10-Point Plan Expert Roundtable No. 1:
Controlling Borders while Ensuring Protection
20 – 21 November 2008, Geneva

Summary Report

Introduction

The Expert Roundtable No.1 'Controlling Borders while Ensuring Protection' was convened by UNHCR in cooperation with the Graduate Institute of International and Development Studies, on 20 and 21 November 2008 in Geneva with funding provided by the European Commission. It was the first in a series of four thematic meetings on UNHCR's '10-Point Plan of Action on Refugee Protection and Mixed Migration' ('10-Point Plan'). Around 40 experts from governments, international governmental and nongovernmental organizations, the academia and UNHCR explored practical ways as to how to operationalize refugee and human rights protection in the context of border and entry management. A particular emphasis was given to the challenges for the entry system related to the phenomenon of 'mixed migratory movements'.[1]

1. Clarification of terminology

Participants first discussed terminology and the concept of 'protection-sensitive entry systems':

Experts welcomed that the 10-Point Plan employed the term 'entry management' which is broader than the commonly used term 'border control'. Several European experts mentioned that the entry management has undergone important changes in their countries and moved away from the actual, physical border towards 'virtual' borders. States have set in place measures outside their own territory, on the high seas and on the territory of third states. These included cooperation agreements with third states, out-posting of immigration officials, extraterritorial interception operations and the factual delegation of certain control functions to private actors through the employment of carrier sanctions.

Participants underlined that it was essential to include activities beyond immediate measures at the border of a State's territory into an entry management strategy. The term 'entry system' should encompass all measures taken by a State to control entry into and stay on its territory, irrespective of whether they take place within the territory, at the border or outside the State's territory. Such measures could range from legislative clarifications through the direct refusal of entry by authorised personnel.

Experts explicitly emphasized that the entry system should be respective of refugee protection requirements, especially the principle of *non-refoulement*. They also emphasized that the notion 'protection-sensitive' should not be restricted to ensuring adherence to international refugee law only. The notion called for the respect of people's human rights and the dignified and respectful treatment of all persons within

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[1] The annotated agenda and list of participants are annexed.

mixed movements, regardless of their status. Mixed movements often included refugees and migrants in extremely vulnerable situations with different humanitarian and protection needs. Safeguards were necessary to ensure that specific needs such as those of refugees, asylum seekers, women and other victims of human trafficking and unaccompanied minors are identified and addressed.

2. Core Functions and Objectives of a Protection-Sensitive Entry System

Conflicting objectives?

Participants emphasized that the entry system had to meet several, at times conflicting objectives, including migration management, crime prevention and respect of protection obligations. Strong expectation to meet control requirements could cause practical dilemmas for border guards, compromising their ability to be sensitive to claims for refugee protection. This was especially the case where border officials are required to meet performance indicators for effective border control or are otherwise submitted to considerable pressure to prevent entry.

But experts also underlined that conflicts between control and protection objectives should and could be solved. The success of increasingly tight border controls was questioned and several participants mentioned that such measures in their countries had not stopped people from arriving, sometimes by ever more dangerous routes. Tighter border control without corresponding protection safeguards would risk threatening the possibilities of refugees and other people in need of international protection to access safety.

Another important objective of the entry system was crime prevention. The development of anti-smuggling and anti-trafficking legislation including criminal penalties, immigration sanctions and travel bans has provided governments with additional possibilities for interventions. Additionally, cooperation and exchange of information among countries along migration routes have yielded positive results in combating these crimes.

A protection-sensitive entry system should, however, also include adequate safeguards to ensure that such measures do not also penalize the victims of such crimes. Some experts mentioned that specific training programmes have produced positive results, including an increased sensitization of border guards and the capability to identify victims of trafficking and distinguish them from traffickers.

A legal presentation on the 'non-penalization of entry of refugees' referred to the fact that the 1951 Convention relating to the Status of Refugees (1951 Convention) specifically addresses the fact that refugees fleeing persecution often do not have the possibility to obtain the documentation necessary for an authorized entry. Art 31(1) of the 1951 Convention exempts refugees from penalization for irregular entry, if they are coming directly from a territory where they faced persecution and have presented themselves without delay to the authorities.

Experts agreed that further research would be useful on the legal aspects of the entry management, including a comparative analysis of Art. 31 (1) of the 1951 Convention,

the question of State responsibility for extraterritorial actions and for the involvement of private actors in the entry system.

