

High Commissioner's Dialogue on Protection at Sea (10-11 December 2014)

Reports of the Breakout sessions

No summary can do justice to the very rich and nuanced discussions that took place during the Breakout sessions, which were the most important part of the Dialogue. The summaries that follow are based upon the oral reports delivered by the Co-Chairs during the final plenary session on 11 December 2014.

Breakout session 1

Saving lives: search, rescue and disembarkation

1. The legal framework

There was broad recognition of the need for renewed commitment to full implementation of the international legal framework for search and rescue at sea. This was accompanied by cautions from some participants that humanitarianism should not provide a 'fig leaf' obscuring a 'securitized' enforcement agenda. A 'whole-of-law' approach — encompassing the relevant principles, standards and obligations under international maritime, refugee, human rights and criminal law — was said to be desirable and necessary. Such an approach would include, notably, commitment to the principle of *non-refoulement* at sea.

Participants repeatedly underlined the need for predictable and prompt disembarkation of rescued persons to a place of safety. They noted that the drafters of United Nations Convention on the Law of the Sea (UNCLOS) did not address disembarkation procedures or burden-sharing arrangements— although the International Convention on Maritime Search and Rescue (SAR) and International Convention for the Safety of Life at Sea (SOLAS), as amended in 2004, provide that States must coordinate and cooperate so that those rescued can be disembarked to a place of safety as soon as possible. The General Assembly has recognized that all States must fulfil their search-and-rescue responsibilities, and that there is an ongoing need to assist developing States, in particular, to increase their search-and-rescue capabilities.

A number of participants pointed out that, while the concept of 'distress' at sea has accepted definitions under international law, guidance and agreement on the factors that should be taken into account in assessing possible distress situations could be valuable.

One participant noted the insufficient attention given to the responsibilities of *flag States* to ensure that vessels flying their flag meet their search-and-rescue and related obligations, suggesting that discussion in this area typically tends to focus on the responsibilities of coastal States and shipmasters alone.

2. Search-and-rescue efforts: cooperation, coordination and the role of the shipping industry

Participants emphasized the well-recognised and long-standing tradition and duty of rescue at sea, codified in international legal instruments, and recalled that the duty applies regardless of the

nationality or status of persons in distress. They commended the maritime industry's professional pride in upholding this seafaring tradition.

It was suggested that States must shoulder greater responsibility and commit to dedicated search-and-rescue efforts, especially in locations where mixed movements by sea are prominent. Rescues by merchant ships and other private vessels have an important role complementing State action and must be supported by States to play that role through predictable and speedy disembarkation of those rescued.

It was noted that there have been instances of people in distress not being rescued, and that lack of agreement among States regarding arrangements for swift disembarkation to a place of safety does not promote timely assistance to people who may be in danger.

Some participants also voiced concerns regarding the health and safety of crew members when large numbers of rescued persons are embarked. The value of practical guidance on post-rescue shipboard arrangements for commercial vessels embarking rescued persons was noted. Among other issues, such guidance could deal with on-board medical and emergency assistance. It would *not* envisage the possibility of processing refugee claims on board, but could provide guidance on the particular needs of rescued refugees.

Participants noted existing limitations on search-and-rescue capabilities in parts of South-East Asia and in the Gulf of Aden, and called for inter-State cooperation to remedy these gaps.

3. The protection dimension, reception and access to asylum

Participants observed that, at both land and sea borders, refugees and migrants are vulnerable to the risk of 'pushbacks'. In this connection, some recommended improving the monitoring of maritime operations — including through the use of modern technologies such as mobile phones or satellite tracking — to guard against abuses.

The importance of burden sharing to facilitate post-disembarkation arrangements, including for asylum-seekers and refugees, was highlighted. In the European context, support was expressed for making better use of existing mechanisms under the Dublin Regulation to enable burden sharing between disembarking States and other EU Member States.

Participants stressed that, following disembarkation, immigration detention should be prevented and called for increased use of alternative, non-custodial approaches, describing them crucial, especially for children and for victims of torture or trafficking. The dramatic increase in women and children (including unaccompanied minors) arriving by sea was particularly noted in this context.

