the transit zones of Member States". This could suggest that asylum law obligations do not apply to situations in contiguous zones or on the high seas, in potential contradiction with the principle of *non-refoulement*. This is particularly worrying, when read in conjunction with Article 10(3), which allows Member States and Frontex to disembark intercepted or rescued persons in the third country from which the ship departed (section 4.3.2). Although Article 10(3) is conditional upon respect of the conditions laid down in Article 4, the sentence above may suggest that all the other conditions laid down in that article shall apply except for those related to the application of the asylum *acquis*, which would apply only to asylum applications made in the territorial sea, and not to situations on the high seas. The undersigned organizations recall that, although the EU asylum *acquis* binds Member States only in respect of applications for asylum made in the territory,

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[13] The ECtHR has found States liable in cases of indirect *refoulement* -- also known as chain *refoulement* (see, inter alia, *M.S.S. v Belgium and Greece*, Application No. 30696/09, 21 January 2011, §§192, 286, 300, 321) -- as well as constructive *refoulement* (*M.S. v. Belgium*, no. 50012/08, 31 January 2012, where the Court found that the applicant could not be regarded as having validly waived his right to the protection against *refoulement* guaranteed by Article 3).

[14] The threat of harm may emanate from the State or from non-State actors. See, for example, UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, paragraph 34: "There is scope within the refugee definition to recognize persecution emanating from both State and non-State actors".

[15] The ECtHR has recognised that the prohibition against *refoulement* extends to circumstances where the risk to an individual emanates from non-State actors as well as from States (see, e.g., *H.L.R. v France*, Application No. 24573/94, Judgment 29 April 1997, §40; and *D v. United Kingdom*, Reports of Judgments and Decisions 1997-III) (1998), 2 May 1997, §49).

[16] Article 33, *Geneva Refugee Convention*; and Article 2(3), *OAU Refugee Convention*. Article 3, *Convention relating to the International Status of Refugees*, League of Nations, adopted on 28 October 1933, Treaty Series Vol. CLIX No. 3663; Article 4, *Provisional Arrangement concerning the status of refugees coming from Germany of 4 July 1938*; Article 5, *Convention concerning the status of refugees coming from Germany,* League of Nations, adopted on 10 February 1938. On the customary nature of *non-refoulement* see, UNHCR, *The Principle of* Non-Refoulement *as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 Bvr 1953/93, 2 BvR 1954/93*, 31 January 1994; UNHCR, *Advisory Opinion on the Extraterritorial Application of* Non-Refoulement *Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 15. See also, *Conclusion No. 6 (XXVIII) Non-Refoulement*, ExCom, UNHCR, 28th Session, 1977, para. (a).

[17] See, Article 1 ECHR, Article 2 ICCPR, Articles 4 and 19(2) EU Charter. The United Nations Convention Against Torture expressly provides for the prohibition of *non-refoulement* in its Article 3. See, for example, *Soering v. United Kingdom,* ECtHR, Plenary, Application No. 14038/88, 7 July 1989, para. 87. Explicitly codified in, inter alia, Article 3, United Nations Convention Against Torture; Art 16, International Convention for the Protection of All Persons from Enforced Disappearance (ICED); Article 19, Charter of Fundamental Rights of the European Union; Article 33, 1951 Convention relating to the Status of Refugees; and Principle 5, UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions.

including at the border or in the transit zones of the Member States, the principle of *non-refoulement* binds them extraterritorially, including on the high seas. Furthermore, as mentioned above, the principle is also enshrined in the EU Charter, both in its substantial (Articles 1, 2, 4, 5, 6, 18 and 19(3)) and procedural dimensions (Article 47). As regards the application of the EU Charter, Article 51(1) of the Charter states that it applies to the EU and Member States when they are implementing EU law.[18] As the operations subject to this proposed Regulation will be governed by EU law, the EU Charter obligations will bind Member States both territorially and extraterritorially, including in non-territorial waters and on the high seas. Finally, Articles 52 and 53 of the Charter recall that its provisions must be interpreted in compliance with the ECHR while not detracting from other international human rights law obligations.

In respect of international human rights law, the principle of *non-refoulement* has been found by international courts and tribunals to apply to risks of violations of the prohibition of torture and cruel, inhuman or degrading treatment or punishment, the right to life, and flagrant denial of fair trial and arbitrary detention. The ECtHR has consistently found that a number of Convention rights entail, implicitly, an obligation not to transfer (*refouler*) people when there are substantial grounds for believing that they would face a real risk of violations of those rights in the event of their deportation, expulsion, extradition, handover, return, surrender, transfer or other removal from the State's jurisdiction.[19] The United Nations (UN) Human Rights Committee has affirmed that *non-refoulement* obligations arise in respect of a real risk of serious human rights violations, including, but not limited to, violations of the right to life, the prohibition of torture and other cruel, inhuman or degrading treatment or punishment and the right to liberty and security of person under Articles 6, 7 and 9 of the ICCPR.[20] Under Article 3(1) of the CAT, "[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture". Both the ICCPR and the CAT are binding on all EU Member States, as all Member States are parties to those instruments. Therefore, *non-refoulement* obligations would arise in connection with a real risk of any other serious violations of human rights.[21] The ECtHR has held that *non-refoulement* protects "the fundamental values of democratic societies"[22] amongst which it has included the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, the right to life,[23] and fundamental aspects of the rights to a fair trial[24] and to liberty.[25]

The undersigned organizations note that a fully-fledged definition of the principle of *non-refoulement* is absent in the present draft of the Regulation, although the text often refers to the principle. This could lead to the application of an inaccurate and outdated definition of this principle, with consequent breaches of the obligations of the EU and Member States under the EU Charter and the ECHR (by which the EU will also be bound following accession), and universal treaties such as the ICCPR and the CAT.

[18] Article 51(1), EU Charter: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

[19] This principle was first recognised in the context of Article 3, *Soering v. UK*, Application no. 14038/88, 7 July 1989, §88. *Non-refoulement* obligations have arisen equally in respect of the right to a fair trial (see *Soering*, §113; see, also, *inter alia*, *Mamatkulov and Askarov v. Turkey* [GC], nos. 46827/99 and 46951/99, 4 February 2005, §§90 and 91; *Al-Saadoon and Mufdhi*, §149; *Bader and Kanbor v. Sweden,* no. 13284/04, 8 November 2005, §47; *Al-Moayad v. Germany* (dec.), no. 35865/03, 20 February 2007, §§100 and 102; *Ahorugeze v Sweden*, no. 37075/09, 27 October 2011, §§113-116; and *Othman (Abu Qatada) v UK*, no. 8139/09, 17 January 2012, §§258-285.

[20] Human Rights Committee (HRC), General Comment (GC) No. 31, (CCPR/C/21/Rev.1/Add.13, 26/05/2004) §12; and *G.T. v. Australia*, CCPR/C/61/D/706/1996, 4 December 1997, §8.7.

