



OHCHR-GAATW Expert Consultation on

Human Rights at International Borders: Exploring Gaps in Policy and Practice

Geneva, Switzerland, 22-23 March 2012

INFORMAL SUMMARY CONCLUSIONS

On 22-23 March 2012, the Office of the High Commissioner for Human Rights (OHCHR), in cooperation with the Global Alliance Against Traffic in Women (GAATW), held an expert meeting on the subject of “*Human Rights at International Borders: Exploring Gaps in Policy and Practice*”. The aim of the expert meeting was to explore the human rights situation at international borders as well as the need for enhanced human rights guidance in this respect.

These informal summary conclusions of the meeting do not necessarily reflect the views of the participants, or of OHCHR or GAATW, but reflect broadly the themes, good and bad practices, and gaps in policy and practice that emerged from the two-day discussion.

WAYS FORWARD

In order to take the issue forward, participants recommended *inter alia* the elaboration of normative standards, the development of guidance tools and research and training materials, and the crafting of multi-stakeholder strategic initiatives in relation to human rights at international borders.¹

Guidance tools

- Recommended principles and guidelines on human rights at international borders, to be drafted by the Office of the High Commissioner for Human Rights
- Guidance on interception at air, sea and land borders; particularly in relation to

¹ The suggested ways forward comprise a potential toolkit of activities and initiatives on human rights at international borders, which could be implemented by the various stakeholders involved according to their respective mandates.

screening, referral, and monitoring mechanisms

- Human rights guidelines on immigration detention and alternatives to such detention

Normative standards

- Joint statement/recommendations from relevant human rights mechanisms on human rights at international borders
- International code of conduct for immigration and border officials
- International agreement to prohibit certain forms of border controls and extra-territorial immigration controls which are potentially lethal or could amount to cruel, inhuman or degrading treatment

Research and training

- Compilation of best and promising practices at international borders
- Database of international, regional and national jurisprudence on the human rights of migrants, including at international borders
- Practical human-rights training material for border guards.
- Research into the relationship between privatisation or delegation of immigration functions and human rights at international borders.
- Research into the relationship between immigration control agreements between States and human rights at international borders.

The meeting also recommended the crafting of multi-stakeholder strategic initiatives in relation to human rights at international borders, including:

- Strategic litigation strategy at the national, regional and international level
- Broad advocacy strategy that will influence the political discourse on migration and encourage responses to irregular migration based on shared responsibility and human rights norms.
- Solidarity strategy and partnerships with key stakeholders; including countries of origin and transit, as well as the private sector such as the media and the business community

THE INTERNATIONAL BORDER

Individuals come across the border at different points on their migratory journey; at the visa counter of a foreign embassy in their country of origin, at the check-in desk at the airport where the carrier examines their visas, when being prevented from boarding a flight by an airport liaison officer, on board a ship that has rescued their capsizing vessel, in an airport detention centre after being denied permission to enter, or as a wall physically separating one country from another.

Border controls are often conceptualised as a complex mix of the following:

- Military defences against invasions and attacks on sovereignty.
- Crime prevention and policing to prevent criminal activity.
- Administrative practices to regulate entry and exit into a territory.

The policies that result from such conceptualisations will have implications for the human rights of migrants at borders. From the human rights perspective, there is a pressing need to ensure that a migrant-centred approach characterises all border enforcement activities.

Human rights concerns at international borders include the following:²

1. Border controls are increasingly spatially distinct from territorial borders. Human rights violations can take place even before people leave their country of origin, including visa regimes that are discriminatory and arbitrary or border control/immigration functions that are carried out by private actors who can operate without significant oversight, without taking human rights into account, and with limited enforcement of human rights standards that do exist. Some border control practices can interfere with the human right to leave any country. Transit countries are also being increasingly enmeshed in the protection of the borders of destination states. A range of border control measures, including injudicious counter-smuggling laws, in addition to a lack of legal migration opportunities, may enhance the vulnerability of migrants to abusive facilitators of movement.
2. Borders can be conceived in national law and administrative regulations as zones of “exceptionalism”, exempted from compliance with all of the safeguards and checks and balances that are embedded in national legislation. In practice, there is often a lack of transparency and a high level of impunity in relation to abuse of power by border officials, as well as a lack of transparency, accountability and access to justice.
3. There are numerous reported cases of violence (sometimes lethal violence) at borders, perpetrated by State (border guards, military personnel) as well as non-State actors (traffickers, smugglers, airline officials, private companies employed to carry out various security functions at borders). Practices of detection of irregular migrants can have a disproportionate impact on the human rights and dignity of migrants.