Support was expressed for the view that regional or sub-regional protection-at-sea arrangements can provide cohesive and predictable approaches to rescue and disembarkation to a place of safety; for reception and other post-disembarkation arrangements; and for addressing criminal trafficking and smuggling networks.

4. Surveillance and better use of technology to prevent loss of life

The use of new tools for aerial and surface surveillance to enhance States' ability to conduct SAR efforts was discussed. The importance of cooperation between States, bringing together their

different surveillance methods and capabilities was emphasized, as was the need for coordination and cooperation between different Government ministries and agencies.

5. Tracing, identification and notification of families

Strong calls were made for developing and implementing better systems for tracing and reuniting those who become separated from family during their journey; for identifying those who perish at sea and communicating with their families, with due respect for confidentiality and security; and for the retrieval and return of human remains.

6. Information

A final theme of discussion was the lack of good data on sea journeys: how many embark and how many arrive? The need to establish a stronger evidence base on the profiles of those who take to the sea, as well as on drivers and routes, was noted by several participants. It was acknowledged that while there are some good models of how to do this, they are few in number.

Breakout session 2

Providing safer options: comprehensive approaches to address the drivers of dangerous sea journeys

Six broad themes emerged from discussion in Breakout session 2. Overall, the common thread was a strong call for enhancing the moral, ethical and legal dimension of this issue, centred on human rights and refugee law, human dignity and a strong partnership approach.

1. A call to establish a holistic evidence base through better data and research on drivers

Participants acknowledged the necessity to confront the multiple, interconnecting drivers of dangerous sea journeys, and to provide safe alternatives to desperate people who might otherwise place themselves at the mercy of seas and smugglers. It was suggested, however, that the current drivers behind dangerous sea journeys may not be fully understood. The need for a more nuanced and sound analysis of these drivers was therefore highlighted. Factors such as globalization, mass communication, mass transportation, as well as 'aspirational' and 'diaspora' migration were mentioned. It was acknowledged that not all who undertake dangerous sea journeys are fleeing from conflict areas — although many are. To support 'evidence-based' policy making, there was also a call for better cooperation and coordination regarding the collection and sharing of data on routes, patterns, drivers, profiles, protection risks, distress incidents, loss of life, and good and bad practices.

2. Atmospherics around migration and protection; the need to expand alternative legal pathways

Embracing human mobility, demonstrating the advantages of migration to the public, moving away from criminalization, and working on legalization and regularization were all highlighted as 'positive approaches'. Emphasis was placed on the positive aspects of migration, and the fact that entire countries and civilizations are built as a result of migratory movements. Creating a positive climate for migrants and refugees, including in the context of reception and processing arrangements, was emphasized, as was expanding the availability of alternative legal pathways and means of entry. A call was made to secure political will and for increased efforts to provide such pathways, in particular for those seeking protection. The possibilities evoked included more substantial resettlement

efforts, humanitarian admission, private or community-based sponsorship, family reunification, and labour mobility schemes.

The question, however, was raised as to the threshold at which alternative legal pathways would result in an actual reduction in 'onward movements' by sea. The central importance of expanding family reunification opportunities and the important role of the diaspora, for example in sending home remittances, were highlighted as critical factors in the prevention of dangerous sea journeys. Several participants emphasized the need for migration to be included in the post-2015 UN development agenda.

3. Support for the right to work and labour mobility

Multiple interventions were made in favour of activities to support the right to work. The need to promote decent work in the country of origin was cited, and a call was made to map labour migration standards and migratory pressures. The ILO's *Fair Recruitment Initiative* was mentioned as pointing to good practices for fostering fair recruitment, preventing human trafficking and reducing the cost of labour migration.

In the case of refugees, it was highlighted that there is a need to create decent work opportunities in countries at the source of onward movements. It was suggested that the right to work and freedom of mobility need to be better analysed. Labour mobility schemes, including in a regional context, will need to be analysed further from the perspective of how refugees could participate in them, while benefiting from adequate protection safeguards.