[21] For example, in *Tomic v. UK* (Application no. 17837/03, Admissibility decision, 14 October 2003), the ECtHR considered the possibility that being exposed to a risk of arbitrary or unfair procedures reaching a certain level of flagrancy would raise an issue under Article 5; something which it reiterated in *Z and T v UK* (Admissibility Decision, Application no. 27034/05, 28 February 2006).

[22] *Saadi v. Italy,* ECtHR, *op. cit.*, fn. 308, para. 127; *Chahal v. the United Kingdom*, ECtHR, *op. cit.*, fn. 43, para. 79.

[23] *Bader and Kanbor v. Sweden*, ECtHR, Application No. 13284/04, Judgment of 8 November 2005, para. 48 (finding that deportation of the applicant to face execution would violate Article 2 ECHR as well as Article 3 ECHR).

[24] *Othman (Abu Qatada) v UK*, ECtHR, Application no. 8139/09, 17 January 2012, §§258-285*, Al-Moayad v. Germany*, ECtHR, Application No.35865/03, Admissibility Decision, 20 February 2007, paras. 100-102.

[25] See, for example, *Othman (Abu Qatada) v. UK*, ECtHR, Application no. 8139/09, 17 January 2012, §§258-285*, Z and T v. United Kingdom*, ECtHR, Application No. 27034/05, Admissibility Decision, 28 February 2006, The Law.

The undersigned organizations therefore recommend the insertion of a **specific recital in the preamble on the principle of *non-refoulement***, after Recital 4, stating that this principle must be applied in full compliance with EU law, and relevant international law and jurisprudence, including the European Convention on Human Rights (ECHR), the International Covenant on Civil and Political Rights (ICCPR), the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the 1951 Geneva Refugee Convention, and other relevant instruments of international law as well as the EU Charter of Fundamental Rights.

In this respect, the undersigned organizations consider the wording of **Recital 6** particularly worrying as it purports to define *non-refoulement* and seems to extend the mentioning of "systemic deficiencies", to which the CJEU had made reference in the case of *N.S. and M.E.* regarding Member States' obligations under Article 3(2) of the 2003 Dublin Regulation (sovereignty clause), to situations in third countries.[26] In the case of *N.S. and M.E.*, the CJEU ruled that Member States are under an obligation not to transfer an asylum seeker to another Member State or Schengen Associated State "whenever they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman and degrading treatment within the meaning of Article 4 of the Charter".[27] By paraphrasing this ruling in the context of arrangements between a Member State and a third country, Recital 6 risks undermining the principle of *non-refoulement* as established by the ECtHR, which does not necessarily require the existence of "systemic deficiencies" in the country of destination for the principle of *non-refoulement* to be engaged but rather the existence of "substantial grounds for believing that the [concerned person] would face a real risk of being subjected to torture or inhuman and degrading treatment or punishment" or the death penalty or any other serious violations of their human rights. It is important to recall that the Court of Strasbourg held in *Hirsi* that Italy could not evade its responsibility under the Convention by referring to its subsequent obligations arising out of bilateral agreements with Libya. Moreover, the undersigned organizations consider the mere mention of "systemic deficiencies" from the *N.S. and M.E.* judgment of the CJEU to be misleading and inapposite to the object and purpose of this Regulation, since that judgment pertains only to considerations arising in connection with transfers within the EU or with Schengen Associated States, and not to potential transfers to non-EU or non-Schengen Associated States.

Furthermore, as currently formulated, Recital 6 refers explicitly only to asylum-seekers, as if the principle of *non-refoulement* were to protect only this category of individuals. As stated above, this principle offers protection without distinction to asylum-seekers, refugees, other migrants, and any other person irrespective of their immigration or other status. The current wording would also conflict with the language contained in Article 4(1) of the draft Regulation which says that "no person" (meaning with no distinction between migrants, refugees and asylum-seekers) shall be disembarked or handed over to [...]".

The undersigned organizations recommend that the above-referenced part of Recital 6 be deleted. The recital should also be amended to include the following sentence:

"**The existence of an arrangement between a Member State and a third country cannot absolve Member States from their international obligations under the principle of *non-refoulement* according to which no persons shall be expelled to any country, territory or other place where they would face a real risk of being subjected to torture or inhuman and degrading treatment or punishment, or the death penalty or any other serious violation of their human rights"**.

The wording in Article 4(1) of the draft Regulation, relating to the principle of *non-refoulement*, albeit taken directly from Article 19(2) of the EU Charter, does not accurately reflect the principle of *non-refoulement* under international human rights law. According to the jurisprudence of the ECtHR on the principle of *non-refoulement*, a person should not be transferred towards a country where there are "substantial grounds for believing that the person would face a serious risk of being subjected" to a serious violation of human rights.

[26] CJEU, Joined Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department and M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, Judgment of 21 December 2011 (hereinafter *N.S. and M.E.)*
[27] *Ibid.*, para. 94.

The undersigned organizations also recall that the CJEU uses the same standards when interpreting the principle of *non-refoulement* under Article 4 of the EU Charter: "substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment".[28] The undersigned organizations recall that under Articles 52(3) and 53 of the EU Charter, the obligations arising from the EU Charter are to be interpreted and implemented in accordance with the ECHR and the jurisprudence of the ECtHR and can in no way diminish the guarantees established therein.

Finally, Article 4(1) of the draft Regulation does not include a reference to the prohibition of collective expulsion, an absolute obligation enshrined in Article 4 of Protocol 4 ECHR and in Article 19(1) of the EU Charter. As held by the European Court of Human Rights in the *Hirsi* case, "the purpose of Article 4 of Protocol 4 is to prevent States being able to remove certain aliens without examining their personal circumstances and, consequently, without enabling them to put forward their arguments against the measure taken by the relevant authority".[29]

The undersigned organizations stress the importance of including a reference to the prohibition of collective expulsion in the present draft Regulation, in order to effectively ensure compliance with the *Hirsi* judgment as is stated in the Explanatory Memorandum, and with the EU Charter, which applies to all operations conducted by or under the authority of Frontex, as they are carried out in implementation of EU law and by or under the authority of an EU agency.

The undersigned organizations therefore recommend redrafting Article 4(1) in the following terms:

"No person shall be disembarked in, or otherwise handed over to the authorities of a country**, or otherwise conducted towards a country**, place or territory where there **are substantial grounds for believing that she or he would face a real risk of being subjected to torture or inhuman and degrading treatment or punishment, or the death penalty or any other serious violation of her or his human rights** or where there **are substantial grounds for believing that such a person might be expelled, removed or extradited** to another country, place or territory in contravention of the principle of *non-refoulement*. **Equally, no person shall be disembarked in, or otherwise handed over to the authorities of a country, or otherwise conducted towards a country, place or territory where his or her life or freedom would be threatened on account of his or her race, religion, nationality, membership of a particular social group or political opinion**. **Collective expulsions are prohibited"**.