² More detailed information can be found in the background paper which was prepared for the consultation, available at www.ohchr.org

4. The attention given to irregular migration in many destination states is often disproportionate to the numbers of migrants who seek to enter in an irregular manner. Discourses of border security can be implicitly or explicitly xenophobic or racist, with assumptions made about the motivations and situation of migrants based on their method of transit and their nationality, ethnicity, age, gender or religion.

5. The criminalisation of irregular migration appears to be proliferating amongst States, as is the criminalisation of individuals and organisations that provide humanitarian or legal support to irregular migrants. This can push migrants into situations in which they are increasingly vulnerable to human rights abuses, violent crime, kidnapping, extortion or other harm.

6. While counter-smuggling laws generally aim at disrupting organised criminal networks involved in the facilitation of illegal entry for profit, some counter-smuggling measures can have negative human rights impacts, both on the people being smuggled as well as on those who are facilitating their movement. Smugglers can be responsible for abuse, exploitation and high levels of violence against migrants, and States should be encouraged to apply appropriate sanctions against such individuals and networks, and to protect migrants against abuse. However care should be taken to avoid disproportionate sanctions against smugglers who have committed no violation against the migrant. From a human rights perspective, the act of smuggling itself (when there is no attendant violence or other human rights impact on the migrant) is merely a crime against the sovereignty of a country.

7. There are a number of human rights concerns in relation to processes of screening and reception at borders, including a lack of information at the point of reception and discriminatory profiling practices, as well as arbitrary confiscation or destruction of the identity documents and property of migrants. Notwithstanding the discretion states are allowed in determining whom to admit to their territory, certain admission practices (such as discrimination on the basis of health status) can violate State obligations under international law not only if the aim is illegitimate (e.g. exclusion on the basis of HIV status can be *prima facie* arbitrary because it is not related to a public health objective or to a public security objective) or the means used are disproportionate, but also if a protected right or interest is affected (such as the right to family unity or the best interests of the child).

8. New technologies of surveillance at borders, database integration, as well as the collection of biometric data raise human rights concerns, such as intrusions into privacy and lack of personal data protection. At the same time, they can save lives by identifying migrants in distress.

9. The issue of maritime immigration patrols and rescue at sea continue to be controversial both in policy and practice. Differences in interpretation of existing obligations under law are leading to gaps in respect of the obligation of rescue at sea, in relation to disembarkation and ports of safety, on the definition of a distress signal or of what constitutes a vessel in distress. In practice, private actors are reluctant to carry out rescues because of fear of penalization and difficulty in disembarking the rescued migrants. Official action is often hampered when a large number of actors are involved in the rescue and due to disputes over search and rescue obligations and rules of disembarkation. At a minimum, it is important

to highlight that the principle of *non-refoulement* applies extraterritorially including on the high seas, and that customary international law obliges all States and other stakeholders as relevant to rescue persons at sea.

10. Detention at borders is increasing around the world, particularly in transit countries (in situations of both attempted entry to and departure from transit countries). It raises concerns, both in relation to a lack of procedural safeguards as well as poor conditions, such as denial of access to medical care, and to adequate conditions including space, food and water in short-term custody. Questions remain as to whether existing standards regulating the conditions of immigration detention are sufficient for border detention, and whether States are being guided by the principle of proportionality and necessity in assessing when to use detention at borders. There does not appear to be much systematic consideration of the use of alternatives to detention, despite evidence that immigration detention fails to impact on the choice of destination country and does not reduce the numbers of irregular arrivals. An area of best practice would be to ensure that children are not detained within immigration detention facilities, unless there is a clear and objective determination that such detention is within their best interests.

11. High levels of violence during forced returns continue to lead to injury and deaths. The use of non-medically justified measures or treatment, such as sedatives to facilitate deportation, is of concern. Other practices of concern include States deporting migrants into no-mans' land or merely to the vicinity of another country's border. This practice is particularly worrying in the case of unaccompanied or separated children. There is a clear need for independent monitoring and increased scrutiny of deportations. In some countries, National Preventive Mechanisms are monitoring the whole process of forced return, from the removal centres through to the arrival at the airport in the destination state. Other areas of best practice in this regard include ensuring that returns take place during the day, and including a medical expert as part of the deportation monitoring team.

