



SUMMARY OF THE PORTUGUESE NATIONAL REPORT

“ACCESS TO PROTECTION: A HUMAN RIGHT”

The principle of *non refoulement* is explicitly enshrined in International Refugee Law and International Human Rights Law and is now considered customary international law. This principle materializes in International Human Rights Law as the obligation of all States to establish, uphold and protect human rights of all individuals under their jurisdiction, either national citizens or aliens – including migrants, independently of their status – as well as refugees. The principle forbids direct or indirect transfer of individuals to a country where there are reasons to believe they may be subject to torture or degrading or inhumane penalties or treatment. According to ECtHR’s case law, obligations arising from the principle of *non refoulement* as per enshrined in the ECHR are not limited to the territory of State parties. The principle of *non refoulement* requires they guarantee and protect human rights of all individuals under their jurisdiction; in the context jurisdiction shall mean legal or *de facto* authority or effective control exercised either by the State or a third party on their behalf whether in their own territory or wherever such jurisdiction is actually exerted. Maritime interceptions conducted by EU member States in high seas and territorial waters of third countries paved the way for many scenarios raising doubts on the extraterritorial application of the *non refoulement* principle. The Hirsi ruling clarified this issue confirming the *non refoulement* obligations of States also in these scenarios regardless of whether the interceptions qualify as border controls.

Both national law and case law still lack an explicit reference to the extraterritorial obligations arising from the principle of *non refoulement*. The rules enshrined in Sea and Maritime Law which regulate the exercise of authority on the high seas and third country waters as well as search and rescue operations by Portuguese authorities bare no reference to their *non refoulement* international obligations. The focus of *non refoulement* in national case law is strictly limited to a territorial approach as it results from asylum procedures triggered by



asylum seekers who find themselves either at the border or in national territory. This does not entail however a legal vacuum on this matter. A coherent interpretation of national asylum and migration rules with international obligations, international obligations of the Portuguese State regarding maritime search and rescue and the law applicable in national ships and aircrafts, should lead to a legal system agreeable with the extraterritorial nature of principle of *non refoulement*.

Both direct and indirect *refoulement* are nonetheless explicitly enshrined in the Law for asylum seekers and beneficiaries of international protection either at the border or in national territory. In the case of expulsion of third country nationals following an entry refusal at the border only direct *refoulement* is foreseen. National case law is consensual in enforcing *non refoulement* both in national territory and at the border regardless of the migrant's status and in cases of either direct or indirect exposure to risks of *refoulement*.

The main focus of this research on the practical implications of the principle of *non refoulement* is on border control operations taking place in national airports. The majority of border controls in Portugal involving third country nationals take place in airports, particularly in Lisbon's airport. This is where the majority of third countries nationals in need of international protection are first subjected to a continuous and exclusive legal and *de facto* control from national authorities.

Sea border controls as well as the exercise of control responsibilities in maritime areas under national sovereignty and jurisdiction are submitted to a coordinated intervention from public authorities. The Immigration Service (SEF) coordinates all surveillance and control activities in maritime areas carried out by the Navy/National Maritime Authority (AMN) and the National Republican Guard (GNR) dedicated to asylum, irregular immigration and human trafficking with the exception of those involving search and rescue operations. Regarding search and rescue operations SEF remains nonetheless the only competent authority for identity controls of third country nationals as well as for administrative procedures relating to



maritime illegal immigration. In practice, the system rests on cooperation and information sharing between coordinating and executing authority that allows for the onboard presence of SEF during irregular immigration control operations carried out by Navy ships in maritime areas under national sovereignty and jurisdiction or for its presence in national territory during disembarkation. According to SEF there were no maritime interceptions of irregular migrants in the context during the period under analysis. This was confirmed by national stakeholders such as the Portuguese Refugee Council (CPR) and international stakeholders such as the Fundamental Rights Agency (FRA). Regarding controls of the external maritime border of the European Union (EU), Portugal has participated in several FRONTEX coordinated operations in the Mediterranean throughout 2013. As the FRONTEX national contact point within the National Maritime Coordination Centre (CNCM) SEF plays a key role in these operations. The information provided by SEF during interviews conducted in this research pointed to the lack of direct involvement of both SEF and Portuguese Navy vessels in interception, search and rescue and disembarkation of migrants in FRONTEX operations but information later released has however confirmed its sporadic occurrence.