3. Access to procedures and procedural safeguards

The European Court's judgment in the case of *Hirsi Jamaa and Others v. Italy* has underscored how interception or rescue at sea operations of third country nationals who may or may not be eligible for international protection inevitably entail the participating States' *non-refoulement* obligations, as well as the right of the individuals concerned to access adequate and effective procedures to substantively assess their eligibility for international protection.

In case of interception or rescue in the territorial waters of an EU Member State, the recast Asylum Procedures Directive applies. Article 3(1) recast Asylum Procedures Directive and recast Reception Conditions Directive now explicitly include applications for international protection made in the territorial waters of the Member States.[30] Following the judgment in *Hirsi*, "application for international protection" must be interpreted broadly in the context of interception or rescue at sea and should not be limited to situations where those intercepted or rescued explicitly request international protection as the Court found that a State's obligation to respect the principle of *non-refoulement* applies regardless of such an explicit request. Procedural safeguards and reception conditions, as laid down in EU legislation, must therefore, without any exception, be guaranteed to the individuals concerned.

Some of the provisions in the Commission's proposal may interfere with these obligations to the extent that they could render the right to access these rights meaningless in practice.

[28] CJEU, *N.S. and M.E.*, para. 106.
[29] *Hirsi Jamaa and Others v. Italy*, para. 177.
[30] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), *OJ* 2013 L 180/60.

Whereas a restrictive interpretation of the scope of the EU asylum *acquis* may seem to exclude its application to interception and rescue on the high seas and in the contiguous zones, the undersigned organizations stress that the principle of *non-refoulement* and the guarantees attached to it under international law must be fully respected in all circumstances, as described in section 2. Following the jurisprudence of the European Court of Human Rights in the case of *Hirsi Jamaa and Others v. Italy*, this requirement necessitates the observance of a number of procedural safeguards to ensure that Member States' obligations under Articles 3 and 13 ECHR as well as Article 4 Protocol 4 to the ECHR are respected in practice. As shown above, the ECtHR has identified in particular access to information on how to access the relevant procedures, access to legal assistance and adequate interpretation as key safeguards to ensure effective protection from *refoulement*.

The Commission's proposal usefully includes an obligation for the participating units to "inform the intercepted or rescued persons of the place of disembarkation in an appropriate way" and to "give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*".[31] It also includes the important reference to the need for an assessment of the general situation in a third country and of the personal circumstances of the intercepted or rescued persons in view of disembarkation in a third country. However, the Commission's proposal remains silent with regard to the need to ensure that intercepted and rescued persons have effective access to adequate interpretation and legal assistance, as well as to an effective remedy, as required by Article 13 ECHR, 2(3) ICCPR, 13 and 14 CAT and Article 47 EU Charter, and recalled by the ECtHR in *Hirsi and Jamaa and Others v. Italy*. Therefore, Article 4(3) should be further amended to fully reflect these procedural obligations under international and EU law.

The wording in Article 4(3) is problematic in stating that "in case of disembarkation" the participating units shall assess the personal circumstances of the rescued or intercepted persons "to the extent possible before disembarkation". In view of the absolute nature of the principle of *non-refoulement* under international law, the personal circumstances of each individual must be assessed *before disembarkation in all cases*. By including the qualifier "to the extent possible", the Commission's proposal would signal that the assessment is not a firm obligation and that States need not take necessary measures to make the assessment possible. This obligation also applies in light of the international obligation to provide an effective remedy for potential or actual human rights violations, under Articles 13 ECHR, 2(3) ICCPR, CAT (13 and 14) and 47 of the EU Charter, and the prohibition of collective expulsions under Article 4 of Protocol 4 ECHR and Article 19.1 EU Charter. The assessment as to whether the place of disembarkation is safe for the individual concerned must also take place before deciding on the disembarkation and not "in case of" disembarkation in view of the irreparable harm that may result from serious violations of human rights such as inhuman or degrading treatment.

Therefore the first sentence of Article 4(3) should be amended to mirror the principle laid down in Article 4(2) and state:

"**Before deciding on** disembarkation in a third country, the participating units shall identify the intercepted or rescued persons and assess their personal circumstances **ensuring effective access to a procedure which guarantees the full range of procedural safeguards as required under international human rights law, including legal assistance, interpretation and an effective remedy**".

The jurisprudence of the ECtHR does not make explicit a requirement that the protection needs of persons intercepted or rescued on the high seas necessarily be assessed on the territory and, therefore, after disembarkation of the persons concerned. However, as discussed further below, from an operational perspective, such assessment is impossible on board ships given the procedural safeguards that need to be observed, including access to legal assistance and interpretation as well as an effective remedy before an independent authority in case of an arguable claim that a person's rights under the Convention would be violated in case of disembarkation in a third country.

[31] Article 4(3), COM Proposal

Furthermore, the international law of the sea obliges States carrying out search and rescue operations to disembark those rescued as soon as possible in a place of safety.[32] To that end, it allows for the temporary postponement, until the place of safety is reached, of all other non-essential procedures.[33] However, this body of international law also obliges the State not to disembark someone in a place where he or she would be at risk of serious violations of human rights or persecution.[34] These provisions relating to search and rescue operations are also applicable to interception on the high seas, since the rights to be protected during disembarkation are exactly the same, whether the operation is one of search and rescue or of interception.

As formulated, the Commission's proposal does not exclude the assessment of protection needs of the persons concerned on board ships. It should be noted that UNHCR's position is that "processing onboard maritime vessels is generally not appropriate" and that "in general the carrying out of full procedures onboard maritime vessels will not be possible, as there can be no guarantee of reception arrangements and/or asylum procedures in line with international standards".[35] UNHCR also highlights the fact that "other procedural requirements – such as access to legal assistance, allowing sufficient time to prepare asylum claims, providing a reasoned decision in writing, and allowing an independent appeal of any negative decision with suspensive effect – remain applicable for on-board RSD [refugee status determination]".[36]

The recently adopted recast Asylum Procedures Directive now unambiguously excludes processing on board ships of asylum applications in the territorial waters of Member States. Articles 6 and 8 of the recast Asylum Procedures Directive require Member States to ensure swift registration of the asylum application and clear instructions for border guards and other authorities likely to receive applications for international protection to inform applicants as to where and how applications for international protection may be lodged. Recital 26 of the preamble to the recast Asylum Procedures Directive states explicitly in that regard that "[w]here those persons are present in the territorial waters of a Member State, they should be disembarked on land and have their applications examined in accordance with this Directive".