12. As more migrants take extreme risks in order to reach borders, they can encounter threats to their physical and mental integrity. There is a clear need for all border personnel to respond to fundamental human and first aid needs in a non-discriminatory manner regardless of legal status.

13. At borders, and even in emergency situations involving large or mass arrivals of migrants at border areas, states continue to have obligations to protect, respect, and fulfil human rights, including economic, social and cultural rights. Human rights, whether economic and social, or civil and political, are also interdependent and interrelated. For example, the right to water and access to sanitation is inextricably linked to the rights to life, to health, to feed, and to the prohibition against cruel, inhuman and degrading treatment.

14. The right to health is a fundamental human right. The international framework recognises that States have a core obligation *inter alia* to ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalised groups. It also stresses the need for international assistance and cooperation. There is also an obligation to ensure the continuity of care apart from immediate needs. In the context of the border, it is also important to ensure attention to cross-cutting issues like

mental health and other risks. An area of best practice is to ensure that competent healthcare workers are present at border posts.

15. Regardless of the size of the migratory “flow” that arrives at borders, within each group are individuals with unique human rights protection needs. The international human rights framework establishes a universal due process right of everyone to have an individualised determination of their situation, their reasons for entry, and their defence against expulsion. This in turn implies that States must institute an adequate screening process at air, sea and land borders for all migrants, and that they must avoid expulsions that are arbitrary and collective. When a State engages in immigration control acts outside of its borders, depending on the nature of the action, identical or similar obligations may be engaged. In other words, assumptions about people based on where or how they are seeking to cross the border, or on other factors such as their race, socio-economic position, gender, disability status, religion or nationality, should not determine policies and practices of border control.

16. There is a clear danger of creating a multiplicity of categories under law which could lead to the fragmentation of human rights protection. At the same time, border policies should recognise the different situations and needs of migrants. For example, the mental health and other needs of victims of torture will be different from the health needs of migrants who have undergone a long sea voyage. Yet the basic standard of equal access to the right to health on a non-discriminatory basis is the same regardless of the legal status of the person. All children are entitled to measures which have been determined to be in their best interest, regardless of whether they are unaccompanied or with their parents, whether they are asylum-seekers or irregular migrants. In order to clearly establish the risks, vulnerabilities and situation of each migrant, a clear human rights-based screening and identification system should exist at all borders.

17. Particularly vulnerable groups include migrants with disability, children at risk, trafficked victims, refugees and asylum-seekers, women who have suffered sexual and gender based violence, older persons, stateless persons, minorities and indigenous people, persons with HIV, lesbian, gay, bisexual and transgender migrants, victims of torture. Many migrants will be vulnerable on more than one ground, and those who are victims of violence and trauma, in an irregular as well as poor situation, are more likely to be vulnerable in transit and at borders. Best practices for children at risk are to ensure the placement of guardians at borders that are able to respond adequately to their needs, and to establish systems of non-governmental access and UN inter-agency coordination at borders. The screening of migrants at borders should also encompass the best interests of the child.

18. As well as changes at the policy level, improved access to justice for those who suffer harms at the border is essential to providing remedies and upholding human rights. Many human rights violations occurring at the border are occurring in zones of ‘exceptionalism’; victims of violence and other violations rarely have recourse to national justice institutions or other formal complaint mechanisms. Best practices include legal aid and translation services at borders, and more transparent border control procedures. It is crucial that States eliminate impunity for violations against the human rights of migrants at borders, whether perpetrated by State or non-State actors, including through ensuring that effective mechanisms are in place to enable victims of crimes to testify against perpetrators without being deported or fearing deportation.

19. There is a critical lack of a credible political counter-discourse to the stigmatisation of migrants, and particularly migrants in an irregular situation, which can fuel discriminatory and abusive border control measures. All interested stakeholders, including States, international organisations, civil society, the media, business communities and other private actors, should work together to ensure that migrants are given a voice in society, that their contributions to society are recognised, and that xenophobic hatred is not allowed to dominate the public discourse on migration.