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Situation of migrants in transit

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Situation of migrants in transit



Summary

The present report, A/HRC/31/35, is submitted pursuant to Human Rights Council resolution 29/2, in which the Office of the United Nations High Commissioner for Human Rights was requested to submit to the Council before its thirty-first session a study on the situation of migrants in transit, including unaccompanied children and adolescents, as well as women and girls.

The report seeks to analyse the human rights situation of migrants in transit, highlighting human rights concerns as well as the relevant normative framework. It contains recommendations aimed at addressing critical protection gaps for migrants in transit.



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I. Introduction

1. In its resolution 29/2, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to submit to the Council before its thirty-first session a study on the situation of migrants in transit, including unaccompanied children and adolescents, as well as women and girls, in consultation with States and other relevant stakeholders, including regional organizations, civil society organizations and national human rights institutions.

2. Accordingly, on 20 October 2015, OHCHR addressed a note verbale to Member States and intergovernmental and non-governmental organizations seeking their views and information on the issue. Written submissions were received from States, intergovernmental organizations, non-governmental organizations and individual experts.[1] On 17 June 2015, OHCHR organized an informal expert consultation on "Human rights and migrant smuggling: exploring issues and challenges". The discussions and outcomes of that consultation have also informed the present study.

[1] Submissions were received from Argentina, Azerbaijan, Belarus, Bosnia and Herzegovina, Chile, Denmark, Germany, Lithuania, Malta, Mexico, the Netherlands, Paraguay, Peru, Poland, Qatar, the Russian Federation, Sweden and Turkey — many of which highlighted good practices —, as well as from United Nations agencies and non-governmental sources. The text of most of the submissions received can be found on the Migration page of the OHCHR website at www.ohchr.org/EN/Issues/Migration/Pages/Studymigrantsintransit.aspx.



II. Background

3. Around the world, migrants in transit are in a precarious — even perilous — human rights situation. During 2015, more than 5,000 women, men and children lost their lives along migratory routes across the globe, with an estimated 2,901 people perishing in the central Mediterranean alone.[2] Some 500 children died in sea crossings during the same period.[3]

4. Even as technological advances have made travel faster and safer, for many migrants, the journey could take weeks, months or even years. Some might never reach their intended destination at all. The route, means of transportation and even the intended destination can change at different phases along the migration trajectory and migrants often fall in and out of various legal categories while in transit.

5. There is no authoritative definition of "transit migration"; the term is commonly taken to mean the temporary stay of migrants in one or more countries, with the objective of reaching a further and final destination. Yet, it is important to appreciate that the notion of "temporariness" embodied in the concept of transit is conceptually challenging: how long or short is the transit period? After what length of stay does the transit country become the final destination?

6. Notwithstanding such conceptual difficulties, it is apparent that transit is an important phenomenon in contemporary migration, with critical human rights implications. In accordance with a human rights-based approach, the present study will seek foremost to analyse the situation of migrants in transit from the point of view of the migrants themselves.

7. Migrants in transit risk a range of human rights violations and abuses, including because they have become destitute or "stranded" in the transit country and because they lack legal protection and are unable or unwilling to seek the protection of the country of transit. Migrant women in transit often face specific gendered forms of discrimination and abuse, both in the public and private spheres. At the same time, States may question their obligations towards migrants who are in transit and not intending to remain on their territory.[4]

[2] International Organization for Migration (IOM), "Missing migrants project". Available at http://missingmigrants.iom.int/en/mediterranean.

[3] United Nations Children's Fund (UNICEF), "On the Day of International Migration, UNICEF says children need urgent solutions, solidarity", 18 December 2015.

[4] Council of Europe, Parliamentary Assembly, "Countries of transit: meeting new migration and asylum challenges", Report (Doc. 13867), 11 September 2015. The Council notes that countries that experience transit migration, in whatever form, are rarely, if ever, only "countries of transit"; many are also countries of destination and/or asylum (p. 3).



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8. In the absence of a universal, legal definition, OHCHR has defined an "international migrant" as "any person who is outside a State of which he or she is a citizen or national, or, in the case of a stateless person, his or her State of birth or habitual residence".[5] In using the term "*migrant*" to describe the subjects of this study, the intention is not to exclude refugees or other legal categories, but rather to use a neutral term for a group of people who have in common a lack of citizenship attachment to their host country.[6] Such an approach stems from recognition of the inherent dignity and equal and inalienable rights of every human being.[7]

9. The study will thus consider the situation of all migrants in transit, with a particular focus on those in an irregular situation and those who are most marginalized and at risk, including children on the move.

