

# **Proceedings of the "Workshop on Reconciling Legitimate State Interest to Control Immigration with Refugee Protection"**

Nadi, Fiji – 27-29 April 2004

**A follow-up to the 2<sup>nd</sup> Bali Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crimes**

## **1. Introduction and Background**

The workshop was co-organised by UNHCR and the Fiji Government and took place in Nadi, Fiji from 27-29 April 2004. This workshop is a follow-up to the Second Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crimes held in Bali, Indonesia from 28-30 April 2003. At that conference, Ministers recommended that States "welcome the cooperation able to be provided by IOM and UNHCR, consistent with their respective mandates, to assist in the follow-up workshop arising from the Bali process."

**The aim of the workshop was to facilitate a discussion and exchange of views between experts from states and international organisations on refugee issues within the context of broader migration movement.** There were 43 participants from 23 different countries. In addition, the International Organisation for Migration (IOM), the Asia Pacific Consultations, and Pacific Immigration Directors' Conference were represented.

The themes discussed were:

- (i) Reconciling the two underpinning principles - the right to limit access to territory and the right to seek and enjoy asylum; exploring their point of intersection, and the implications on immigration/asylum management;
- (ii) Establishing fair, quick and effective mechanisms to identify those in need of international protection and screen them from economic migrants;
- (iii) Excluding from refugee protection those who have committed serious crimes;
- (iv) The problem of refugees who move in an irregular manner from a country in which they had already found protection;
- (v) Developing co-ordination strategies among states to ensure removal of those who have been rejected after a fair and effective refugee status determination procedure; and,
- (vi) Working on durable solutions for refugees.

## **2. Reconciling the Underpinning Principles - the right to limit access to territory and the right to seek and enjoy asylum; exploring their point of intersection and the implications on immigration/asylum management.**

In the current context of mixed migratory flows, the participants expressed concerns on the abuse of the international protection system. Despite this abuse, the participants agreed it was important to identify the refugees among the arrivals and screen them from economic migrants. It was also important to identify the victims of trafficking to address their psycho-social needs. Protection should be provided by setting up a proper reception arrangement and establishing a fair, effective and efficient system, with the possibility of appeal, to determine refugee status. In the case of countries which are not party to the refugee instruments, it was felt that UNHCR could be of assistance in determining refugee status and seeking durable solutions as appropriate.

The participants identified several problems in establishing or maintaining the refugee status determination system. These problems include:

- the lack of human, financial and technical resources;
- the difficulties in accessing country of origin information to verify the identity of asylum seekers and to check the authenticity of their documents and the genuineness of their claims;
- the difficulties in communicating with asylum seekers due to the lack of interpreters;
- the lack of accommodation; and
- the lack of refugee legislation.

Some participants also considered the arrivals of the asylum seekers to have negative social, political, economic and cultural impacts on their society.

The participants proposed the following:

- the need for the international community (states and international organisations) to have a bigger role in terms of burden sharing;
- the need for states to enter into agreements to share country of origin information; and,
- to establish a mechanism for the return of those not in need of international protection to their countries of origin.

Some participants mentioned that if a penalty is to be imposed to those who present fraudulent or false identity, documents or claims, such penalty should be humane and to bear in mind that some of those who are being penalised could be refugees.

## **3. Establishing fair, quick and effective mechanisms to identify those in need of international protection and screen them from economic migrants.**

A case study was presented to participants using the Albanian model in identifying persons in need of international protection based on a formalised co-operation between UNHCR, IOM, Organisation for Security Co-operation in Europe (OSCE) and Albanian police. The screening procedures as arranged in the model involve the Albanian police presenting an apprehended foreigner (for illegal stayer) to a pre-

screening team, composed of members of the organisations mentioned above. The pre-screening team would then conduct a preliminary interview with the foreigner (with an interpreter) within 24 hours in the place of detention to establish his or her profile as an asylum seeker, economic migrant or victim of human trafficking. If the foreigner is profiled as an asylum seeker, he or she is taken to the centre for asylum seekers and referred to the Albanian national asylum procedure. If the foreigner wishes to return to his country of origin, he or she is taken by IOM to a temporary shelter until he or she is returned. IOM and NGOs also provide special assistance required by victims of trafficking.

