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The Legal Framework

Session 2 Manual

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Objectives

In the area of expanding knowledge, after this Session, participants will:

- Understand the importance of the 1951 Convention in relation to EU law and how these two bodies of law relate to each other.
- Start familiarizing themselves with the refugee definition and its main elements
- Understand the principle of *non refoulement* in the context of both the 1951 Convention and international & regional refugee and human rights law instruments.

In the area of skills and attitudes, it is foreseen that they will:

- Understand the complexity of differentiating between “irregular migrants” and “refugees”
- Gain awareness of the situation of victims of trafficking as *victims or survivors* of a crime, rather than as mere irregular migrants (particularly trafficked women and children for purposes of sexual exploitation) as foreseen by international criminal law.



Session Outline

Methodology	Material required	Duration (Total: 1h 30min)
2.1. Quiz	<ul style="list-style-type: none">- PowerPoint projector & large screen- Handouts for participants with copies of relevant international instruments- Quiz Instructions- List of five questions	90 mins
2.2 Answer key to the quiz		



2.1. Quiz: The legal framework

This exercise aims to consolidate some concepts introduced during the previous Power Point presentation referred to at para.1.2 of Session 1. It also intends to help participants integrate new knowledge through reflection and open discussion in a relaxed and humorous environment.

a) Preparation:

1. Depending on groupsize, the facilitator should place four tables across the room for five or six persons each;
2. Beside each table, there should be a flipchart with white paper and one marker;
3. On each table, the facilitator should place a copy of the following documents:
 - 1951 Convention Relating to the Status of Refugees and its 1967 Protocol [↗](#)
 - Protocol To Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing The United Nations Convention Against Transnational Organised Crime [↗](#)
 - Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing The United Nations Convention Against Transnational Organised Crime [↗](#)
 - European Convention for the Protection of Human Rights and Fundamental Freedoms [↗](#)
 - Universal Declaration of Human Rights [↗](#)
 - Convention Against Torture and Other Cruel, Inhuman or degrading Treatment of Punishment [↗](#)
 - EU Charter of Fundamental Rights [↗](#)

b) Methodology

1. Participants should be divided into four groups and sit at the tables prepared by the facilitator as above.
2. The facilitator will present and explain the instructions for the Quiz, by using a two-slide Power Point presentation with the [basic instructions](#), along with the questions for the [Quiz itself](#).
3. Once all possible queries have been dealt with, the facilitator will project the first question of the quiz and the groups will have three minutes to discuss amongst themselves and write their response on their respective flipchart. The questions cannot be answered with a yes or no: the replies need to be justified. The participants may consult the documents made available to them on the table. The reason for asking them to **write down** their response is to ensure that the group agrees on one single reply and does not modify its response as the plenary discussion evolves.
4. As soon as one group finishes writing its reply on the flipchart, it must call the attention of the facilitator by shouting “STOP”!! At that point, the other groups must stop writing.
5. The group who called first will present its reply. If the answer is correct, the group will receive 5 points. The Questions and their respective Answer Key for facilitators can be found below. **The assessment of the given replies, however, will ultimately be a judgment call of the facilitator.** There is often more than one way to reply to a question. This makes the exercise more interesting for the participants, as they will see that their efforts to explain or expand on certain issues can be acknowledged and rewarded.

6. Prior to moving on to the following question, the facilitator will give the other groups the possibility to challenge or improve the response given by the first group. This could be done, for instance, by referring to additional legal instruments that sustain the reply, or qualifying the reply by mentioning specific circumstances where it would not apply, etc.
7. If the facilitator considers that the group indeed managed to provide a better reply, that group will receive 10 points. But if the group who challenged the initial response gets it wrong, it will lose five points!
8. When giving feedback to the groups on their replies, the facilitator should try to expand the knowledge of the group, either by providing concrete examples on the question at hand or by explaining the reasons for a given reply in a more in-depth manner. To this end, the Answer Key below contains a set of key messages, to be brought up in the course of discussing the replies given.



2.2. Answer key to the quiz

Question 1

As the European Union has adopted its own asylum and immigration legislation, (including the Asylum Procedures Directive) EU Member States should make sure that border control measures are in accordance with those norms. They are no longer bound by the more general 1951 Convention on the Status of Refugees.