Migrants in transit

10. The drivers for the movement of migrants are multiple and often intertwined. In addition to persecution and conflict, today, the reasons that compel movement include poverty, discrimination, lack of access to rights, including education and health, lack of access to decent work, violence, gender inequality, the wide-ranging consequences of climate change and environmental degradation, and

[5] See OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (2014) chap. I, para. 10. Available from www.ohchr.org/Documents/Issues/Migration/OHCHR_Recommended_Principles_Guidelines.pdf.

[6] See Opening statement by the United Nations High Commissioner for Human Rights at the panel discussion, "Promoting tolerance, dispelling myths, protecting rights: an evidence-based conversation on migration", held in Geneva on 15 December 2015. Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16889&LangID=E.

[7] See Universal Declaration of Human Rights, art. 2; International Covenant on Civil and Political Rights, art. 2 (3); International Covenant on Economic, Social and Cultural Rights, art. 2 (2); and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 7.



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separation from family. In many regions, migrants with varying protection profiles and reasons for movement move along the same routes and use the same transport or means of travel in so-called "mixed flows", often in large numbers.

11. Migrants who move out of necessity rather than free choice are at greater risk of human rights violations throughout their migration, are less likely to be able to make choices or to formulate exit strategies and are therefore more likely to migrate in conditions which do not respect the dignity of the human being. Along the migration continuum, varying degrees of coercion and voluntariness mark each individual's migration experience, which is dynamic in that it changes as the journey progresses.

12. The contemporary phenomenon of transit migration is linked in many ways to increasing barriers to international migration. Stringent migration control measures, coupled with a lack of regular migration channels for work, family reunification, education and humanitarian reasons, are increasingly restricting the options for movement of potential migrants and, in many cases, compelling them to move through irregular channels. Such control measures include legislation that criminalizes irregular emigration, age and sector-specific bans on the movement of potential migrants and the externalization of migration control, which can be manifested in obstacles such as carrier sanctions and onerous visa requirements.[8] The phenomenon of "refugees in orbit", whereby refugees are unable to access the asylum system and are therefore obliged to move from one country to another, is an important driver of transit migration, as are overly onerous and lengthy refugee status determination processes.

13. A migrant who moves regularly experiences the journey and "transit" differently from a migrant who travels irregularly. Studies indicate that most irregular migrants will use the services of a range of actors in the informal economy, including smugglers, at some point during their journey. For instance, it has been estimated that 80 per cent of recent crossings of the Mediterranean from Africa to Europe were facilitated by migrant smugglers.[9] Another study found that almost two thirds of migrants transiting in Indonesia were using the services of smugglers or agents to arrange their irregular movement towards Australia.[10] Irregular migrants in transit are often at risk of abuse as a result of corruption.[11]

14. Corruption emerges as a key element in the experience of migrants in transit, including along smuggling routes. Border officials, police, soldiers and consulate and embassy officials may also participate in the movement of migrants by providing documentation, by turning a blind eye to migrants or even by their involvement as organizers or facilitators in collusion with criminal actors.[12] For migrants in transit, corruption can exacerbate risks and prolong journeys; it is an enormous obstacle to the realization of human rights and has a disproportionate impact on the poor. Migrants who have been victims of abuse by State officials or private actors are rarely able to access justice effectively and abusers can operate with impunity.[13]

15. Migrants who lack access to financial and material resources or are otherwise at risk

[8] Maybritt Jill Alpes and Ninna Nyberg Sørensen, "Migration risk campaigns are based on wrong assumptions", Policy brief (Danish Institute for International Studies, 5 May 2015). The authors refer to the "document jungle", in which consulate offices may request documents that people have never needed before in their life and work trajectories (see p. 4), such as bank accounts.

[9] Tuesday Reitano, Laura Adal and Mark Shaw, *Smuggled Futures: The Dangerous Path of the Migrant from Africa to Europe*, (Geneva, Global Initiative against Transnational Organized Crime, 2014), p. 1.

[10] Graeme Hugo, George Tan and Caven Jonathan Napitupulu, *Indonesia as a Transit Country in Irregular Migration to Australia*, Irregular Migration Research Programme, Occasional Paper Series 08/2014 (Australia, Department of Immigration and Border Protection, September 2014), p. 22.

