

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

Key NGO Messages

This document has been drafted in consultation with a wide range of NGOs and attempts to reflect the diversity of views within the NGO community.

Synopsis of key messages:

- 1) Protection at sea should centre on saving lives and providing equal access to international protection.
- 2) Search and rescue (SAR) operations need increased regional support, and must prioritize life, rights and needs.
- 3) States are urged during disembarkation and reception to provide emergency care, psychosocial support, and undertake screening for vulnerabilities.
- 4) Systematic immigration detention should be avoided and treated as an exceptional measure of last resort.
- 5) People arriving by sea should have systematized access to legal protections through fair, transparent asylum systems.
- 6) People arriving by sea with international protection claims should have an available path to legal status, education, work opportunities and freedom of movement.
- 7) Alternative means of lawful migration are necessary to reduce incentives to board overcrowded, dangerous boats.

Background

The NGO community commends the UN High Commissioner for Refugees (UNHCR) for selecting Protection at Sea as the topic for this year's Dialogue on Protection Challenges. Increasing numbers of refugees, asylum-seekers, stateless persons and other vulnerable migrants are risking everything, including their lives, in a bid to find safety and security via the sea. They face perilous journeys, risking severe forms of harm en route, including physical abuse, exploitation and death.

We urge the international community to uphold existing protection obligations, and develop stronger, more comprehensive response mechanisms that are firmly grounded in fundamental principles of humanity, human dignity, human rights and international cooperation. Responses must be consistent with existing obligations under different branches of international law, including human rights, refugee and maritime law. The fundamental obligation of non-*refoulement*, prohibiting States from returning individuals to persecution and other forms of serious harm, must underpin all responses.

NGOs look forward to concrete commitments by governments and other stakeholders in this Dialogue, and urge all actors to focus on cooperative actions that reduce loss of life and protect vulnerable migrants.

Key Messages

1) Protection at sea should centre on saving lives and providing equal access to international protection. States, with the support of the international community, have individual and collective responsibilities to ensure the rights of those arriving by sea, including by providing international protection for refugees, stateless and trafficked persons. As such, vessels intercepted at sea must not automatically be turned back to the country of departure, or to a country where dignified reception and access to asylum is not guaranteed. All individuals have the right to seek protection from persecution and other human rights violations, and must have a fair opportunity to seek asylum or other protective status.

Rescue and disembarkation

2) Search and rescue (SAR) operations need increased regional support, and must prioritize life, rights and needs. SAR operations are to be distinguished from border control operations. SAR is crucial to preventing loss of life on the high seas. Saving lives must be given priority over purely political considerations. States and other actors are urged to commit to regional mechanisms and arrangements that implement SAR swiftly and efficiently. Commercial and other private vessels should be encouraged to engage in rescue without fear of criminalization, fines, or costly delays for their efforts. Disembarkation from private vessels should be predictable, accessible and safe. States that have not ratified the International Convention on the Law of the Sea, International Convention on Maritime Search and Rescue, and other relevant international instruments should do so as a priority action.

3) States are urged during disembarkation and reception to provide emergency care, psychosocial support, and undertake screening for vulnerabilities. States must prioritize protection from *refoulement*, and humane treatment of all people surviving dangerous conditions at sea. Individualized screening should be conducted in a safe, non-custodial place on land – never aboard a vessel – and used to identify vulnerable people and refer them to relevant services and processes as swiftly as possible. Screening must be conducted by competent and trained professionals, in compliance with international law, in a timely and individualized manner, and should focus on identifying the need for protection, establishing identity, confirming health and security, and recognizing vulnerabilities and needs. No personal data shall be transmitted to law authorities unless the person has explicitly agreed.

Officials responsible for reception should be trained in protection-sensitive processing, provide access to basic first aid, and identify and refer individuals needing medical attention, psychosocial support, and other services, regardless of their legal status. Every effort should be made to ensure that appropriately trained social workers and legal assistance providers are included in the screening process.

Reception

4) Systematic immigration detention should be avoided and treated as an exceptional measure of last resort. The systematic detention of migrants arriving by sea is by definition arbitrary, since it is not based on an individualized assessment of risk and it is not applied only as a last resort. Thus, as a general rule, asylum seekers, stateless persons, trafficking victims and survivors of torture should never be detained based on immigration status alone. Detention of children is a violation of the rights of the child under international law. Instead, the best interest of the child must be the primary consideration for any children, adolescents and caregivers arriving by sea. Families should not be separated, unless in the best interest of the child.

When detention occurs, it should be used as a last resort for screening and processing in compliance with Article 31 of the 1951 Refugee Convention, Article 9 of the ICCPR, and other applicable laws. Disembarkation areas cannot be treated as zones of exception from these legal protections. When detention is deemed necessary, non-custodial, community-based alternatives must first be employed. The Community Assessment and Placement (CAP) model, for example, provides a framework for states, UN partners, and civil society to collaborate on non-custodial alternatives to detention. A recent study documents that this model can cost less than detention, maintain high rates of compliance, and reduce overcrowding and long-term detention, among other benefits.

UNHCR should be made aware of all detentions. UNHCR and service providers should have full access to individuals in detention, and conditions of detention must meet minimum international standards.

5) People arriving by sea should have systematized access to legal protections through fair, transparent asylum systems. Asylum-seekers should have access to competent interpreters, legal representation and impartial decision-making throughout asylum procedures, and accelerated procedures should only be used when the presumption favours the grant of protection. All asylum-seekers have the right to appeal asylum decisions, and the right to remain in the host country during the appeals process. We urge a shift away from the criminalization of trafficking victims and towards the prosecution of perpetrators.