Some participants believed that the presented model, or another practical mechanism, could work in the region, provided that resources and political will were made available by states. Some participants expressed concerns that the current system does not provide for a speedy resolution through resettlement or return. Instead, by default, countries would only have one option, local integration, which in turn would create a pull factor, which the smugglers can manipulate.

A majority of the participants recommended the following:

- the return to the country of origin or to countries where they have found effective protection should be undertaken through bilateral agreements;
- durable solutions should be facilitated by UNHCR in the context of international burden sharing; and,
- the international community and, in particular, the developed countries have to commit themselves to assist and support transit countries.

UNHCR proposed that participants look for more creative responses and suggested the following approach to consider:

- signatory states to the 1951 Refugee Convention that are advanced in refugee status determination should maintain their high standard;
- that they should provide capacity building opportunities in less advanced signatory states to assist them in the refugee status determination procedure; and,
- find ways and means for non-signatory states to set up a mechanism for refugee status determination.

#### **4. Excluding from protection those who have committed serious crimes.**

UNHCR and states have a common interest that persons who do not deserve international protection are excluded. This is to protect the receiving communities and to preserve the integrity of asylum. Mechanisms already exist in international refugee law to do this, especially the exclusion clauses of the 1951 Refugee Convention. Such mechanisms should be applied but with certain safeguards. For instance, exclusion should not be decided by border officials but referred to a central authority in charge of refugee status determination. The exclusion clauses should be interpreted with an evolutionary approach considering the development of Human Rights Law and International Humanitarian Law on one side, and emerging threats (such as terrorism) on the other.

## **5. Problem of refugees who move in an irregular manner from a country in which they had already found protection.**

The participants were presented with a short summary of how concepts, such as "safe third country" or "country of first asylum" have been developed. In the past, states where asylum seekers were physically present tended to assume responsibility to determine their need for international protection. However in circumstances of protracted caseloads and in response to increasing secondary movements, some developed "destination" states began to articulate concepts of "first country of asylum", "safe third country" and, more recently, "effective protection" to more clearly define their own and other states' responsibilities to provide protection.

If states are to use these concepts to prevent secondary movements while maintaining international protection, then it is important to understand the reasons why people continue to move. These reasons include:

- to re-unite with family;
- the lack of legal right to stay in a country which they had transited;
- the constant threat of being refouled;
- inability to meet basic subsistence needs; no hope of a durable solution; and no community support.

To illustrate the reason why people continue to move, a video depicting the plight of asylum seekers/migrants from various African countries who were trying to go to Morocco then Spain was shown. In reaction to the video, some participants concluded that sophisticated detection equipment, radar, and fences to keep out asylum seekers/migrants in a discriminatory way do not address real issues as their movement is a result of push factors. Hence, it is important to address the problem by looking at the root causes.

UNHCR provided an outline of critical factors in determining "effectiveness" of protection in the context of return to third countries. These critical factors are that:

- the person being returned does not have a well-founded fear of persecution in third state on 1951 Convention grounds;
- his/her fundamental human rights in the third state are respected (which includes the right to life, not to be tortured, not to be detained without due process);
- he/she will not be sent out to another country where there is no effective protection;
- the receiving state has agreed to re-admit the person;
- he/she has access to fair and efficient refugee status determination process (though this need not necessarily be individualised);
- he/she has access to subsistence sufficient to maintain an adequate standard of living;
- the third state would take into account the special vulnerabilities of persons being returned; and,
- if the person is found to be a refugee then the effective protection should be available to him or her until the durable solution is found.

It was acknowledged, however, that there are a number of dilemmas related to these critical factors. For example:

- the requirement to an adequate standard of living for the asylum seeker/refugee being returned may be problematic if some countries cannot provide adequate standard of living even to their own nationals. Nonetheless, it is questioned whether asylum seekers or refugees could be returned to a situation where basic rights could not be satisfied;
- in some instances, access to a group determination of refugee status may be an insufficient safeguard; and,
- what does the "prospect of durable solution" really entails, as there are refugee camps in which people had lived for a protracted period without prospect of durable solutions for 15 years or more.