[11] For example, research indicates that Nepali migrants en route to other destinations will elect to travel through India – thereby prolonging their journey and the risks associated with being in transit – as a way of avoiding having to pay a bribe at the labour migration desk at Kathmandu airport. See International Labour Organization, No *Easy Exit: Migration Bans Affecting Women from Nepal* (Geneva, 2015), p. 9. Available from www.ilo.org/wcmsp5/groups/public/–ed_norm/–declaration/documents/publication/wcms_428686.pdf.

[12] See United Nations Office on Drugs and Crime (UNODC), "Corruption and the smuggling of migrants", Issue paper (Vienna, 2013); also Nourhan Abdel Aziz, Paola Monzini, Ferruccio Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean* (Rome, Istituto Affari Internazionali, 2015), p. 27.

[13] For instance, it has been noted that there have been few successful prosecutions of migrant smugglers, including in cases of abuse or exploitation of migrants, and those who have been tried have invariably been lower-level transporters or facilitators. See Tuesday Reitano, "A perilous but profitable crossing: The changing nature of migrant smuggling through sub-Saharan Africa to Europe and EU migration policy (2012-2015)", *The European Review of Organised Crime*, vol. 2, No. 1, 2015, p. 13.

of discrimination are more likely to experience dangerous journeys and a lengthier, more precarious time in transit than those who are able to pay for faster and safer transport to their destination.[14] The amount that migrants have to pay the smugglers usually varies according to the service offered and is often determined by the migrants' socioeconomic or social status or diaspora connections.

16. Children can be particularly at risk, whether they are travelling on their own or with their families or caregivers. Migrant children in transit are unlikely to be able to access education and health care, including mental health care and timely vaccinations. The difficulty in overcoming the isolation and invisibility of children in transit means that this is often the stage of migration where conventional child-protection systems are weakest.[15] A particular issue of concern for migrant children in transit is that of age assessment, with a "culture of disbelief" pervading official determinations of age, particularly in the case of adolescent migrants. Concerns have also been raised about inappropriate and highly intrusive age assessment techniques being applied to children.[16] The vulnerability of migrant children to physical, psychological and/or sexual abuse and exploitation, including child labour, is exacerbated when immigration enforcement policies are allowed to override child rights.

[14] Migrant women with few resources are often used by smugglers as decoys at border crossings to facilitate the movement of other migrants. See Carla Angulo-Pasel, "Complex migration: A woman's transit journey through Mexico, Working paper (United Nations Entity for Gender Equality and the Empowerment of Women, February 2015), p. 15. In some sea crossings, richer migrants were able to secure passage on the upper deck of boats, while poorer migrants found accommodation in the more dangerous hull. See "The darker your skin – the further down you go: The hierarchical system aboard Italy's migrant boats that governs who lives and who dies", *The Independent*, 21 April 2015.

[15] Daniela Reale, "Protecting and supporting children on the move: Translating principles into practice" in *Children on the Move* (Geneva, IOM, 2013), p. 67 and 68.

[16] See A/69/277, para. 14.



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17. Policy responses to groups perceived as vulnerable, such as migrant children in transit, are often premised on models of "rescue" and "return" and on inaccurate or incomplete assumptions about why and how children move, rather than a participatory and rights-based analysis of the best interests of the child.[17]

18. The Committee on the Rights of the Child has asserted that, in the case of a displaced child, the best interests principle must be respected during all stages of the displacement cycle. At any of those stages, a best interests determination must be documented in preparation of any decision fundamentally impacting on the unaccompanied or separated child's life.[18]

[17] Moussa Harouna Sambo and Fabrizio Terenzio, "Children on the move: a different voice", in *Children on the Move* (Geneva, IOM, 2013), p. 23.

[18] See the Committee's general comment No. 6 (2006) on the treatment of unaccompanied and separated children outside their country of origin, para. 19.