The Commission's proposal would benefit from a further clarification stating that a proper assessment of the person's protection needs cannot take place on board ships. In the view of the undersigned organizations, it must be explicitly acknowledged that, in practice, the assessment of an individual's protection needs cannot be conducted effectively aboard ships. Such operations on board boats are impracticable, particularly bearing in mind the need for States to respect their human rights obligations. First, there are practical challenges in ensuring the necessary safeguards with regard to reception conditions and procedural guarantees aboard ships. Secondly, an on-board assessment would typically take place in an emergency-type situation. Conducting an assessment of an individual's protection needs in such conditions, would necessarily undermine its quality, place the individual concerned in an even more vulnerable situation and increase the risk of protection being denied in violation of the principle of *non-refoulement*, the prohibition of collective expulsions and the right to an effective remedy. Finally, conducting such procedures on board vessels may also undermine the safety of those involved in these complex operations at sea.

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[32] The 2004 amendments to the International Convention on Maritime Search and Rescue (SAR) and to the International Convention for the Safety of Life at Sea (SOLAS) (the latter entered into force in 2006, with the objection of the Maltese Government) have established that the State "shall arrange for such disembarkation to be effected as soon as reasonably practicable", Chapter V, Regulation 33, New para. 1.1, SOLAS; and new Chapter 3.1.9 SAR Convention. See the International Maritime Organisation (IMO) Maritime Safety Committee's Resolution MSC.167(78), adopted on 20 May 2004 on *Guidelines on the treatment of persons rescued at sea*, Doc. MSC 78/26/Add. 2, and Article 2(5) of these Guidelines.

[33] The *Guidelines on the treatment of persons rescued at sea* (hereinafter the *Guidelines*) of the IMO Maritime Safety Committee also recalled that operational plans and arrangements devised before rescue operations are called for should "quickly address initial border control or immigration issues to minimize delays that might negatively impact the assisting ship, including temporary provisions for hosting survivors while such issues are being resolved", Article 6(5)(4), *Guidelines on the treatment of persons rescued at sea*, Doc. MSC 78/26/Add.2. Significantly, the *Guidelines* note that, "if survivor status or other non-SAR matters need to be resolved, the appropriate authorities can often handle these matters once the survivors have been delivered to a place of safety. […] Examples of non-SAR considerations that may require attention include […] survivors who are migrants or asylum seekers […]. National authorities other than the RCC typically have primary responsibility for such efforts" (Article 6(19)). Article 6.20 states that "any operations and procedures such as screening and status assessment of rescued persons that go beyond rendering assistance to persons in distress should not be allowed to hinder the provision of such assistance or unduly delay disembarkation of survivors from the assisting ship(s)". See, the *Principles relating to administrative procedures for disembarking persons rescued at sea*, FAL.3/Circ.194, 22 January 2009, of the IMO Facilitation Committee.

[34] See, "rescued asylum seekers should be referred to the responsible asylum authority for an examination of their asylum requests; and international protection principles [which include international refugee law and international human rights law] as set out in international instruments should be followed", *Principles relating to administrative procedures for disembarking persons rescued at sea*, FAL.3/Circ.194, 22 January 2009, paras. 2.4-2.5.

[35] See UNHCR, *Protection Policy Paper: Maritime interception operations and the processing of international protection claims: legal standards and policy considerations with respect to extraterritorial processing*, November 2010, para. 56. UNHCR furthermore points to the fact that "in terms of reception arrangements, this would require a vessel of a certain size, with adequate facilities to meet asylum-seekers' basic needs (including for medical treatment, food and fresh water, rest, interpretation, as well as space to conduct individual, confidential interviews). Even on large vessels the limitations on space may increase the risks of overcrowding and spread of contagious illnesses. It may also be more challenging to manage security risks on maritime vessels than in onshore reception centres".

[36] Ibidem, para. 58.

Therefore, a recital relating to Article 4 – amended as suggested above – should be introduced stating the principle that the assessment of protection needs of those intercepted or rescued at sea should never be conducted on board ships as such operations effectively would not be compatible with Member States' and Frontex's obligations under international human rights and refugee law and EU law. A clear reference should be made to Recital 26 recast Asylum Procedures Directive requiring disembarkation for the purpose of the examination of the asylum application in case of persons applying or wishing to apply for international protection who are present in the territorial waters of a Member State.

4. Legitimizing "push-backs" at sea

Despite the positive addition of *non-refoulement* references and affirmation of search and rescue duties and guarantees, the proposed Regulation still dedicates three of its articles (Articles 6, 7 and 8) to the interception of ships on the high seas, operations which would include both stop and search and accompanying of the ships to a third State's or an EU Member State's jurisdiction. The above-mentioned provisions, together with Article 10(3) on disembarkation as it stands, risk to effectively legitimize in EU law a system of "push-backs" at sea. As analyzed below, these provisions are clearly inconsistent with international human rights and refugee law, with the EU Charter and the asylum *acquis*, and are not legitimized by any provision of the international law of the sea.

4.1. Jurisdiction at sea

It is a well-established principle of the international law of the sea that the sovereignty – and hence the jurisdiction – of a State extends to the territorial sea and its related air space.[37] The UN Convention on the Law of the Sea (UNCLOS) also provides that "in a zone contiguous to its territorial sea, described as the contiguous zone, the coastal State may exercise the control necessary to [...] prevent or punish infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea".[38] Hence, when a State chooses to exercise this control, it assumes jurisdiction over this zone, which may not extend beyond 24 nautical miles from the baselines,[39] for the purposes of international law.

Outside of these zones, the basic principle of sovereignty on the high seas is that of "freedom of the high seas". In accordance with this principle, the high seas are open to all States, which enjoy freedom of navigation there.[40] The basic rule for jurisdiction for ships on the high seas is that of the flag State, which is responsible and has jurisdiction for any vessel flying under its banner.[41]

Under international human rights law, it is now widely accepted that where State agents operate outside the territory, and, at the very least when they exercise control or authority over an individual, the State has jurisdiction, and is under an obligation to secure the human rights of the individual concerned.[42] In the *Hirsi* case, the Court rejected the argument that there was no State jurisdiction over a "rescue operation in the high seas": since "the applicants were under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities", the nature and purpose of the operation was irrelevant.[43] As regards the application of the EU Charter, Article 51(1) states that the Charter applies to the EU and member states when they are implementing EU law.[44] The operations subject to this proposed Regulation would be governed by EU law and the obligations under the EU Charter bind Member States both territorially and extraterritorially, including in non-territorial waters and on the high seas.