- **Is this statement correct? Justify your reply.**



Key messages for question 1:

This statement is not completely correct: One can take different approaches, though all of them lead to the same reply:

All individual Member States of the EU have ratified the 1951 Convention, so they are bound by the rules of the Convention, independently of their membership of the European Union, as international legal obligations cannot be derogated from through European or national laws - indeed the latter must be adapted in order to comply with international law.

If there is any rule of the 1951 Convention that the EU countries do not wish to abide by, then the Member States would have had to have made a reservation to the Convention at the moment of ratifying it (which some have done). They could also derogate from the application of some articles through the specific procedures established to this end. They may do so, for instance, in situations of national emergency.

However, there are some articles of the 1951 Convention which cannot be subject to a reservation nor derogated from under any circumstances, as any such derogation would go against the purpose and the spirit of the Convention itself. These articles include the principle of *non refoulement* and the refugee definition.

The EU *acquis* is the set of norms and standards adopted by the EU as a whole. The Treaty establishing the EC clearly sets out the obligation for EC legislation and measures to conform to the 1951 Convention and 1967 Protocol. The primacy of the 1951 Convention is further recognised in European Council conclusions and EC policy documents, which affirm that the asylum *acquis* is based on the 'full and inclusive application' of the 1951 Convention and other relevant treaties.

The EU *acquis* on asylum contains instruments relevant to the development of asylum systems in candidate countries. Candidate countries to the European Union must accede to these instruments without reservations, in order to honour the international obligations to which Member States are – and future ones should be committed.

To sum up, the 1951 Convention continues to be binding for all Member States that have ratified it. All EU instruments are to be applied in accordance with the obligations set out in the 1951 Convention.

Question 2:

“A person attempting to cross an EU external border by means of a false passport only applies for asylum at the point where he is stopped by the border authority. The person is refused entry to the territories of the Member States and may be sanctioned for fraudulent use of personal documentation, as established in national legislation”.

- **Is this statement correct or incorrect?**
- **Which international legal provisions are relevant in this context?**



Key messages for question 2:

This question is related to the previous one. This statement is incorrect: asylum-seekers attempting to cross the border with false documents should be granted access to the asylum procedure and not penalized because of their irregular entry.

The Schengen Borders Code (Art. 13) establishes that a *third-country national who does not fulfil all the entry conditions laid down in Art. 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.*

According to Article 14 of the Universal Declaration of Human Rights, the right to seek and enjoy asylum is recognized as a basic human right. In exercising this right asylum-seekers are often forced to arrive at, or enter, a territory 'illegally'.

The drafters of the 1951 Convention acknowledged that refugees may have justifiable reasons for using fraudulent documentation to travel abroad to seek asylum. UNHCR's Executive Committee has dealt with this issue in a similar manner and has stated that their reasons for such actions are mainly based on their fear of persecution as such, or danger to their safety or freedom.

Art. 31 of the 1951 Convention states: *“The Contracting State shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, present themselves without delay to the authorities and show good cause for their illegal entry or presence”.*

This is called the **principle of non-penalization for illegal entry**. It applies not only to recognized refugees but also to asylum-seekers pending determination of their status. This is because the Convention provides a person with a number of rights (including this one) once they are under the jurisdiction of a country, even before they are lawfully present and potentially later recognised as being a refugee.

The fact that an asylum-seeker chooses to apply for asylum only after being identified by the authorities as using fraudulent documents at the border, should not negatively affect his/her possibility to apply for asylum, nor the analysis of the asylum claim as such.

The UNHCR Handbook underlines that the circumstances which lead asylum-seekers to flee their country may also make them apprehensive about approaching persons in position of authority.

The reference to *penalties* appears to include prosecution, fines and detention. However, in some cases states may place the asylum-seeker under *administrative detention*. UNHCR has issued public guidelines to clarify what is considered to be non-discriminatory and lawful detention of asylum-seekers.

[The issues around the detention of asylum-seekers will be dealt with in more depth later on in the training materials].