6) People arriving by sea with international protection claims should have an available path to legal status, education, work opportunities and freedom of movement. Regional cooperation agreements should include meaningful durable solutions as core priorities, providing access to rights – including freedom of movement. Governments and civil society should work together to ensure that people arriving by sea have access to education and employment, benefiting individuals arriving, as well as host communities. Studies of migrants have shown that they can enhance local labour markets and create new markets, of given access to jobs and opportunities.

Addressing drivers of flight and migration

7) Alternative means of lawful migration are necessary to reduce incentives to board overcrowded, dangerous boats. People facing persecution or other threats to their safety need lawful avenues to escape their abuse. Those forced to flee by sea face extreme exploitation and abuse during their journey, including physical and sexual abuse, and life threatening conditions at sea. NGOs encourage States to reduce unsafe and irregular movement by sea by increasing access to third country refugee resettlement, family reunification and labour migration, and by supporting regional asylum systems.

Countries of departure or transit should be supported in respecting the rights of refugees, asylum-seekers, and other vulnerable groups who should enjoy due process, and access to rights and opportunities. To move the conversation forward, forced migration should be meaningfully included in the post-2015 sustainable development agenda.

Regional Concerns

We encourage protection-sensitive regional approaches to international cooperation that include civil society as meaningful partners.

Caribbean

This year marks the 30th anniversary of the Cartagena Declaration. States in the Caribbean have endorsed the new Declaration and ten-year Plan of Action signed in Brasilia on 3 December 2014. Caribbean states have a duty to uphold the components relating to protection at sea.

Between 2010 through the first half of 2014, 240 migrants were killed and 176 went missing in the Caribbean Sea. Migrants and refugees intercepted in the Caribbean – many of whom are Cuban and Haitian – must be given meaningful access to asylum in accordance with international law. The lack of meaningful review and individualized screening in Creole or Spanish of people interdicted on the high seas has severe implications, particularly for unaccompanied minors, refugees, and trafficking victims.

The U.S. policy of automatically detaining without parole all Haitian asylum-seekers who arrive by boat is discriminatory and undermines international protection. Haitian migrants are also subjected to the “shout test” and “sweat test” – processes that have led to zero grants of asylum since the policies were by into place. In contrast, in 2010, 55% of Haitians who applied for asylum in the U.S. after arriving by air or land were granted asylum. Moreover, the “wet foot, dry foot” policy for Cuban migrants does not comport with international law, and creates a risk of *refoulement*. This policy is discriminatory in its limitations on Cubans, in contrast to those arriving by land borders from other countries.

Haitians and Cubans who have been deemed to be refugees by the United States continue to be detained indefinitely at Guantanamo Bay. This arrangement is in violation of international law, and the refugees should be transferred to the mainland of the United States and processed in accordance with U.S. asylum law.

Mediterranean

In the past year, more than 3,000 people have died or are missing at sea after attempting to cross the Mediterranean Sea. Over 18,000 children have arrived in Italy and Malta by sea in that time. Unfortunately, Italy’s *Mare Nostrum* operation, which rescued 156,000 people between October 2013 and October 2014, has now ended. The new Frontex operation, “Triton,” was not designed to replace *Mare Nostrum*. It is a border control operation that leaves a vast gap in SAR and places an unsustainable and undue burden on private vessels to engage in SAR.

European Union (EU) Member States are urged to immediately support and provide resources for SAR on a sustained, regional level lest many more vulnerable people risk losing their lives. The EU must ensure that migrants intercepted at sea through Triton are disembarked on European territory and given an individualized asylum procedure. In addition, vulnerable migrants need safe, legal, alternative ways to enter the European Union via land borders, and all pushbacks of migrants must end immediately.

Gulf of Aden

In the past year, the Gulf of Aden has seen more deaths at sea than the previous three years combined. Reports of extreme abuse by smugglers have added to this death toll, as people are forced to swim to shore, thrown overboard, trapped on overcrowded vessels that capsize, or are

tortured en route or in border towns. NGOs ask states to utilize the Djibouti Framework to create a mechanism for protected, lawful migration that reduces reliance on criminal gangs and smugglers.

Asia and Pacific Region

NGOs express concern that existing regional frameworks, like the Bali Process and ASEAN mechanisms, are not providing adequate protection for refugees and other vulnerable migrants. NGOs commend the outcomes of the Jakarta Workshop and Bangkok Mapping Exercise, and urge states to develop these processes into a more formal regional agreement that guarantees the safe landing and dignified reception of the Rohingya and other refugees and migrants arriving by sea.

There has been an increase in movement of Rohingya asylum seekers and Bangladeshi migrants in hazardous vessels and with limited options for seeking safety. State security representatives have been documented taking bribes and otherwise profiting from the flight of Rohingya, and the kidnapping and trafficking of these populations throughout the region remains endemic. Upon their arrival in neighbouring countries, Rohingya are routinely detained and have no access to a formal protection mechanism.

Australia's asylum practices are a source of grave concern. Offshore processing of asylum claims traps people in appalling humanitarian conditions and seriously delays the resolution of their claims. This is not only inconsistent with international refugee law, but also inhumane. Australia is urged to uphold international laws and standards and ensure respect for non-*refoulement*. Asylum-seekers must be allowed access to due process and humane living conditions on Australia's mainland. Finally, the "Australia-Cambodia" asylum deal raises concerns over responsibility sharing and the human rights outcomes of refugees diverted to Cambodia. We urge the Australian government to reconsider this arrangement and pursue protection-sensitive alternatives that might be elaborated in this Dialogue.