Timing and location of protection measures

Participants noted that a protection-sensitive entry system should include measures at the pre-departure stage. It would, as one participant pointed out, 'help to provide protection without the need to make a potentially dangerous journey'. As a measure of prevention, it was seen useful to inform people who may consider leaving on their options, their rights and obligations and to raise awareness on the risks of human trafficking and smuggling.

Several participants expressed concerns on whether it can be assessed whether refugees have access to international protection elsewhere when they are intercepted long before reaching the territory of their desired asylum country. It was seen crucial that protection begins before physical entry into the territory of the intended destination country. The human rights of all people on the move should be protected at every stage of the entry process. This, however, requires solution of a number of practical and legal questions.

A specifically problematic area identified by participants was interception on the high seas where support services are regularly not available to those intercepted. Border officials have to decide quickly on interception measures and are often not in a position to resort to the advice and assistance of asylum experts.

A legal presentation on the extraterritorial application of the *non-refoulement* principle underlined that States' *non-refoulement* obligations under international human rights and refugee law are not restricted to their territory. They apply extraterritorially wherever the State exercises its jurisdiction. Supervisory bodies to international human rights and refugee treaties, especially the European Court of Human Rights (ECHR), have taken a cautious approach with regard to the establishment of jurisdiction, and require effective control over a territory or person. There is, however, a growing tendency in the international human rights discourse to hold States responsible for violations of human rights which they have caused.

Providing access to services at the initial reception stage and before the final status of the applicant is established was emphasized as another fundamental requirement of a protection-sensitive entry system. Such services ensure that persons with specific needs are identified and addressed in a timely manner.

3. Actors in Protection-Sensitive Entry Systems

Traditional actors in entry management include different State entities from border guards to officials in ministries of interior, immigration or security, justice etc. Increasingly, private actors also have become involved in entry management tasks. Two categories of actors were specifically discussed: carriers such as transport and shipping companies which are tasked with certain control functions and civil society representatives, sometimes in cooperation with international organisations, supporting governments in providing assistance and protection services to newly arrived persons.

Carriers

Several participants voiced concerns about the increased involvement of private carriers in entry control procedures. Their roles were often not adequately defined and safeguards are lacking that would help carriers to identify asylum seekers and to take differentiated approaches. It was also discussed whether and to what degree States remain responsible for actions carried out by carriers and for ensuring that all border control measures comply with international human rights and refugee protection standards.

A legal presentation on "State Obligations and Private Actors in the Entry System" highlighted the following points: Private involvement in migration control has been increasing in recent years, expanding the obligations of carriers, using private contractors to assist border control and process visa applications and the hiring of private security firms assist border management in third countries. For the asylum seeker these new forms of private-public partnerships raise a number of protection challenges. So far case law has been limited and little is generally known about the conduct and consequences of privatised migration control. Principles of customary international law nonetheless provide strong arguments that States retain basic protection obligation and responsibilities even when delegating immigration functions to private actors.

Civil society representatives

Participants concurred that the increasing involvement of non-governmental organisations and other civil society representatives was a positive development, which could ensure better safeguards and provide additional services. It was therefore important that they be given access to people seeking entry, including in transit zones. At the same time it was mentioned that the involvement of several actors could also create confusion. It was therefore necessary to stress the importance of coordination and clear definition of roles and responsibilities. In some countries, specific legislation or agreements has helped to clearly establish the roles of non-governmental organisations.

4. Establishing and Improving Protection-Sensitive Entry Systems

Participants exchanged practices and suggestions on the implementation of a protection-sensitive entry management. These included the following:

Cooperation

Throughout the roundtable, participants underlined the importance of effective cooperation, amongst organisations, with and between different branches of government institutions and law enforcement bodies, on national, sub-regional, regional and even global basis. Cooperation required clarity about mandate, roles and responsibilities of all actors involved in border management and coordination. Participants reported about the positive experiences with cooperation agreements formalized through a Memorandum of Understanding (MoU) or a Tripartite

Agreement. Participants pointed out the potential of international organisations playing a facilitator role between governmental bodies and civil society organisations in reaching such agreements.

Cooperation between States was relevant not only in law enforcement areas such as combating international crime, but could also facilitate the return of non-refugees. Co-operation among transit and destination countries was important to establish a system of burden sharing and for agreeing on the responsibility for the examination of asylum applications. Participants expressed concerns that inter-state cooperation in the area of border management often focused on control only and more attention should be given to include refugee protection and human rights concerns into cooperation and readmission agreements. In this respect it was recommended to conduct further research on existing readmission agreements. Some experts also suggested that cooperation should also be include, where necessary, capacity building measures.