It is clear from international maritime law, as described above, that a State has border control enforcement powers only in the territorial sea and in the contiguous zone, which, as such, falls within its territorial jurisdiction for the purposes of international human rights and refugee law. On the other hand, international human rights law dictates that States' exercise of control or authority over individuals on the high seas gives rise to jurisdiction, which in turn gives rise to the obligation to secure human rights, including *non-*

[37] Article 2, UNCLOS
[38] Article 33(1) UNCLOS
[39] Article 33(2)UNCLOS
[40] Article 87(1) UNCLOS
[41] Articles 92 and 94 UNCLOS. As recognised also by the European Court of Human Rights in *Hirsi*, para. 77.
[42] *Hirsi*, para. 74.
[43] *Hirsi*, para. 81.
[44] Article 51(1), EU Charter: "The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law".

refoulement,[45] the prohibition of collective expulsion,[46] the right to asylum[47] and the right to an effective remedy.[48]

4.2. Interceptions and "push-backs" in the high seas

While there are some limited grounds to allow for boarding of a stateless vessel,[49] the undersigned organizations consider that States have no power under the international law of the sea to push back ships in the high seas and that, indeed, operations constituting what are sometimes termed "push-backs" are prohibited as they constitute violations of the prohibition of collective expulsion and seriously risk breaching the principle of *non-refoulement*. The principle of the freedom of navigation on the high seas is a centuries-old general principle of customary international law. Any restriction or exception to this freedom must be explicitly provided for in a treaty provision. The proposal of the Commission suggests that the United Nations Protocol against the Smuggling of Migrants by land, sea and air, supplementing the United Nations Convention against Transnational Organised Crime (heareinafter UN Smuggling Protocol), to which the EU is a party, constitutes a basis for these practices; however, an analysis of the Protocol reveals that such interpretation would be fallacious.

Article 2 of the UN Smuggling Protocol provides that its purpose is "to prevent and combat the smuggling of migrants, as well as to promote cooperation among States Parties to that end, **while protecting the rights of smuggled migrants**".[50] Article 8 states that a suspect vessel without nationality may be boarded and searched and, only afterwards, "if evidence confirming the suspicion is found, [the State Party who conducted the operation] shall take the appropriate measures in accordance with relevant domestic and international law".[51] In Article 11(5), the Protocol envisages measures of denial of entry or revocation of visas only for the "persons implicated in the **commission** of offences established in accordance with this Protocol".[52] No express provision allows for the denial of entry or push back of smuggled migrants at sea. The purpose of the UN Protocol is instead to ensure that those responsible for or complicit in the commission of the offence of smuggling of migrants be brought to justice.

Indeed, as concerns smuggled migrants, the UN Smuggling Protocol requires States Parties – consistent with their obligations under international law – to take all appropriate measures to preserve and protect the rights of smuggled migrants "in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment" and to "afford appropriate assistance to migrants whose lives or safety are endangered" as a result of smuggling".[53]

The only provision concerning the return of smuggled migrants (Article 18) effectively requires the carrying out of detailed procedures and establishes that States "shall take all appropriate measures to carry out the return in an orderly manner and with due regard for the safety and dignity of the person".[54] Finally, Article 19 contains a general saving clause establishing that "nothing in this Protocol shall affect the other rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein".[55]

4.3. Human rights concerns in interceptions and "push-backs"

[45] Articles 2, 3, 5 and 6 ECHR; Articles 6, 7, 9 and 14 ICCPR ; Articles 4 and 19(2) EU Charter.
[46] Article 4 Protocol 4 ECHR, Article 19(1) EU Charter.
[47] Article 18 EU Charter.
[48] Article 13 ECHR, Article 2(3) ICCPR and Article 47 EU Charter.
[49] Apart from the powers to seize a ship in case of piracy and unauthorized broadcasting, the only exceptions to the rule of freedom on the high seas provided by the international law of the sea are the rights of visit and of hot pursuit. See, Articles 105, 109, 110 and 111 UNCLOS.
[50] Emphasis added.
[51] Article 8(7), UN Smuggling Protocol.
[52] Article 11(5), UN Smuggling Protocol (emphasis added).
[53] Article 16(1) and (3), UN Smuggling Protocol. In relation to this Article, the *travaux préparatoires* clearly state that "the intention in listing certain rights in this paragraph was to emphasize the need to protect those rights in the case of smuggled migrants, but that the provision should not be interpreted as excluding or derogating from any other rights not listed. The words "consistent with its obligations under international law" were included in the paragraph to clarify this point further", *Travaux Préparatoires,* para. 108.
[54] Article 18(5), UN Smuggling Protocol.
[55] Article 19(1), UN Smuggling Protocol. The recently established Working Group on the Smuggling of Migrants reaffirmed in 2012 that "States parties should adopt appropriate measures, including legislation, if necessary, to protect smuggled migrants from violence, discrimination, torture or other cruel, inhuman and degrading treatment or punishment, as well as violation of their rights, and should provide smuggled migrants who have been victims of other crimes with effective access to justice and to legal assistance when it is envisaged in national legislation" (§21). Furthermore, they "should take into account the international protection framework for refugees and asylum seekers [and] inform migrants of their rights under domestic law, including the right to appeal, and, where applicable, their options for voluntary return" (§§29-31). The ECtHR re-enforced this position when it held in *Hirsi* that "none of the provisions of international law cited by the Government justified the applicants being pushed back to Libya, in so far as the rules for the rescue of persons at sea and those governing the fight against people trafficking impose on States the obligation to fulfil the obligations arising out of international refugee law, including the "*non-refoulement*" principle", *Hirsi*, para. 134.

The undersigned organizations stress once again that, under international law and in accordance with the judgment of the ECtHR in *Hirsi* in particular, operations constituting what are sometimes termed "push-backs" are proscribed as they constitute violations of the prohibition of collective expulsion and seriously risk breaching the principle of *non-refoulement*.

In light of the international law standards described above, the undersigned organizations are concerned about the statement in **Recital 1** that "border surveillance is not limited to the detection of attempts at irregular border crossing but equally extends to steps such as intercepting ships suspected of trying to gain entry to the Union without submitting to border checks". As explained above, under the law of the sea, such measures of border control would be allowed only in territorial waters and, in clearly circumscribed and well-defined circumstances in the contiguous zone, and not on the high seas. On the high seas, there is indeed an entitlement to board stateless ships, but not one to push them back as is foreseen by Article 7. Therefore, Article 7 of the present draft Regulation, which construes "interception in the high seas" as including the practice of "push-backs" also renders Recital 1 at odds with the customary law principle of the freedom of the high seas.

4.3.1 Territorial waters

In the case of interception in the territorial sea, and in the contiguous zone (following Article 8), of the host Member State or a participating Member State, Article 6(1)(e) of the draft Regulation allows for the participating units to order "the ship to modify its course outside of or towards a destination other than the territorial sea or the contiguous zone, including escorting the vessel or steaming nearby until the ship is heading on such course", where there is a suspicion that the ship is carrying persons intending to circumvent checks at border crossing points or is engaged in smuggling migrants by sea. Such action would *de facto* mean that individuals wishing to lodge an application for international protection could be physically prevented from doing so and therefore from accessing the safeguards laid down in the EU asylum *acquis* to ensure a full and fair examination of their application.

