

# **Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime**

**(Bali II)**

**Office of the United Nations High Commissioner for Refugees (UNHCR)**

**Co-operation to address the irregular movement of asylum-seekers and refugees: Elements for an International Framework**

## **I. Background**

1. Population flows are rarely homogeneous. The phenomenon of globalisation, involving the movement of capital, goods and services across the world, coupled with the exponential growth in communication and transportation technologies, has contributed to an acceleration of migratory movement, much of it irregular and undocumented, with an important component self-channelled into the asylum stream in developed countries. Serious human rights violations and armed conflict are a major cause of displacement and onward movement. Additional, or aggravating factors, including poverty, environmental degradation, population pressure and poor governance also influence the intricate dynamics of migration. The result is mixed migratory flows, comprised of groups of people following similar routes but for widely diverging reasons, and with very different needs. Addressing the root causes of forced population movements more robustly is clearly a key challenge for the international community. At the same time the complexity of these modern movement patterns makes it increasingly important to differentiate among the various types of migrants and consequently to develop responses appropriately tailored to specific needs.
2. Responses of States to date have tended, to the contrary, to rely overly on border migration management. They have been built around an array of general measures, including visa requirements, carrier liabilities and interception beyond national borders. Measures to combat smuggling and trafficking, and counter-terrorism mechanisms have also become a growing constituent element.
3. The first Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime, (Bali I), focused on the challenges confronting States in their efforts to combat transnational crime, in particular smuggling and trafficking. UNHCR's concern was to ensure that the measures being considered took proper account of the human rights and protection dimensions of population movements, properly informed by the complex underlying root causes. Bali II will provide an opportunity to reflect on follow-up to date and focus attention on the issues still to be tackled.
4. In this regard, UNHCR is committed to co-operating with efforts designed to address migratory strains on the asylum system. In so doing we hope to achieve better protection and solutions for all persons of its concern. UNHCR's participation in Bali I and subsequent contributions to the Action Plans of the Ad Hoc Expert Working Groups, in pursuit of a comprehensive approach to the irregular movement of asylum-seekers in the Asia-Pacific region, are illustrative of this commitment.
5. This paper sets out important features which UNHCR would like to see included as part of international arrangements to tackle the irregular movement of asylum-seekers. The paper also presents the rationale behind UNHCR's thinking on the issue. The irregular movement phenomenon has been a feature of refugee displacement globally for many years, but manifests itself differently from region to region. For a comprehensive plan to be workable it must respond to regional specificities. The paper focuses on elements common across regions and aims to assist States, working together with UNHCR and other concerned agencies, to build principled and practical region specific approaches.

## **II. Challenges**

6. Asylum-seekers constitute a portion of the global movement of people but crafting approaches which recognise and address their specific needs is a requirement. Persons in need of international protection have to be appropriately distinguished from those moving for other reasons within a mixed asylum and migration flow. Proper identification of refugees will often necessitate access to processes which can fairly and objectively assess the well foundedness of protection claims. Simultaneously, and no less important, national asylum systems have to be freed of claimants who are misusing the system, thereby undermining its functioning, just as systems need to be enabled to effectively exclude persons not deserving of international refugee protection.
7. Together with improving the working of their own national asylum systems, States also have the challenge of strengthening the capacity of asylum countries at points where asylum-seekers first seek international protection. Amelioration of asylum conditions in countries hosting major refugee populations and more accessible solutions from first asylum countries are prerequisites if the pressures driving onward movement, the so-called "secondary flows", are to be reduced. These are shared responsibilities in keeping with the principle of international solidarity and burden sharing. Achieving equitable mechanisms through which to realise burden and responsibility sharing is a priority challenge to be addressed.
8. Effective disincentives to smuggling and trafficking go beyond measures which are exclusively control driven. Greater access to legal migration opportunities and channels, coupled with more reliable return of persons found not to be in need of international protection, would go some way towards disentangling asylum procedures from the profit driven objectives of smugglers and traffickers.
9. The Programme of Action of the Agenda for Protection, endorsed by UNHCR's Executive Committee in 2002, contains a number of objectives bearing directly on better management of the asylum/migration nexus. In addition to the foregoing broad directions for action, the Agenda promotes;
  - Better data collection and research on the nexus between asylum and migration;
  - Information strategies which would provide relevant information on available channels for legal immigration and warn of the dangers of human smuggling and trafficking;
  - Comprehensive and systematic registration of asylum-seekers and refugees;
  - Increased focus on the obligation of States under international law to re-admit their own nationals who have been determined not to be in need of international protection;
  - Finding solutions for protracted refugee situations;
  - Reducing pressures on premature return that is neither safe nor sustainable and could itself become a trigger for secondary movement;
  - Development of an international co-operative framework to respond to the specific needs of asylum seekers and refugees rescued at sea, well as the provision of effective protection.
1. Many, if not all, of these objectives are closely related to the central purposes of the Bali process – combating smuggling, trafficking and related transnational crime. UNHCR's existing programmes in the Asia-Pacific region and elsewhere already include activities directed at realising many of the above objectives. These activities would be strengthened if located within an international co-operative framework, characterised by a focus on burden sharing and on solutions for asylum-seekers and refugees.