Information sharing was identified as an important tool benefiting all relevant actors in the coordination, identification and effective protection of people crossing borders. Information sharing is or should be taking place between governments, humanitarian organizations, including UNHCR, and migrants, on national, regional or international level.

Actors involved in border management should regularly meet and discuss issues of common interest and identify problem areas. Humanitarian agencies and NGOs could better coordinate their functions and exchange cross-border information.

Some participants mentioned good experiences with cross-border cooperation between NGOs. They mentioned examples where NGOs informed their partners in other countries about the arrival of asylum-seekers who are returned under 'safe third country' arrangements to third States for the examination of their asylum requests.

Participants underlined that the exchange of best practices and twining arrangements could be beneficial for a more protection-sensitive border management as well as help to overcome certain resource constraints and asked that this issue is given the appropriate attention in the future. Furthermore, collection of data, which should not just encompass numbers but also profiles of people on the move, was also seen as an area requiring further action.

Tools for information exchange could include cross border meetings, handbooks, manuals and the internet. Information networks have the benefit of reaching out to a larger audience and provide access to information that is normally only available to a limited group.

Specific good practice examples:

The MoU between the Hungarian Border Guards, UNHCR and the Hungarian Helsinki Committee, establishing a monitoring framework with specific responsibilities allotted to each of the three parties. The MoU has improved access to the territory, asylum procedures and brought practices in line with international law. A public report on the project agreed upon by all three parties has been presented to

the public. Similar MoUs have also been concluded in other Central European Countries (Slovakia, Slovenia and Romania). [2]

The partnership between UNHCR London and the British Refugee Council aims to initiate a dialogue on protection-sensitive entry systems with the UK Government. The following five main objectives have been agreed upon: 1) to organize senior level discussions between civil society, UNHCR and the UK Government; 2) to design an independent monitoring model for the UK's outposted immigration control, 3) to develop a strategy for UK parliamentary lobbying 4) to agree on refugee law and human rights training for outposted UK immigration officials; 5) to develop a refugee protection toolkit for outposted immigration officials.

Examples of inter-state cooperation mentioned include: 1) the Migration and Development for South Africa initiative (MADFSA), a mechanism for dialogue between Governments in the Southern Africa region and providing university training courses on general migration and refugee protection and 2) the Cross Border Cooperation Process in Central and Eastern Europe, supported by the EU, UNHCR and the Swedish Migration Board and promotes networking on migration issues through intergovernmental and NGO meetings.

One example of a successful information network provided during the Roundtable is the Population Movement Tracking System in Somalia that monitors the movement of displaced people in Somalia. It has been particularly useful to humanitarian agencies, the national authorities and the media to identify refugees and migrants on the move and requiring humanitarian assistance and/or protection. Through an information network, relevant actors are alerted about these movements, allowing them to ensure adequate responses.

Protection tools

A protection-sensitive entry management should ensure that asylum seekers are given effective access to a procedure in which their protection needs can be examined. This includes access to information, interpretation, and legal advice. People with specific needs may require further services.

It was acknowledged that the identification of asylum seekers and other persons with special needs was not an easy task for border officials and required a proactive approach. Several participants highlighted the particular importance of communication between persons seeking entry and border or migration officials. The availability of information about rights and procedures, legal advice and interpretation services could facilitate such communication.

Several participants emphasized that border guards and others actors who fulfil similar functions should be given guidance on how to identify and refer asylum seekers and other people who may have specific needs to mechanisms where these needs can be assessed and addressed. Such guidelines should differentiate between different entry situations such as ports, airports, land borders, in-country applications and encounters taking place extraterritorially. For the identification of asylum seekers

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[2] A copy of the MoU and an information note are included in the documentation of the roundtable.

it was stressed that entry officials should be able to create confidence and establish a meaningful communication with persons seeking entry.

Participants also mentioned that it was important to provide border guards with tools to facilitate this task. While some tools in this regard existed already participants recommended that additional ones be developed.

Specific good practice examples:

Participants referred to the following examples: Lists of countries or groups with specific protection needs, questionnaires regarding specific protection risks (as used in the Netherlands and Canada); toolkits and practical guidelines for migration and border officials on how to identify asylum seekers and follow protection obligations in their everyday activities; structures which provide border guards with the possibility to contact asylum experts and discuss problematic cases.