4. A call for effective, protection-sensitive responses to smuggling and trafficking of refugees, asylum-seekers, stateless persons and migrants

It was mentioned that a significant factor contributing to dangerous journeys at sea is the existence of established smuggling routes and networks. A blurring of lines between trafficking and smuggling was noted. Several participants highlighted the need for effective, protection-sensitive responses, and suggested that these should avoid possible unintended consequences, such as penalizing or criminalizing those involved in rescue operations. More generally, it was claimed by some participants that an exclusive focus on combatting smuggling that has the effect of criminalising victims could be counter-productive. Participants also repeatedly stressed that sea routes must be recognized as asylum routes.

The weakness of maritime law and labour standards regarding protection for seafarers and for those who work at sea was cited. A call was also made to address the protection needs of people affected by smuggling and trafficking, including through their identification and referral to appropriate processes and services. Regarding in particular those States that have not signed the 1951 Convention relating to the Status of Refugees, there was also a call to expand mechanisms and procedures to address the needs of victims of trafficking and other vulnerable people on the move. Assisted Voluntary Return (AVR) was recognised to be an important component of the package of measures necessary to address the situation of failed asylum-seekers and victims of trafficking. A number of participants mentioned that policies of prohibition, deterrence and non-entry are extremely costly, and can risk undermining international law and human dignity.

5. The necessity to strengthen or establish international and regional cooperation

The importance of South-South cooperation was repeatedly stressed. A proposal was made that sub-regional cooperation aimed at achieving economic and social integration (e.g. MERCOSUR or

ECOWAS) benefit from each other's experience in promoting freedom of movement and labour mobility. It was highlighted that effective regional cooperation is likely to be encouraged and facilitated by the development of mechanisms to clarify responsibilities, such as the Khartoum Process (EU-Horn of Africa Migration Route Initiative) which aims to tackle trafficking and smuggling of migrants between the Horn of Africa and Europe. These need to be built upon the existing international and regional legal regimes regulating refugee protection and search and rescue. Further, the often cited but equally often limited cooperation between sending and receiving countries needs to become more substantial.

Participants also noted that protection at sea cuts across the mandates of a number of agencies. Finally, the fragmented global governance system was mentioned, including the disconnect between its development, peacebuilding, humanitarian and economic components.

6. The rule-of-law and spirit-of-law dimensions

There was a strong call to ensure that the whole issue is looked at from a rule-of-law perspective — at the international, regional and national levels. This would involve building rule-of-law systems in countries of origin, 'transit' and 'destination' as a key part of improving economic and social development. Temporary protection and stay arrangements were acknowledged to be a useful tool in response to complex rescue-at-sea scenarios. The issue of collusion of State authorities in the trafficking industry was highlighted as a challenge in many contexts. Participants noted the unfortunate reliance on detention, and its arbitrary use as a deterrent or punitive measure against those travelling by sea in a number of contexts. Several participants articulated the need to bring the human rights, and refugee law dimensions more clearly into this debate.

Breakout session 3

Making it work: international cooperation to share burdens and responsibilities

This session focused on how to enhance solidarity and make international cooperation work in the context of the ever-increasing phenomenon of dangerous movements by sea. A threshold point that was strongly expressed by some participants was that using the word 'burden' was not a helpful way of approaching the issue.

Session participants highlighted the following interconnected imperatives, which require reinforced international cooperation.

1. Reducing the need to take dangerous sea journeys and enabling informed choices

Participants noted that cooperative efforts must be made well *before* people embark on risky sea journeys. One way of reducing the necessity of taking such risks could be through providing more pathways for reaching safety and for legal migration, including through increased resettlement quotas, labour mobility schemes and humanitarian entry arrangements.

There were also strong calls for strengthening international action and diplomacy to resolve situations of conflict and persecution that lead to displacement. To tackle important drivers of migration, displacement and onward movement, such as poverty, conflict and persecution, increasing the engagement of development actors in countries of origin and of first asylum was identified as an important part of the spectrum of solutions.