### **III. The starting premises for UNHCR**

2. UNHCR's involvement in international co-operative efforts to address the irregular movement of asylum-seekers and refugees starts from certain premises:

- i. A better managed global system centred on multilateral co-operation and the equitable sharing of responsibilities and burdens (rather than unilateral responses which may well just shift burdens) is a positive ambition;
- ii. Improved management of asylum does not require formal amendment of the current international legal framework, in particular the 1951 Convention and its 1967 Protocol, whose continued viability - and indeed need for strengthened implementation - is repeatedly and authoritatively asserted;
- iii. What is required, though, are co-operative arrangements buttressing the international legal regime so as to facilitate the delivery of protection in complex scenarios whilst meeting State concerns about the effective management of borders;
- iv. A genuine and concerted effort, in partnership with States and international and non-governmental organisations, to improve the quality and effectiveness of protection available within the countries in regions close to the source of refugee movements has to have an integral place in systems which might be developed;
- v. Readmission arrangements to facilitate return are crucial to underpin international co-operative efforts;
- vi. Effective protection for refugees and viable solutions which respect the dictates of equitable responsibility and burden sharing, must be as much the goals of better international co-operation as border control;
- vii. State responsibility is a key concept, which must be maintained at all stages but can be fulfilled through international co-operation and the sharing of commitments;
- viii. Practically speaking no action plan has a real chance of success unless it is reliably resourced for as long as is necessary;
- ix. Interception en route is an increasingly prominent feature of State practice. As it can impede access of refugees to international protection, the matter will be considered by UNHCR's Executive Committee this year and should generate a conclusion setting out parameters that could then be built into any co-operative responses;
- x. Detention of all asylum-seekers as a matter of course is inherently undesirable and costly. As outlined in Executive Committee Conclusion No. 44, and further elaborated in UNHCR's Guidelines on Detention, the limited restrictions permissible are those necessary, (i) to verify identity; (ii) to determine the elements on which the claim for refugee status or asylum is based; (iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State, in which they intend to claim asylum; and (iv) to protect national security and public order.

#### **IV. The Issue of State Responsibility**

1. The nature and extent of State responsibility for protection of refugees is determined by reference both to law and practice. Though there is a margin of flexibility as to how responsibilities are fulfilled, certain fundamental principles, including *non-refoulement* and non-discrimination, are not negotiable. International refugee law requires that a State presented with an asylum request, at its borders or on its territory, has and retains the immediate refugee protection responsibilities relating to admission, at least on a temporary basis. This responsibility extends to the provision of basic reception conditions and includes access to fair and efficient asylum procedures. The delivery of effective protection is first and foremost a State responsibility, but one which in practice invariably involves a range of actors, including UNHCR, other international organisations, and international and national non-governmental organisations, working in close co-operation with States.
2. A transfer of responsibilities between States for the handling of asylum applications is possible provided that certain conditions are met. International co-operative arrangements reliant upon such a transfer must be clear as to the division of responsibilities between the different actors involved and the continuation of such responsibilities until such time as an appropriate durable solution is achieved or, in

the case of those found not to be in need of international protection, return to the country of origin takes place.