Controls carried out by SEF and/or the national air company TAP with the support of SEF at Bissau's airport in Guinea Bissau targeting travel document fraud or undocumented passengers and aimed at preventing boarding to Portugal were allegedly suspended in 2012 according to SEF but information made public by the media contradicts this claim. In the absence of an agreement between the Portuguese and Guinean governments framing these controls, these consisted of informal procedures involving training of TAP employees, *in loco* control of passport's security elements and boarding refusals. Such controls involving the presence of SEF inspectors at Bissau's airport were meanwhile put back on the agenda through a cooperation, training and capacity building on migration protocol signed by the two governments in the summer of 2014. The externalization of border controls by EU member States resorting to activities aimed at preventing boarding of individuals in need of international protection in flights bound to their territory has already raised concerns among



the international community for its potential implications in their *non refoulement* and *bona fide* obligations.

With the exception of extraterritorial controls and without prejudice to some problematic issues in the remaining scenarios mentioned above the research did not identify instances of *refoulement* on the basis of the interviews or the research conducted into other sources such as international or media reports. The almost absolute lack of maritime interceptions as described above leads to the exclusion of relevant *refoulement* occurrences in the framework of maritime interceptions or search and rescue operations.

The expulsion of third country nationals from the border at Lisbon airport in breach of *non refoulement* was categorically denied by SEF given that passengers who are refused entry into the country are subjected to an individual procedure for purposes of entry refusal and expulsion. Still according to SEF these procedures entails the necessary guarantees to avoid instances of *refoulement*. Forced returns are carried out in the framework of the Convention on International Civil Aviation in most cases to the country from where the third country national embarked on his flight to Lisbon. The Portuguese Law provides for the individual assessment of risks of *refoulement* within the expulsion procedure upon request of the third country national for purposes of forced return to an alternative country. The implementation of these provisions remains unclear as they are not applied in practice since SEF chooses rather to refer those cases to the asylum procedure. In clear contradiction with the relevant ECtHR case law the burden to claim and prove the fear of persecution according to such provisions lies solely with the third country national.

In practice, however, the option of authorities has been to refer individuals at risk of *refoulement* to the asylum procedure. SEF refers individuals to the asylum procedure and systematically suspends the expulsion procedure when the fear of return is raised by the third country national or is suspected by the interviewer. This information has been confirmed by other interviewees such as CPR and asylum seekers. The absence of a legal framework setting



out the circumstances and conditions under which risks of *refoulement* should be conducted in a systematic and structured way may however represent a weakness in the system. This is particularly true in light of existing challenges regarding compliance with positive obligations such as the right to information and legal assistance as well as training.

Possible instances of *refoulement* in the framework of extraterritorial controls at Bissau airport targeting travel document fraud or undocumented passengers to prevent boarding to Portugal have also been refused by SEF. Portuguese authorities should be considered responsible for boarding refusals by the air company as they are based on SEF's expert opinion *in loco* or in training offered by SEF. It should be noted that such procedures might exceed what is legally required from air companies in preventing boarding of inadmissible third country nationals. The circumstances and the conditions under which international protection needs and risks of *refoulement* should be assessed during these extraterritorial controls do not follow any formal guidelines. SEF considered instances of boarding refusal to third country nationals who expressed the intention to apply for asylum unlikely although not impossible due to language barriers. Information put forward by the media has shed light on instance where Syrian nationals had been refused boarding by air company personnel due to travel documentation fraud raising concerns on possible instances of *refoulement* given the security risks in their country of origin and in Bissau as well as the risk of expulsion from that country. In light of the relevant ECtHR case law, these instances of collective boarding refusals without prior assessment of potential international protection needs might also be in breach of the extraterritorial prohibition of collective expulsions as per the ECHR.

The right to information is enshrined in Law regarding the reasons of the entry refusal, the right to appeal and applicable deadlines at the border. A systematic interpretation of existing provisions extends this right to information on the rights of migrants in detention centers such as the right to interpreters, free legal aid and protection from *non refoulement*. In practice, this right to information is implemented by serving the migrants an Annex to the entry refusal decision that transcribes article 40 of Law No 23/2007 which foresees those rights. The only



information provided on access to international protection consists of a laconic reference to asylum within that Annex. The document is available in English, French and Spanish, but interpreters are available in case the migrant is not knowledgeable in one of those languages. Pro-active information on international protection is understood by SEF as unnecessary in the absence of any explicit or tacit expression of interest from the migrant. National law is silent regarding the right to information in the framework of extraterritorial controls or maritime interceptions and the information gathered during the research points to an absence of information provision in regarding extraterritorial controls.

According to SEF and CPR, once the application for asylum is registered, provision of information on its procedure and on the applicants' rights and duties as an asylum seeker is done systematically in accordance with applicable legislation. Information leaflets and written information on the applicants' rights and duties pending the asylum procedure are used as well as face to face counseling by specialized non-governmental organizations such as CPR that resorts to interpreters on a needs basis. Written information provided by SEF in this context is translated into some languages, namely Portuguese, French, English, Spanish, German, Russian and Arabic.