The undersigned organizations are concerned that this proposal risks contravening the principle of *non-refoulement* and the prohibition of collective expulsions (Article 4 Protocol 4 ECHR and Article 19(1) EU Charter) by legitimizing "push-backs" at sea. As highlighted above, where a ship has reached the territorial sea or the contiguous zone of the host Member State, it is clearly within the jurisdiction of that Member State. The mere suspicion of a possible violation of entry conditions or the involvement in smuggling cannot justify a measure which might result in returning the persons concerned to a third country where they may face persecution or serious human rights violations, including because of a real risk of onward removal (*i.e.* chain *refoulement*).

This would furthermore prevent the individual from effectively enjoying his or her rights under the EU Charter including the right to asylum (Article 18), the right to good administration (Article 41) and the right to an effective remedy (Article 47 EU Charter and 13 ECHR). Furthermore, the principle of effectiveness as a general principle of EU law, developed in the jurisprudence of the CJEU, requires that individuals have effective access to their rights under EU law.[56]

Changing the course of a vessel outside of the territorial waters is likely to have the effect of denying persons intercepted or rescued access to the range of procedural safeguards under EU law, and would be therefore likely to render the exercise of their rights conferred by EU law impracticable or at least excessively difficult.

Moreover, as it is formulated now, Article 6(1)(e) also seems to contradict the obligation laid down in Article 10(2) for Member States to disembark the third country nationals intercepted in the territorial sea or the contiguous zone of EU Member States, in the host Member State or in the participating Member State, without exception.

Article 6 of the draft Regulation also raises concerns in relation to the application of the SBC. According to its Article 3, the SBC applies to all persons crossing an internal or external border of a Member State. Article

[56] It is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, but this is "provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness). CJEU, Case C-13/01, *Salafero Drl v. Prefetto di Genova*, Judgment of 11 September 2003, para. 49. It is furthermore specified that "while it is, in principle, for national law to determine an individual's standing and legal interest in bringing proceedings, Community law nevertheless requires that the national legislation does not undermine the right to effective judicial protection", see para. 50.

2(2) SBC includes as external borders Member States' sea borders, which include territorial waters, according to the international law of the sea. The Commission's proposal risks undermining the guarantees for third country nationals laid down in the SBC with respect to the border checks[57] to which they can be subjected and the remedies available in case of refusal of entry. Proposed Article 6(1) states that the measures to be undertaken can be triggered when "there are **reasonable grounds to suspect** that a ship is carrying persons intending to circumvent checks at border crossing points or is engaged in the smuggling of migrants by sea" – a standard that is much vaguer than the Code's requirement that third-country nationals fail to meet specified entry conditions.[58] Furthermore, the possibility under proposed Article 6(1)(e) to order the ship to modify its course outside of the territorial sea or contiguous zone would deprive the persons concerned of the guarantees laid down in Article 13 SBC in case entry is refused.[59] This formulation of Article 6 authorizes the application of intrusive measures which may effectively hinder the exercise of rights under international and EU law, including those listed under Article 6(1), on the basis of a mere suspicion. **As a result, people who may be entitled to cross the external border under the SBC may be turned away without enjoying the guarantees and having access to the procedural safeguards provided for in the SBC.[60]**

The undersigned organizations consider that the current draft Article 6 would undermine the application of the SBC in territorial waters by considerably lowering the guarantees established therein in relation to conditions for refusal of entry into EU territory and border checks thus putting at risk the protection of such guarantees as established in the Code and therefore recommend that Article 6 be amended to reflect the standards laid down in Article 5 and 7 of the SBC.

Furthermore, draft Article 6(1)(e) should be deleted as it is incompatible with Member States' obligations under the EU asylum *acquis* and the EU Charter as well as Article 13 SBC and undermines the internal coherence of the proposal. An explicit reference to Member States' obligations under the EU asylum *acquis* should be included in the preamble and in proposed Article 6.

4.3.2. High Seas

In cases of interception on the high seas, Article 7(1)(e) and (f) allows Member States to order a ship to modify its course outside of or towards a destination other than the territorial sea or the contiguous zone and to conduct the ship or persons on board to a third country or hand them to the authorities of a third country.

As highlighted above, there is no entitlement for States in international law to "push back" stateless ships to third countries. The accompanying of a boat to a State's shores may be allowed only in limited circumstances, such as in the context of rescue operations to disembark the rescued person to a place of safety or, when there is a need to prosecute smuggling of migrants, to the territory of the intercepting State in order to prosecute those criminally liable and to process international protection needs of the concerned migrants. As such, the provision contained in Article 7(1)(e) and (f) is contrary to the customary law principle of freedom of navigation in the high seas.

Furthermore, the practices contemplated in Article 7(1)(e) and (f) must be interpreted together with Article 10(3) on disembarkation which provides that, "subject to the application of Article 4, in the case of interception on the high seas as laid down in Article 7, the disembarkation may take place in the third

[57] Article 7(5) SBC provides that "Third-country nationals subject to a thorough second line check shall be given information on the purpose of, and procedure for, such a check. This information shall be available in all the official languages of the Union and in the language(s) of the country or countries bordering the Member State concerned and shall indicate that the third-country national may request the name or service identification number of the border guards carrying out the thorough second line check, tha name of the border crossing point and the date on which the border was crossed".
[58] Entry conditions for third-country nationals are listed under Article 5 SBC.
[59] Article 13(1) SBC states that "a third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the Member States. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas".
[60] Article 13(2) provides that "entry may only be refused by a substantiated decision stating the precise reasons for the refusal. The decision shall be taken by an authority empowered by national law […]" and 13(3) adds that "persons refused entry shall have the right to appeal. Appeals shall be conducted in accordance with national law. A written indication of contact points able to provide information on representatives competent to act on behalf of the third-country national in accordance with national law shall also be given to the third-country national […]".

country from which the ship departed. If that is not possible, disembarkation shall take place in the host Member State".

This provision does not reflect the minimum procedural safeguards as required by the ECtHR. As underlined above, in the case of *Hirsi Jamaa and Others v. Italy* the ECtHR concluded that there was a violation of Article 13 ECHR in conjunction with Article 3 as well as Article 4 of Protocol 4 (prohibition of collective expulsions), as the persons intercepted by the Italian authorities on the high seas did not have access to a procedure to identify them and to assess their personal circumstances before they were returned to Libya. The fact that the migrants concerned had access neither to interpreters nor to legal advisors was also stressed by the ECtHR.

Considering the inefficacy and practical impossibility to conduct individual assessment on board ships in a manner that complies with Member States' and EU obligations under international human rights law and EU law, the undersigned organizations are concerned that the combined effect of Article 7(1)(e) and (f), Article 10(3) and the inaccurate wording in Article 4(1), may lead to repetitive breaches of the principle of *non-refoulement*, of the right to an effective remedy, of the right to asylum and of the prohibition of collective expulsion, and recommend deletion of paragraphs (e) and (f) of Article 7(1).