#### **6. Developing co-ordination strategies among states to ensure removal of those who have been rejected after a fair and effective refugee status determination procedure.**

The participants were informed that the return of persons who are not in need of international protection is essential for the integrity of the international protection system. It is important, however, that before the return can be undertaken, the person being removed has been processed in a fair and effective refugee status determination. However, as the person being removed is assessed not to be a refugee, he or she does not fall under UNHCR's mandate. Hence, his or her return falls under the responsibility of the removing state with the support of IOM in the situation of voluntary returns only. IOM explained these are usually carried out under tripartite agreements between government/s and IOM, and sometimes with UNHCR. IOM return activities include transport, logistics, and re-integration. Forced (involuntary) returns are conducted by states and must comply with basic human rights standards.

UNHCR, on the other hand, is not involved in the return of persons not in need of international protection but has an interest to ensure that the integrity of international protection system is not undermined. Under the Agenda for Protection (Goal 2, Objective 7) and ExCom 96 in 2003, UNHCR's involvement would be limited to:

- taking public positions on its support for the return of persons not in need of international protection;
- assisting host governments and local host communities to support returns;
- providing country of origin information to people to assist them to decide to go home voluntarily; and
- the promotion of the Statelessness Conventions and the obligations of the country of origin to receive their nationals (Art 13 of Universal Declaration of Human Rights (UDHR)).

A case study was presented to encourage participants to identify the obstacles and solutions involved in returning people not in need of international protection.

As a result of the case study, participants identified a number of legal, geographical, logistical, financial, security, political and other obstacles involved in return. These

may include, for example: the absence of bilateral agreements between a country of asylum and country of origin; the lack of infrastructure, resources and capacity to receive the returnees in the country of origin; the existence of physical danger and the lingering causes of the conflict.

The participants also put forward the following possible solutions:

- Concerned states should come up with bilateral or tripartite agreements to allow for the return;
- rebuilding infrastructure,
- providing assistance and co-ordinating efforts between humanitarian and development aid;
- providing training for self sufficiency to returnees and provide them with counselling;
- rebuilding law enforcement agencies; and, also providing assistance to the host communities.

The participants acknowledged that unilateral actions were not likely to be successful but that states should look for multi-dimensional approaches that address the humanitarian, security, protection and development issues in holistic rather than "compartmentalised" way.

## **7. Working on durable solutions for refugees.**

The participants were presented with the concept of the three durable solutions for refugees, namely voluntary repatriation, local integration and resettlement. The presentation highlighted the importance of these solutions as noted under the Agenda for Protection. A video on the situation of Colombian refugees was shown to the participants. In response, the participants appreciated the difficulties and complexities in finding durable solutions for refugees. They also endorsed UNHCR's efforts in searching for durable solutions.

## **8. Observations**

Based on the discussions on the themes mentioned above, the following observations were made. In general, there are effective mechanisms by which refugees can be protected without jeopardising the states' interest to both control their borders and combat people smuggling, human trafficking and other related transnational crimes through the following:

1. Establishment of an efficient, effective and fair system that would identify asylum seekers/refugees within the mixed flows, which would include:
  - co-ordination and co-operation among transit and final destination states to share information and expertise to verify identity of claimants, the authenticity of their documents and the genuineness of their claims;
  - assistance from the international community to help states to establish their own effective, efficient and fair system that would identify asylum seekers/refugees and to provide support to refugees; and

- speedy resolution of cases through durable solutions facilitated by UNHCR and the return of persons who are found not to be in need of international protection to their country of origin.
2. Excluding from refugee protection those who do not deserve it in accordance with the required procedural standards and safeguards;
  3. The possibility of returning secondary movers to a country where they have already found effective protection provided that necessary safeguards are clearly observed. In this regard, it was suggested to focus on addressing the root causes of secondary movement.