Training

Training was considered as an effective means to ensure (a protection-sensitive) implementation of the entry system and equip all actors in the entry system with the knowledge and skills to apply it in their daily work. Training should be all-inclusive, involving also private actors and bodies which, though not directly in contact with people seeking entry, nevertheless influence the design and implementation of the system, such as judges and policy makers.

Training should be provided to all new staff. Regular follow-up training events could ensure that entry officials are aware of changes in policies and/or the composition and profiles of migratory movements. Participants expressed some concerns regarding uncoordinated training provided by different actors and recommended joint or, at least harmonized training.

Participants suggested that training strategies and materials should further be made available in order to build upon the experience and know-how of others. This was also seen as a way to overcome resource limitations for the development of training modules.

Specific good practice examples:

"Protection with Broader Migration Flows" training in Angola: The use of case studies and videos and the work in teams of trainers from different organisations and institutions have been identified as being helpful in a country that has only recently been exposed to mixed migration issues.

FRONTEX's capacity building programmes: FRONTEX provides comprehensive and specified training to all EU border officers, including on joint returns, safe third countries, and false documents. The training is based on a common core curriculum, with a strong human rights component. The curriculum also requests all European border guards to follow the relevant national legislation on asylum claims.

Another example given was the training package for immigration officers in Canada. This training has to be undertaken by all immigration officials and includes special sections for tasks at land borders.

Monitoring

Many participants underlined that monitoring and quality-control mechanisms were essential instruments for the establishment and continuous improvement of a protection-sensitive entry system. Some experts reported about the monitoring mechanisms they have been setting up in their countries and suggested the following steps: (i) assessment of the current situation (existing legislative framework, key stakeholders, roles and responsibilities, operational context, compliance with international standards) and identification of strengths and gaps; (ii) organization of a workshop/meeting with stakeholders to clarify roles, develop strategies to overcome current gaps; (iii) regular monitoring of day-to-day activities and analysis of new developments; (iv) establishment of problem solving structures; (v) evaluate and list lessons learned and share findings of different activities with stakeholders, with the aim of further improving the system. Participants frequently referred to the important role UNHCR has played in establishing trust between governmental and civil society partners, and in facilitating and implementing the monitoring mechanisms.

<u>*Specific good practice examples*</u>:

The activities under the Hungarian MoU aim at monitoring the entry of persons in need of protection to the territory of, and access to the asylum procedures as well as their protection against *non-refoulement*. Lawyers from the Hungarian Helsinki Committee visit border sections with full access to foreigners, border police staff and detention facilities, as well as statistics and (anonymous) case files. Reports are being made from individual visits and issues taken up in regular tripartite working groups The work under the MoU has helped to increase mutual understanding and transparency, developed confidence, enhanced access to asylum, identified training needs as well as needs for changes in existing laws, particularly on non-penalization of entry, *non-refoulement*, and the cooperation between border police and immigration/asylum authorities.

Canada has regular quality control assessments of all stages and levels of border and immigration operations. The findings form the basis for adjustments and improvements of the existing system.

In the United Kingdom, an independent inspectorate has been tasked with monitoring the UK Border Agency in its implementation of national legislation in issues related to immigration and asylum.

State responsibility for extraterritorial activities and private actors

Several participants deplored the lack of information about extraterritorial border control activities, especially when undertaken by carriers or other private actors and their impact on the possibility of refugees to access countries in which they would be granted effective protection. It was recommended that this be further examined and

possibilities explored on how States' extraterritorial border control could be brought in line with international human rights and refugee protection standards.

One suggestion made in this respect was that outposting of immigration and border control officers could be accompanied by the parallel deployment of asylum experts. It was also recommended that outposted border officials or airline staff refer intercepted asylum seekers to their embassy for further examination. Embassies should and could make more use of humanitarian visa to allow onward travel in specific protection cases. While UNHCR's mandate generally does not allow for interventions in the country of origin, UNHCR may assist in assessing whether onward travel from countries of transit is necessary for protection reasons.

Conclusion and follow-up

Experts appreciated that the roundtable has provided them with the opportunity to exchange views on the basic features of a protection-sensitive entry system and on experiences and practices developed in different regions. Many experts mentioned that they will inform relevant actors in their governments about the results of the roundtable and share the background material with them.

Participants said that they would welcome continued exchange of information within the group and suggested to create a platform for exchange. The group felt that given the variety of regional and national particularity, it had not been possible to discuss all issues exhaustively. Participants agreed that it would be useful to continue these discussions on regional, sub-regional and national level. They welcomed the roundtable organized by the British Refugee Council and UNHCR London in December as a good practice to follow.

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