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III. Human rights concerns

A. DANGEROUS INTERCEPTION PRACTICES

19. Dangerous interception practices have frequently led to human rights violations, including injury or death of migrants in transit. All persons, regardless of where they are, their legal status, nationality or mode of travel, are entitled to protection of their right to life.[19] States should scrupulously avoid dangerous interception measures, including arbitrary or collective expulsions.[20]

20. In May 2015, four Special Rapporteurs expressed their serious concern about the push-back policy implemented by the Governments of Thailand, Indonesia and Malaysia against irregular migrants in the Bay of Bengal, highlighting their particular concern about the impact of the policy and the lack of rescue on the health and personal safety of migrants while at sea.[21] Similar concerns have been expressed about the turn-back policy operated by Australia to return boats to Indonesia, allegedly in unsafe conditions.[22]

21. The 1979 International Convention on Maritime Search and Rescue requires States parties to ensure that assistance is provided to any person in distress at sea, regardless of the nationality or status of the person or the circumstances in which the person is found and to provide for his or her initial medical or other needs and deliver him or her to a place of safety. OHCHR has recommended that States should agree on what constitutes a situation of distress, nearest place of safety and safe ports, with a view to enhancing human rights protection for migrants.[23]

22. At land borders, the erection of fences, walls and other physical barriers to entry have raised concerns about the human rights impact of such measures. The Council of Europe Commissioner for Human Rights has expressed concern about the increased use of razor-wire fences, border controls and restrictions to free movement in several countries in Europe.[24]

23. Physical barriers to the movement of migrants in transit have been accompanied by a wide range of restrictive measures to restrict or deny access to territory, asylum procedures and other screening and identification procedures by migrants in transit, as well as accelerated or even summary returns. OHCHR has provided guidance to States to ensure the accountability of private transport companies and other private actors that are implementing entry restriction measures.[25]

B. COLLECTIVE EXPULSIONS AND VIOLATIONS OF THE PRINCIPLE OF NON-REFOULEMENT

24. International human rights law limits the sovereign entitlement of States to remove migrants from their territory when the migrant would be at risk of serious harm upon return.[26] Collective expulsions are prohibited as a principle of general international law.[27] OHCHR has recommended that removal orders should only be issued following consideration of individual circumstances with adequate justification in accordance with the law and international human rights standards.[28] Any consent given to voluntary return processes should be fully informed and given free of any coercion, such as

[19] See Universal Declaration of Human Rights, art. 3; and International Covenant on Civil and Political Rights, art. 6 (1).

[20] OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders* (see footnote 5), guideline 4.5.

[21] See https://spdb.ohchr.org/hrdb/30th/public_-_UA_Malaysia_21.05.15_(2.2015).pdf.

[22] Amnesty International, *By Hook or by Crook: Australia's Abuse of Asylum Seekers at Sea*, (London, 2015).

[23] OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 4.13.

[24] See Council of Europe, "Europe should lead by example by treating migrants and asylum seekers humanely and fairly," Statement by the Commissioner for Human Rights, 13 November 2015.

[25] OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 4.6. See also the contribution to the present study from the Identity Project (http://papersplease.org).

[26] See Intervener Brief filed by the United Nations High Commissioner for Human Rights pursuant to leave granted by the Court on 9 October 2015 in European Court of Human Rights, *N.D. and N.T. v. Spain,* Application Nos. 8675/15 and 8697/15. Available at: www.ohchr.org/Documents/Issues/Migration/ThirdPartyIntervention.pdf.

[27] See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 22 (1); as well as Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, para. 10; and Committee on the Elimination of Racial Discrimination, general recommendation No. 30 (2005) on discrimination against non-citizens, para. 26.

[28] See Intervener Brief filed by the High Commissioner (see footnote 26), para. 19, for a non-exhaustive list of individual circumstances; also OHCHR Recommended principles and guidelines, guideline 9.4.

the prospect of indefinite detention or detention in inadequate conditions.[29]

25. Also guaranteed to all persons, regardless of their legal or other status, is the right to protection from refoulement (i.e., the return of anyone to a country where they would be at risk of torture, cruel, inhuman and degrading treatment).[30] It should be noted that the principle of non-refoulement, which is recognized as a rule of customary international law, is equally applicable to all places where the intercepting State exercises jurisdiction and control, including on the high seas.