The right of migrants to interpretation, legal counsel and effective remedies is enshrined in Law for migrants present at the border only and some concerns remain regarding their scope, quality and effectiveness .

Regarding interpretation at border points, a legal requirement of "necessity" leaves room for uncertainty and has a potential negative impact on access to free legal assistance. Responsibility for the costs of interpretation in the context of free legal assistance in particular is not clearly defined and has been problematic in the framework of asylum procedures as per the experience of stakeholders such as CPR. Interpretation is free of charge for the migrant and no significant problems regarding availability of interpreters in given languages were reported at the Lisbon airport border. Questions remain, however, concerning the quality of



interpretations services as there is no legal quality assurance mechanism in place nor training requirements or guidance on the adequate profile of interpreters.

Migrants at the Lisbon airport border point do not benefit from legal counsel before the issuance of their entrance refusal order. Where no asylum application is registered, lack of implementation of a Protocol creating a pool of lawyers to be appointed freely and in a timely manner to challenge the entrance refusal order and to request the suspension of the removal order hamper the right to an effective remedy. Migrants can appoint a lawyer at their own expenses generally with the support of friends, family and at times of SEF that attempts to reach their respective Consulates in trying to secure legal representation. When an asylum application is registered at a border, including at the Lisbon airport, the CPR provides adequate legal assistance at first instance to asylum seekers, in accordance to Asylum law. CPR also insures access to free legal representation at appeal stage funded by social security services. However, it does not provide this legal assistance systematically to all migrants in need of legal counseling and assistance but only to asylum seekers.

National Law provides for mandatory training on asylum law and international protection to SEF personnel receiving or working with asylum seekers at border points only. No legal reference to mandatory training of other relevant stakeholders such as navy officers involved in border management could be identified. According SEF's Training Department human rights and asylum law is part of the training program of introductory and promotion courses as well as on the job training and includes subjects such as the UDHR, ECHR, CRC, asylum law, human trafficking and trafficking indicators. Information on the exact content and planning of training activities could not be obtained in the framework of this project. According to SEF training on human rights of national experts is also carried out by FRONTEX engaged in its operations. The training record of individual border officials interviewed in the framework of this research revealed some gaps however. While not necessarily representative, international protection was not covered regularly (over 4 years) and the training on the ECHR even less so (over 10 years). Notwithstanding the absence of a



structured training program on country of origin information, interviewees from SEF claimed to receive adequate and relevant information on security and respect for human rights in removal destination countries from various sources and through different channels such as e-mails.

Summary of Recommendations

i) The legal obligation to carry out an assessment of potential risks of *refoulement* prior to expulsion should be clearly stated and enforced including during exercise of extraterritorial jurisdiction.

ii) The right to appeal the expulsion decision at the border or a decision of equivalent effect with suspensive effect should be enshrined in Law.

iii) Adoption of uniform standards and procedures to identify asylum seekers, unaccompanied minors, victims of human trafficking and survivors of torture, not exclusively dependent of their own expression of interest and providing for the involvement of specialized government, international and nongovernmental entities as well as the support of qualified interpreters.

iv) Implementation of a Country of Origin Information system available to SEF and other AMN members allowing for the assessment of the general situation in the country of destination of the returnee.

v) The legal regime of Decree No 86/2007 of 12 December and Law No 23/2007, of 4 of July, with the amendments introduced by Law No 29/2012, of 9 August, should be amended in order to explicitly safeguard the international obligations of the Portuguese State as regards the extraterritorial application prohibition of direct and indirect *refoulement* and the ban on collective expulsions.



vi) Standard provisions should be introduced regarding the obligation to provide migrants at border posts with information on their rights as regards international protection before a decision is rendered regarding their return to a third country or a EU member. The right to information should also be granted in the context of maritime interceptions and externalization of the refusal of access to national territory. SEF and other relevant members of the MAS should be given precise guidelines on the implementation of these provisions.

vii) The necessary legal and practical provisions should be implemented to insure effective access to free legal assistance thus giving effect to the provisions of Law No 23/2007, of 4 July, with amendments introduced by Law No 29/2012, of 9 August regarding the urgent appointment of a lawyer at border points.

viii) The right to interpretation should be legally enforced and effectively ensured by qualified interpreters during expulsion procedures at border posts, interception and search and rescue operations and externalization of access controls to national territory. This shall apply, namely, to judicial support to insure access to an effective remedy.

ix) Mandatory training on international protection in accordance to international obligations should be extended to members of the SAM other than SEF officials posted at the borders to include their officials who might come into contact with migrants in need of international protection in discharging their duties.