Question 3

- **What element is missing in the following refugee definition? Why is it important?**
- **In which legal instruments can it be found?**

A refugee is...

“a person who owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, owing to such fear, to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”



Key messages for question 3:

The missing element is (in bold): “... **or** owing to such fear, **unwilling** to avail himself of the protection of that country”. The text has been excerpted from Art. 1 of the 1951 Convention, with this wording omitted. The EU Qualification Directive also incorporates this element in the refugee definition.

The term “unwilling” points to the subjective element of the fear of persecution. Asylum-seekers do not need to have already suffered serious violations of their rights or suffered persecution in any other way to qualify for refugee status.

At border points, this element can be relevant where an asylum-seeker requests entry into the territory of a specific country without fulfilling the migratory conditions for entry. One way they could have to express that they are requesting asylum may be by saying “*I don’t want to return to my country because I am afraid that I may be harmed*”.

Authorities in the country of origin may seem very open to have asylum-seekers return to their country. However, an asylum-seeker may still not be willing to return on grounds of that fear and the 1951 Convention recognizes this possibility.

Question 4

A person found not to be in need of international protection is someone who has been found not to qualify for refugee status or subsidiary protection after undergoing national asylum procedures. As any foreigner in an irregular migratory situation (i.e. no residence permit, pending expulsion order, etc) asylum-seekers whose applications have been rejected should be returned to their country of origin.

- **Is this statement true or false? Please, justify your reply.**



Key messages for question 4:

The principle of *non refoulement* is not only expressed in the 1951 Convention, but its application is wider than that. It is also part of other universal and regional instruments: the Convention against Torture (CAT) and the European Convention for Human Rights (ECHR).

The CAT (Art 3), for example, expressly prohibits States from removing an individual in any manner whatsoever where there are substantial grounds for believing that doing so would **expose him or her to a danger of being subjected to torture**.

The ECHR (Art 3) also contains a prohibition on torture or inhuman or degrading treatment or punishment. This precludes the removal of individuals who face a real risk of being exposed to those forms of harm.

A general principle of refuge, based on humanitarian law and human rights law, has also emerged in State practice, protecting those who flee civil war or generalized violence. Some regions, like Africa or the Americas, have incorporated such situations as grounds for granting refugee status in international treaties (such as the 1969 OAU Convention) or instruments of soft law (such as the Cartagena Declaration of 1984). Some states have called these other forms of the *non refoulement* principle “complementary forms of protection” or “subsidiary protection”.

In the EU, this matter is addressed in the Qualification Directive, which states that a “*person eligible for subsidiary protection*’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, (...) would face a real risk of suffering serious harm (...)and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country;”

[This definition, together with the refugee definition, will be looked at in greater detail later on in the training materials].

To conclude, a person who undergoes refugee status determination and is found not to be a refugee, might still have the right not to be returned to his or her country of origin if that would be the cause for serious harm (torture, inhuman, cruel or degrading treatment, etc).

Question 5

A young woman working in a farm in Zimbabwe agrees to board a merchant ship which will take her to Europe, where she has agreed to work in a nightclub. An old friend of hers was the one who gave her the idea. He has been in contact with the owners of the nightclub in a European country and has received money in advance to make the necessary arrangements for her trip, including sorting out her travel documents. When she arrives, the nightclub turns out to be a brothel and she has to engage in prostitution to pay back for her travel costs.

- **Is this woman a victim of trafficking? Please, justify your reply.**



Key messages for question 5:

In principle, looking at the few elements known, the woman could indeed be a victim of trafficking. What happens to her meets the definition of trafficking provided by Art. 3 of the Palermo Protocol; she was *recruited and transported by means of the abuse of a position of vulnerability or of the giving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation includes the exploitation of the prostitution of others*. The text in italics corresponds generally to an excerpt from the definition of trafficking in the Palermo Protocol on Trafficking.