Furthermore, the compliance of Article 10(3) with international human rights law and refugee law and EU law is conditional on the amendment of Article 4 of the proposed Regulation as suggested by the undersigned organizations in section 2 above (see recommendations on Article 4).

5. Search and rescue operations, disembarkation and place of safety (Articles 9 and 10)

5.1. Search and rescue operations

The undersigned organizations welcome the establishment in EU law of criteria for search and rescue of persons in distress at sea.

Although Article 9 generally reflects the criteria laid down in the International Convention on Maritime Search and Rescue (hereinafter SAR Convention) Convention, this provision should be further clarified by including an explicit reference to the obligation to disembark. It is assumed that the intention of the Commission is that a rescue operation is not deemed over until the passengers on a vessel have reached a place of safety, as laid down in Article 10(4). However, Article 9(11) only states that "where the ship cannot or can no longer be considered as being in a distress situation or the search and rescue operation has been concluded, the participating unit shall, in consultation with the International Coordination Centre, resume the sea operation". This article seems to allow for the provision of only minimal repairs or supplies to the boat in order to change "a situation of distress" into "a situation of uncertainty". This would not be in line with States' obligations under the law of the sea. Article 9(11) should therefore specify that an operation is not deemed concluded until the people present in the rescued boat are disembarked in a place of safety.

The undersigned organizations recommend modification of Article 9(11) as follows:

"Where the ship cannot or can no longer be considered as being in a distress situation or the search and rescue operation has been concluded **as provided by Article 10(4),** the participating unit shall, in consultation with the International Coordination Centre, resume the sea operation".

5.2. Disembarkation after rescue operations must be swift

The undersigned organizations welcome the fact that the criterion identified in Article 10(4) is that of ensuring the rescued persons' "rapid and effective disembarkation". Equally welcome is the provision that the third subparagraph of Article 10(4) makes for disembarkation in the host Member State in certain circumstances, in the interests of the safety of the rescued persons and that of the participating unit itself.

However, as currently worded, this paragraph could imply that the choice of the host Member State as a place of safety must be considered only after all other alternative places have been excluded. This may mean giving priority to third States and participating States without proper consideration of the implications for *non-refoulement*. As described below, the primary concerns in disembarkation are to ensure that it is carried out as expeditiously as possible, without being impaired by non-search and rescue concerns and that it respects the protection needs of the rescued persons. The reason for establishing a hierarchy of priorities for the identification of the place of safety in Article 10(4) is unclear. According to the law of the sea, the only considerations permitted are that a place of safety allows swift disembarkation in respect of the obligations of *non-refoulement* and meets the definition of a place of safety in accordance with the law of the sea. The Proposal fails to introduce any clear and binding rules or procedures to ensure swift interventions and disembarkation in a place of safety, which should be the paramount concern in search and rescue operations.

The undersigned organizations recommend inclusion of an explicit reference in Article 10(4) to the obligation of Member States to ensure that disembarkation is carried out in compliance with the principle of *non-refoulement*. If proposed Article 4 is amended as suggested by the undersigned organisations, Article 10(4) subparagraph 1 should be amended as follows:

"In the case of search and … effective disembarkation, ***subject to the application of Article 4".***

5.3. The definition of "place of safety"

The IMO *Guidelines on the treatment of persons rescued at sea* state the duty of the shipmaster to "seek to ensure that survivors are not disembarked to a place where their safety would be further jeopardized".[61] They define a place of safety as "a location where rescue operations are considered to terminate. It is also a place where the survivors' safety is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met. Further, it is a place from which transportation arrangements can be made for the survivors' next or final destination".[62] More precisely, "an assisting ship should not be considered a place of safety based solely on the fact that the survivors are no longer in immediate danger once aboard the ship".[63] The IMO Guidelines also specify that "the need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea".[64]

PACE has recommended that "the notion of "place of safety" should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights".[65] PACE has further recommended, together with the full respect of the principle of *non-refoulement* in border surveillance including on the high seas, that States "carry out as a priority action the swift disembarkation of rescued persons to a 'place of safety' and interpret a 'place of safety' as meaning a place which can meet the immediate needs of those disembarked and in no way jeopardizes their fundamental rights, since the notion of 'safety' extends beyond mere protection from physical danger and must also take into account the fundamental rights dimension of the proposed place of disembarkation".[66]

The definition of "place of safety" is one of the central issues in search and rescue obligations under international law. The definition used in Article 2(11) is problematic in various respects. First the wording "safety of life including as regards the protection of their fundamental rights is not threatened" is unclear. It conflates "safety of life" with "fundamental rights" as if they were synonymous. This may end up excluding other rights, such as protection against risks of torture or cruel, inhuman and degrading treatment or punishment, or of flagrant denial of the right to a fair trial or personal liberty, in disrespect of the principle of *non-refoulement*. In addition, "safety of life" has a different meaning than "right to life". Therefore, a separate mention of the principle of *non-refoulement* should be included. Secondly, the definition should also include an express reference to protecting survivors from indirect *refoulement* as required under international law.

[61] Article 5.(1)(6), *Guidelines on the treatment of persons rescued at sea*, Doc. MSC 78/26/Add.2
[62] Article 6(12), IMO *Guidelines*.
[63] Article 6(13), IMO *Guidelines*.
[64] Article 6(17), IMO *Guidelines*.
[65] Resolution 1821(2011), para. 5.2.
[66] Resolution 1821(2011), para. 9.5.

The undersigned organizations recommend amending the definition of place of safety in Article 2(11) as follows:

"Place of safety means a location where rescue operations are considered to terminate and where the survivors' safety of life as well as the protection of their human rights are not threatened, where their basic human needs can be met and from which transportation arrangements can be made for the survivor's next destination or final destination, in respect of the principle of *non-refoulement*".