26. The Special Rapporteur on the human rights of migrants has expressed concern about refoulement from Europe to countries of origin and third countries with weak rule of law and poor asylum systems that have been conducted under the broad auspices of bilateral agreements.[31]

27. Returns that are not sustainable can lead not only to further abuse and exploitation, but also to more cycles of insecure and irregular migration, with human rights implications for the people moving. In one survey of sub-Saharan African migrants in Morocco, 68 per cent of people interviewed said that they had been arrested and expelled since their arrival in Morocco; and almost 80 per cent of them had been expelled multiple times.[32] Furthermore, in the case of children, it is vital that return is only used as a protection measure and not as a punitive one.[33] In a 2012 study of migrant children returned from Germany to Kosovo,[34] it was reported that many returned children lived in abject poverty with little access to health care and that 70 per cent of minority children had dropped out of school upon return.[35]

C. DENIAL OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

28. Migrants can face physical and environmental threats, hunger, ill health and exposure to trauma in transit. Migrants in transit are often unable to legally work, rent accommodation or access basic services, such as education and health care. Where irregular migration is criminalized, migrants in transit live with the constant fear of detection and abuse.

1. Lack of access to health care

29. Migrants often begin their journey in good health. However, the complexity of the migratory journey, the conditions of travel and the absence of, or inadequate, access to health care can result in many migrants experiencing poor physical and mental health outcomes.

30. Migrants may face hazardous conditions as they move, such as being confined in severely overcrowded boats or trucks.[36] Dangerous sea crossings with inadequate life-saving equipment, physically gruelling journeys though deserts and other unsafe travel in harsh terrain are common. Infants and young children, pregnant women, older persons and persons with disabilities can be at particular risk. This phase of the migration cycle is associated with high risks of death and morbidity at land, air and sea borders, including respiratory and gastrointestinal infections, dehydration, hypothermia and injuries from accidents and violence.

31. Migrants are often unable or unwilling to access necessary first aid and other immediate

[29] See OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 9.3.

[30] See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, art. 3; and, in the case of refugees, 1951 Convention relating to the Status of Refugees, art. 33.

[31] See A/HRC/29/36, para. 39.

[32] See Doctors Without Borders, *Violence, Vulnerability and Migration: Trapped at the Gates of Europe: A report on the situation of sub-Saharan migrants in an irregular situation in Morocco*, March 2013, p. 14; also Duncan Wood, "Reflections on the Mexico-Guatemala Border", in *Reflections on Mexico's Southern Border*, Duncan Wood and others, contributors (Washington, D.C., Wilson Center; Mexico, Autonomous Institute of Technology Institute, 1 April 2015), pp. 5-6, a study of migrants attempting to transit from Guatemala through Mexico to the United States of America, in which it is noted that migrants paid smugglers around $7,000 for up to three border-crossing attempts. Deported migrants therefore soon made more attempts to cross the border irregularly.

[33] See Office of the Special Representative of the Secretary-General on Violence against Children, *Toward a World Free from Violence: Global survey on violence against children*, (New York, October 2013), p. 23.

[34] All references to Kosovo in the present document should be understood to be in compliance with Security Council resolution 1244 (1999).

[35] Verena Knaus and others, *Silent Harm: A report assessing the situation of repatriated children's psycho-social health*, (UNICEF Kosovo in cooperation with Kosovo Health Foundation, 2012), p. 8.

[36] See A/HRC/23/41, para. 3.



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health interventions following rescue or interception, owing to a lack of competent medical staff or equipment, or because they are under pressure to continue their journey to their intended destination. With regard to international borders, OHCHR has recommended that States ensure that competent medical staff are present at the point of rescue or interception to carry out screenings and refer persons for further medical attention, including mental health referrals where appropriate.[37]

32. All migrants, regardless of status, are entitled to the full protection of their right to health. The International Covenant on Economic, Social and Cultural Rights protects the right of everyone to the enjoyment of the highest attainable standard of physical and mental health (art. 12). The Committee on Economic, Social and Cultural Rights notes that States have an obligation to ensure that all migrants have equal access to preventive, curative and palliative health services, regardless of their legal status and documentation.[38]

33. In addition to basic access to health care, specific challenges to migrants' right to health while in countries of transit include the management of chronic conditions, such as diabetes and cardiovascular disease, and addressing psychosocial and mental health problems. Many migrants undergo traumatic experiences relating to their journey, including imprisonment and physical and psychological violence, which necessitate mental health care.[39] Without access to adequate services, migrants are likely to self-medicate or rely on informal medical interventions to address their health problems.

34. The specific health needs of migrant women and girls, particularly in relation to their sexual and

[37] OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 5.2.

[38] See the Committee's general comment No. 14 (2000) on the right to the highest attainable standard of health, para. 34.