Looking to the future, participants noted the importance of including refugee-protection and migration concerns in relevant international forums on development, such as the Post-2015 Sustainable Development Agenda and the 2016 World Humanitarian Summit.

An additional intervention suggested by participants was engaging with diaspora communities to assist in awareness-raising, as well as using contemporary media channels to disseminate information.

2. Saving lives as the paramount concern

There was broad recognition that saving lives should, in all circumstances, take priority over other concerns. In this context, the discontinuation of the *Mare Nostrum* operation in the Mediterranean was met with widespread concern. There were repeated calls to develop and implement region-wide, cooperative search-and-rescue arrangements that would be similarly effective in saving lives.

3. Tackling smuggling and trafficking

To respond to the serious issues of migrant and asylum-seeker smuggling and the trafficking of human beings, participants called for the development and effective implementation of robust legal frameworks at national level. At the same time, it was emphasized that anti-smuggling measures must not prevent access to protection, lead to penalization of asylum-seekers, or interfere with search-and-rescue efforts.

4. Identifying and meeting protection needs

Many participants highlighted both the fact that movements by sea often and increasingly include people with international protection needs, and the importance of protecting the rights of migrants. It was noted that, for some, protection needs might only arise in the course of their journeys (e.g. for many victims of trafficking).

Participants pointed to the need to improve conditions in reception facilities and to ensure that detention is only used in limited situations and as a last resort. It was proposed that there would be benefit in developing standard screening, identification, risk-assessment and referral mechanisms and committing to their consistent use.

It was suggested that complementary strategies could include the deployment of mobile protection teams involving international organizations (such as UNHCR and IOM), relevant State agencies, and other actors — along the lines proposed during the Djibouti Expert Meeting on Refugees and Asylum-Seekers in Distress at Sea in 2011.

For those found not to have international protection needs, a stronger strategic approach to assisted voluntary return and reintegration (AVRR) was recommended.

5. Investing in protection at sea

The lack of adequate financial, technical and human resources to manage the myriad issues and protection challenges affecting those making sea journeys was raised by a number of participants. Increased capacity building, through training and exchanging good practices and lessons learned, was proposed as part of the solution.

Improving technical cooperation between all actors — including States, international agencies, civil society, and the shipping industry — was also considered to be critical. Participants underscored the need for better cooperation and coordination on collecting and sharing data on current and emerging trends in mixed migration by sea, to support effective, evidence-based policy responses.

The example of the Regional Mixed Migration Secretariat, based in Nairobi, was cited as a useful model.

6. Expanding the toolbox to protect the rights of asylum-seekers, refugees and migrants

Finding innovative solutions to deal holistically with the range of issues raised by large-scale movements by sea was a recurrent theme. A number of participants noted the importance of establishing regional or sub-regional responsibility-sharing arrangements, through protection-sensitive multilateral or bilateral agreements. It was recommended that such agreements, entered into by States and other stakeholders, need to specify cost-sharing arrangements as well as mechanisms for equitable, differentiated solutions for those in need of protection.

Participants noted the relevance of existing and historical models (e.g. the Djibouti Model Framework Agreement and the Comprehensive Plan of Action on Indo-Chinese Refugees). At the same time, it was stressed that these must be adapted to particular contemporary circumstances. While recognizing the role played by regional forums such as Regional Consultative Processes (e.g. the Bali Process), the need was emphasized for a stronger focus on protection to be incorporated into such processes.

Providing training to the media — with a view to raising awareness and improving public perceptions of asylum-seekers, refugees and migrants, including those who take risky sea journeys — was deemed a worthwhile approach. Participants remarked that, to change the often negative public discourse around asylum-seekers, refugees and migrants, the full range of media and advocacy channels should be harnessed.

Finally, it was highlighted that existing legal frameworks for international protection could be complemented in appropriate circumstances by new tools which are in line with international standards (e.g. UNHCR's Guidelines on Temporary Protection or Stay Arrangements).