5.4. Disembarkation in the EU

Article 10 does not address the issue of disembarkation in an EU Member State where the asylum system is flawed and where those in need of international protection would not be guaranteed access to a fair asylum procedure and dignified reception conditions as a result of systemic deficiencies, as it is currently the case in Greece.[67]

In the case of *M.S.S. v. Belgium and Greece,*[68] the ECtHR ruled that the principle of *non-refoulement* cannot be bypassed whether or not the State of destination is an EU Member State. Moreover, it stressed that asylum procedure, conditions of detention and the living conditions of asylum seekers must always respect the prohibition of inhuman and degrading treatment or punishment, the principle of *non-refoulement* and the right to an effective remedy. A similar approach has been expressed by the CJEU in *N.S. and M.E.*[69]

Whereas disembarkation to ensure the physical safety of the persons intercepted or rescued at sea must prevail, additional measures may be necessary to ensure access to a fair asylum procedure and reception conditions in accordance with the standards laid down in the EU asylum *acquis.* Depending on the specific situation, this may mean that disembarked persons may have to be relocated to another EU Member State for the purpose of assessing their protection needs in order to ensure that they have access to a procedure that complies with the *acquis* in law and in practice[70] and that their rights under the EU Charter, including the right to asylum, the right to good administration, to an effective remedy and human dignity are fully respected in practice. The involvement of Member States in the interception or search and rescue operation triggers their responsibility to ensure that the individuals concerned do not suffer human rights violations resulting from those operations, including post disembarkation. As the existence of such a situation in participating Member States can be anticipated before the launch of the Frontex operation, the necessary arrangements to address those situations should be included as part of the modalities for disembarkation in the operational plan.[71]

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[67] See, *Second Submission of the International Commission of Jurists and of the European Council on Refugees and Exiles to the Committee of Ministers of the Council of Europe in the case of M.S.S. v. Belgium and Greece and related cases*, February 2013, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/ICJECRE-MSS-CommitteeMinisters-2ndsubmission-Final.pdf. For detailed information on the flaws in the asylum system, including the extensive and indiscriminate detention of refugees, asylum-seekers and migrants, and the reception conditions in Greece, see Amnesty International, *Frontier Europe. Human Rights Abuses on Greece's border with Turkey*, (Index: EUR 25/008/2013), July 2013, available at http://www.amnesty.org/en/library/asset/EUR25/008/2013/en/d93b63ac-6c5d-4d0d-bd9f-ce2774c84ce7/eur250082013en.pdf. In light of the findings presented in the report, Amnesty International echoes the ECtHR and CJEU's rulings in *M.S.S. v Belgium and Greece and N.S. and M.E.*, and specifically calls on the EU and its member states to "*Abide by the ruling of the European Court of Human Rights and the Court of Justice of the European Union by maintaining the halt of transfers of asylum-seekers back to Greece and take responsibility for those asylum-seekers"*. For further information on the situation of refugees, asylum-seekers and migrants in Greece, particularly the county's failure to establish a fair and effective asylum system, prolonged detention and substandard conditions in detention centres and police station, see also Amnesty International's *Annual Report 2013, The state of the world's human rights*, (Index: POL/10/001/2013), May 2013, Greece – Refugees, asylum-seekers and migrants, available at: http://www.amnesty.org/en/region/greece/report-2013#section-56-5. See also UN General Assembly, *Report of the Special Rapporteur on the human rights of migrants, Francois Crepeau. Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants,* A/HRC/23/46, 24 April 2013, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf which describes, among others, the appalling conditions in detention facilities in Greece, which violate international human rights standards.
Greece is not the only EU member state whose situation may be of concern in relation to disembarkation. For example in Malta mandatory detention for asylum-seekers and migrants, lack of safeguards to challenge detention and removal and poor detention conditions are of concern. For more detailed information on the situation in the country, see, *Suso Musa v Malta,* ECtHR, Application no. 42337/12, Judgment of 23 July 2013; *Not here to stay, Report of the International Commission of Jurists on its visit to Malta on 26-30 September 2011* available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2012/08/ICJMaltaMissionReport-Final.pdf; *Third party intervention of the ICJ in the case Suso Musa v Malta*, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2013/02/Suso-Musa-v-Malta080213final.pdf; "ICJ urges Maltese Government not to expel Somali nationals", Press Release of the ICJ, 9 July 2013, available at http://www.icj.org/icj-urges-maltese-government-not-to-expel-somali-nationals-to-libya/. Amnesty International's *Annual Report 2013, The state of the world's human rights*, (Index: POL/10/001/2013), May 2013, Malta – Refugees, migrants and asylum-seekers, available at: http://www.amnesty.org/en/region/malta/report-2013. See also Amnesty International's Public Statement *Malta: collective expulsions, push-backs and violating the non-refoulement principle are never an option* (Index: EUR/33/001/2013), 12 July 2013, available at: http://www.amnesty.org/en/library/asset/EUR33/001/2013/en/94da229b-24d2-409c-83ca-22bd42aaadef/eur330012013en.pdf.
[68] *M.S.S. v. Belgium and Greece*, ECtHR, GC, Application no. 30696/09, Judgment of 21 January 2011.
[69] *N.S. and M.E.,* para. 94.
[70] *M.S.S. v. Belgium and Greece*, ECtHR, GC, Application no. 30696/09, Judgment of 21 January 2011, §§286-322.
[71] See Article 10(1) Commission proposal.

It is expressly stipulated in Article 10(1) that "[t]hose modalities for disembarkation shall not have the effect of imposing obligations on Member States not participating in the sea operation unless they expressly provide authorisation for measures to be taken in their territorial sea or contiguous zone in accordance with Article 6(4) or Article 8(2)". However, this should in any case be interpreted in light of Article 80 of the Treaty on the Functioning of the European Union (TFEU) establishing the principle of solidarity and fair responsibility sharing as a matter of primary EU law.[72] The EU and its Member States already have a range of tools at their disposal to enhance solidarity between EU Member States, including financial and technical support as well as intra-EU relocation of persons who have obtained a legal status after disembarkation.[73] Measures needed to comply with Article 80 TFEU (including disembarkation in non-participating Member States where this is necessary to ensure compliance with the EU Charter and the EU *acquis*) will have to be assessed on a case-by-case basis.

The undersigned organizations recommend that, in order to ensure such compliance, a recital be added referring to the obligation of the EU and its Member States to fully respect Article 80 TFEU when conducting such operations.

6. Conclusion

The proposed Regulation has introduced some improvements in respect to the previous partly non-binding Council Decision. However, as the undersigned organizations have demonstrated in this submission, there are still important areas that are not in line with international law, including human rights law, refugee law, and the law of the sea, as well as with EU and the Member States' duties under EU law, particularly the EU Charter. The proposed Regulation must not become a vehicle to legitimize "push-backs" at sea or disregard the procedural guarantees laid down in the EU asylum *acquis* and the EU Charter to ensure that the principle of *non-refoulement* and other human rights of refugees, asylum seekers and migrants are fully respected and protected. Furthermore, EU law should not be based on erroneous or incorrect understanding of the principle of *non-refoulement*, whose distortion may have pernicious effects beyond this Regulation's scope.

The present draft Regulation is of utmost importance in a Union in which thousands of people attempt to cross its sea borders each year at the extreme peril of their lives and with many casualties. An EU Regulation dealing with interception and rescue at sea should be concerned first and foremost with the protection of their lives and human rights, not with their denial.

[72] "The policies of the Union set out in this chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle".

[73] For a discussion of the legal implications of Article 80 TFEU and intra-EU solidarity tools in the field of asylum see ECRE, *Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, January 2013.