[39] A survey of 1,102 men, women and youth who were receiving post-trafficking assistance services found that symptoms associated with depression were reported by 59.7 per cent of participants; symptoms associated with post-traumatic stress disorder were reported by 35.6 per cent of participants and 41.9 per cent met the symptom criteria for an anxiety disorder. See Cathy Zimmerman and others, *Health and human trafficking in the Greater Mekong Subregion: Findings from a survey of men women and children in Thailand, Cambodia and Viet Nam* (International Organization for Migration and London School of Hygiene and Tropical Medicine, 2014), p. 6.

reproductive health and rights, frequently remain unmet. Where medical services are provided to migrants in transit, they may not include consultations with gynaecologists or sexual and reproductive health services and specialized care for survivors of sexual violence.

2. Inadequate living conditions

35. In a report on sub-Saharan African migrants in transit in Morocco, it was noted that almost half of the medical problems diagnosed were diseases closely related to poor living conditions.[40] While in transit, migrants may be compelled to live in precarious conditions, such as in forests, fields, abandoned houses, train stations or other public spaces, with no sanitary facilities and limited access to safe food and water sources. Improvements to those places are often prevented and access to homeless shelters may be denied. Migrants who manage to rent accommodation are often forced to live in crowded, unsanitary and unsafe conditions, because they are unable to rent accommodation legally or because they lack the financial means to do so.

36. The International Covenant on Economic, Social and Cultural Rights recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" (art. 11 (1)) and the Convention on the Rights of the Child recognizes the right of every child to a standard of living adequate for the child's mental, spiritual, moral and social development (art. 27). States should adopt measures to prevent and sanction discrimination against all migrants that undermines their right to an adequate standard of living, and should avoid the marginalization and social exclusion of migrants in an irregular situation, including because of the location of their accommodation.[41]

3. Lack of access to decent work

37. While in transit, many migrants are compelled to seek employment in order to survive and to be

[40] See Doctors Without Borders, *Violence, Vulnerability and Migration: Trapped at the Gates of Europe* (see footnote 32), p. 9.

[41] OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (New York and Geneva, 2014), p. 78.



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able to fund further travel. More often than not, migrants in those circumstances are only able to find work in the informal sector, which can be hazardous and exploitative. Migrants are often unable to have their labour rights protected, including because they are in an irregular situation. For example, migrant women in transit in Mexico were restricted to gendered and informal occupations such as domestic work, hospitality or entertainment, where legal protection of their labour rights was limited.[42] In a study, it was found that, in Thailand, unaccompanied migrant children in transit tended to work in similar occupations with a high risk of labour exploitation.[43]

38. The protection of all workers against exploitation and abuse is a core component of labour-related human rights.[44] The Committee on the Rights of the Child has recommended that States consider establishing monitoring and reporting systems for identifying and remedying child rights violations taking place in work contexts, particularly in informal and/or seasonal situations.[45]

D. ARBITRARY DETENTION AND INADEQUATE CONDITIONS OF DETENTION

39. Detention of irregular migrants is increasing around the world, including in transit countries and at international borders. Far from being used as a last resort — as befits a measure with such a drastic effect on its subject —, administrative detention is often routine and, in some cases, mandatory. In many cases, procedural safeguards for administrative detention are fewer than for criminal detention, including a lack of measures to determine the arbitrariness of arrest and continued detention. Migrants in detention are often denied access to legal aid or interpretation services and, thus, may not understand why they are detained or how to challenge the legality of their detention.

40. The use of detention for migrants is of concern, owing to the lack of procedural safeguards and poor conditions such as denial of access to medical care, including mental health care, as well as to the lack of adequate conditions, including space, food, water and sanitation, in short-term custody. Migrants in detention often suffer violence, including sexual violence, and a deterioration in their physical and mental health.[46]

41. The enhanced use of detention and other forms of strict enforcement increases the likelihood that migrants in transit will seek to avoid the authorities entirely, which, inter alia, renders them more vulnerable to abuse and exploitation, and increases the likelihood that they will accept greater risks to continue their journey.[47] There is evidence that migrants are less likely to abscond in a country through which they are transiting if their basic needs are met through legal avenues, they are not at risk of detention or refoulement and they can remain hopeful regarding future prospects.[48]

42. The right to liberty and security of person is a fundamental human right to be enjoyed by everyone, regardless of legal status.[49] Under international human rights law, the deprivation of liberty should, in all cases, be a measure of last resort, of limited scope and duration, necessary and proportionate, and the result of an individual determination. The detention of asylum seekers as a penalty for irregular

[42] Carla Angulo-Pasel, "Complex migration: a woman's transit journey through Mexico" (see footnote 14), p. 17.