The fact that the woman had **agreed** to travel to Europe to work in a nightclub can trigger some discussion with regard to the element of *consent* by the potential victim of trafficking; yet, in this context, there is one key consideration:

- The Palermo Protocol states that “*the **consent** of a victim of trafficking in persons to the intended exploitation set forth in subparagraph a) [the one providing the above definition of trafficking] shall be **irrelevant** where any of the means set forth in subparagraph a) have been used.*”
- If we look at the country of origin information on Zimbabwe, we will see that the country’s political situation has resulted in a total breakdown of the national economy and the isolation from international aid, being

most of the population affected by severe famine. Therefore, it is most likely that the woman was in a position of *vulnerability* that made her an easy target for trafficking networks.

- Another element is the payment made to the woman's "acquaintance" to talk her into doing the trip, organize her transportation and sort out her travel documents. Against the trafficking definition, this could fall under "*by means of the giving of payments or benefits to achieve the consent of a person having control of another person.*"

A thorough understanding of the phenomenon of trafficking in human beings among entry officials would lead to a higher identification of victims, as well as to adequate treatment following identification. Consequently, it would reduce the victims' risk of remaining in the trafficking cycle. Awareness about the facets of human trafficking is the way to avoid victims being treated as irregular migrants, criminalised and re-victimised, and forcibly returned without being offered appropriate assistance and protection. Entry officials should also be aware that some victims of trafficking are also in need of international protection and ensure this possibility is factored into their identification processes, so that while receiving care as needed, such victims of trafficking are also given access to an asylum procedure.



Facilitation Tip 3: Asking participants questions to induce learning or commitment

Asking questions to the group and receiving the answers in an appropriate manner is a very important skill for facilitators, which is often taken for granted. Like most skills, however, it can be developed with some technique and practising. Questions, if adequately formulated and posed in a timely manner, can greatly contribute to **inducing learning or personal involvement directly**.

This means helping participants to work things out for themselves. Letting the group find solutions to apparent controversies can be useful to enable the group gain ownership and commitment to basic protection principles. The guiding rule is that facilitators should maintain genuine confidence in the participants as a group.

In the present manual, the facilitator is continuously being invited to pose questions to participants after most exercises, such as after sharing personal experiences, watching a movie, reading a document, doing a role-play, etc. To maximize the learning, questions should be of the following kind and posed in the following order:

- Questions to help organizing the facts mentioned in the stories so that all participants get the same vision (i.e. the same facts): *“What are some of the aspects of this situation that caught your attention?”*
- Questions to trigger personal reflection to compare their feelings *vis-à-vis* those facts: *“What was your instinctive response to the situation?”*
- Questions on the impact of the exercise to focus on how the facts and feelings are relevant for the participants’ job: *“What is the significance of these exercises for our daily work?”*
- Questions that may open the way for some kind of inner commitment through specifying which concrete actions participants could take: *“If we went back home right now, what key message would we carry with us that we would like to remember in our daily work or whenever we find ourselves in a similar situation?”*
“Are there any legal instruments that could provide some guidance in such cases?”

Since such questions invite participants to provide a lot of information, and the group may lose some focus, it is important that the facilitator is fully attentive to the reply to help participants get back on track if needed.

The facilitator should avoid questions which contain the answer, as they can sound patronizing or make the exercise boring. All participants will have a base point of knowledge. Questions that call for a participant to use knowledge and reason out of a situation are most effective.

Participants need to be able to answer at the present level of learning. The facilitator should not pose questions if they are not explained. If participants lack the theoretical background to respond, they should be supplied with support documents to build their reply.



Background documents and further reading for facilitators:

- Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, 3rd Edition, Oxford University Press, 2006. (Published textbook, not available online)
- COUNCIL DIRECTIVE 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. (Known as the Qualification Directive) [↗](#)
- UNHCR's *Guidelines on Applicable Criteria and Standards relating to the Detention of asylum-Seekers*, February 1999 [↗](#)
- ExCom Conclusion No. 58 (XL) – 1989, *The Problem of Refugees and Asylum Seekers who Move in an Irregular Manner from a Country in which They had already found Protection*. [↗](#)
- ExCom Conclusion No. 15 (XXX) – 1979, *Refugees without an Asylum Country*. [↗](#)
- UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status*, September 1979 [↗](#)
- *Cartagena Declaration on Refugees*, 1984 [↗](#)
- OAU, *Convention governing the specific aspects of refugee problems in Africa*, 1969 [↗](#)