3. Consistent with international practice, a transfer of responsibility to another country normally occurs on the basis of links considered valid under international law, such as, for example, previous stay on the territory of the third country, previous issuance of an entry visa or close family ties. Subject to basic standards applying in relation to transfers, admission can be negotiated based on the first country of asylum or the "safe third country" concepts. In this connection, UNHCR's Executive Committee has stipulated that no asylum-seeker should be sent to a third country for determination of the claim without sufficient guarantees in each individual case that: i) the person will be admitted to that country; ii) will enjoy there effective protection, in particular against *non-refoulement*; iii) will have the possibility to seek and enjoy asylum; and iv) will be treated in accordance with accepted international standards.

## **V. Elements of an International Co-operative Framework**

4. On the basis of the foregoing, it is possible to develop an international co-operative framework to tackle irregular movement of asylum-seekers and refugees, which might incorporate the following components.

### **A. Strengthened protection capacity in host countries**

5. The Agenda for Protection foresees more effective co-operation to strengthen protection capacities in refugee-receiving countries in regions of origin. During the Global Consultations process a number of strategies as well as some best practice examples were identified. UNHCR is already working in a number of countries to this end. In order to ensure that available protection is indeed effective protection, analyses of gaps in the treatment of specific groups of refugees in selected countries is being undertaken. This work should lead to the identification of inadequacies and encourage a willingness on the part of the host country to address them, as well as substantial financial and material investment to enable host countries, UNHCR and others to respond. In UNHCR's experience, refugees often move on because they are not allowed, or not given, the means to become self-reliant pending a durable solution. Self-reliance is therefore often particularly relevant to avert secondary movements. Using development assistance for this purpose would enable genuine progress in this area. The High Commissioner's proposal, "Development Assistance for Refugees" (DAR), not only aims, from a development assistance perspective, to enhance effective protection and promote durable solutions for refugees, but also to provide concrete support to, and burden sharing with, host countries in the developing world. DAR should be built into responses, particularly in protracted refugee situations, to better equip refugees for any of the three durable solutions.

### **B. Comprehensive durable solutions arrangements**

6. Comprehensive plans of action to arrive at solutions for targeted refugee groups, particularly those in protracted situations, could be developed, drawing also on gaps analyses to be undertaken for specific caseloads. Such plans of action might variously include arrangements of the following sort:
  - Active promotion of **voluntary repatriation and sustainable reintegration**. The Agenda for Protection promotes strengthened co-operation to make repatriation possible and sustainable. In post-conflict situations, the High Commissioner has proposed an integrated approach, the "4 Rs" (Repatriation, Reintegration, Rehabilitation and Reconstruction) which aims to bring together humanitarian and development actors in order to facilitate sustainable reintegration and bridge the transition period between emergency relief and long-term development.

- Strategic use of targeted development assistance to achieve more equitable burden-sharing for countries hosting large numbers of refugees and to promote **self-reliance** of refugees. Self-reliance is an important precursor to any of the three durable solutions. An integrated approach which anchors refugee issues within national, regional and multilateral development agendas is called for.
- "Development through Local Integration" (DLI) as a strategy in circumstances where the **local integration of refugees** in countries of asylum is a viable option. DLI aims at soliciting additional development assistance to underpin this durable solution.
- Multilateral commitments to expand **resettlement** as a protection tool, a durable solution as well as an instrument of burden-sharing. Expanded resettlement options might be made available in the form of a multi-lateral pool administered by UNHCR.

### C. A co-operative approach to the handling of asylum applications

1. Region specific arrangements can contribute to the expedient and fair processing of asylum applications. These arrangements should be humane for the individuals concerned; entail shared responsibility for determining the claims of people who move on in an irregular manner from one asylum country to another; and contribute effectively to reduction of such movements and their exploitation by smugglers and traffickers. The facilitation of re-admission to countries of first asylum would be one element, as would be the acceptance by countries of origin of the return of persons found not to be in need of international protection. How the various elements are combined would vary according to specific regional circumstances, the States involved, the compatibility of their asylum systems and whether or not individual processing is necessary in the country of first asylum. The elements would include:
  - An admissibility/pre-screening procedure, the purpose of which would be the prompt differentiation and subsequent channelling of claims to one of several possible locations for consideration on their merits. Pre-screening should distinguish claims presumed to be protection related from those presumed to be motivated primarily for economic or migratory reasons, which would be an important determinant of the modalities for further processing. Other relevant factors, including links to a particular country or previous stay in a country offering effective protection would also be identified during pre-screening and would determine the subsequent handling of claims. Pre-screening of this sort could take place;
    - i. in the country of chosen destination or
    - ii. in a transit country.
  - A process to handle claims would have to be adjudicated within a set and short timeframe. The location for such processing would have to depend on factors identified during the pre-screening. Possibilities include as appropriate:
    - i. the country where the claim for asylum is first presented;
    - ii. a transit country, either within the framework of an existing domestic asylum system or, absent this, in a specifically provisioned and resourced centre;
    - iii. a country deemed to offer effective protection, should processing be necessary in the context of a durable solutions strategy.
  - Acceptance of State responsibility: The adjudication of cases would normally be undertaken by States with UNHCR providing guidance and support. One formula might be co-operative arrangements among several States who

agree to participate in a jointly administered process, through pooling of resources and responsibility. UNHCR could catalyse and facilitate the process.

- Agreement on "effective protection" requirements: There has to be a shared understanding on the types of situations guaranteeing effective protection, leading to timely and genuine solutions.
- Properly equipped and resourced centres: Where protection requires formal adjudication of claims in countries in regions of origin or in transit countries, such processing may require centres specifically established, equipped and supported for this purpose. This would in turn require guaranteed investment in infrastructure, reception conditions and training programmes in countries hosting such processing centres, in addition to investment in protection and sustainable and dignified stay in host countries in the region of origin until solutions are realised.
- Readmission arrangements: The prompt return to their countries of origin of those found not to be in need of international protection would have to be feasible. Readmission agreements, assistance schemes and other supportive incentives are crucial components. In particular, readmission agreements would need to be in place beforehand, to ensure that individuals who are to be returned either to their countries of origin, or to countries offering effective protection, can be transferred promptly and under acceptable conditions, in full compliance with relevant international standards.

#### **D. Partnerships**

1. Co-operative partnership arrangements would have to underpin the international framework, drawing upon the specific expertise of different actors, including UNHCR, IOM and non-governmental organisations. They should be formalised through memoranda of understanding at the country level, which would feed into broader regional arrangements. Ideally co-operation would be built around existing programmes managed by partner organisations, including for example IOM's assisted voluntary return programmes, or existing programmes to respond to the needs of victims of trafficking.

#### **VI. Outlook**

2. This paper flags important challenges confronting States in managing the asylum and migration nexus. It highlights the importance of ensuring that migration management tools, including measures to combat trafficking and smuggling, are compatible with the goal of providing international protection to refugees.
3. Not all the elements set out in this paper are necessarily new. Many are drawn directly from understandings generated during UNHCR's Global Consultations process and carried forward within the Agenda for Protection. States are encouraged to give active consideration to the timely platform offered by the Agenda for Protection and the Convention Plus initiative, as enabling mechanisms for the development and implementation of an effective international framework to address the irregular movement of asylum-seekers and refugees. Convention Plus provides a basis for transforming ad hoc or unilateral responses to the causes and effects of irregular migration and forced displacement into multilateral special agreements to bring this international framework into working effect.

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