[43] Daniela Reale, "Protecting and supporting children on the move: Translating principles into practice" (see footnote 15), p. 71.

[44] See OHCHR, *The Economic, Social and Cultural Rights of Migrants in an Irregular Situation* (see footnote 41), p. 116.

[45] See the Committee's report of the 2012 day of general discussion on the rights of all children in the context of international migration, para. 90.

[46] The United Nations Support Mission in Libya in 2014, for example, found conditions of grave concern in detention centres for migrants, where detention is "widespread and prolonged", including chronic overcrowding, poor sanitation and health care, and insufficient food. There were also consistent reports of physical or verbal mistreatment, labour exploitation, sexual abuse, extortion and confiscation of identity documents, and minors were being detained with adults. See A/HRC/28/51, paras. 32-33.

[47] Robyn Sampson and others, *There are Alternatives: A handbook for preventing unnecessary immigration detention* (revised edition), (Melbourne: International Detention Coalition, 2015), p. 63.

[48] Ibid. "Transit community models" of alternatives to detention in some countries ensure the right to freedom of movement in the community; in some contexts, migrants are required to reside in specific towns (Turkey) or to not enter border areas without permission (Indonesia). Conditions, such as reporting, are only applied as needed. The principles of case management and information about available options remain central, as seen in reduced levels of absconding in Thailand.

[49] See Universal Declaration of Human Rights, arts. 3 and 9; and International Covenant on Civil and Political Rights, art. 9.



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entry is not lawful.[50] OHCHR has called on States to establish a presumption against detention in law and legally prescribe human rights-compliant alternatives to detention.[51]

43. Children are often detained along with unrelated adults or arbitrarily separated from their family members. While there is a lack of data on how many children are detained globally, since many countries do not keep or release relevant data, the Global Campaign to End Immigration Detention of Children estimates that hundreds of thousands of children are currently detained for immigration purposes.[52]

44. According to the Committee on the Rights of the Child, detention of a child owing to his or her or the parent's migration status always contravenes the best interest of the child. The Committee has called upon States to expeditiously and completely cease the detention of children on the basis of their immigration status.[53]

45. In the exceptional cases where migrants are detained, international law provides that all migrants are entitled to adequate living conditions and procedural safeguards.[54] The Committee on the Elimination of Discrimination against Women has called on States to ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence and that pregnant and breastfeeding mothers as well as women in ill health have access to appropriate services.[55] OHCHR has called for States to ensure that conditions in detention facilities adhere to the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules) and other relevant standards.[56]

50 Office of the United Nations High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, (Geneva, 2012), guideline 4.1.4, p. 19. Available at www.refworld.org/pdfid/503489533b8.pdf.

51 See OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 8.1.

52 See Global Campaign to End Immigration Detention of Children, "The Issue", available at http://endchilddetention.org/the-issue/.

53 See the Committee's report of the 2012 day of general discussion on the rights of all children in the context of international migration, para. 78.

54 See A/HRC/20/24, paras. 15-20.

55 See the Committee's general recommendation No. 26 (2008) on women migrant workers, para. 26 (j).

56 OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 8.7.

Alternatives to detention

46. The prohibition of arbitrary detention means that any decision to detain must be guided by the principles of reasonableness, necessity, proportionality and non-discrimination. This requires States to contemplate other ways to achieve their objectives, such as considering alternatives to detention.

47. Around the world, however, there is a marked lack of human rights-compliant alternatives to detention, although research indicates that immigration detention is expensive, damaging to individuals and does not in general deter irregular migration.[57]

48. An alternative approach respects migrants as rights holders who can be supported and empowered to comply with immigration processes without the need for detention, while at the same time achieving migration management objectives.[58] Research indicates that alternatives are most effective when a diversity of strategies and approaches that focus on constructive engagement and respect for human rights are used. Such successful alternative approaches include case management, legal assistance, social support and ensuring the protection of the rights to education, housing and health care. Alternatives to detention also increase the likelihood of compliance with return decisions; for instance, independent returns in the European Union and Australia result in savings of approximately 70 per cent compared to escorted removals.[59]

E. VIOLENCE, ABUSE AND EXPLOITATION

49. While in transit, migrants are frequently at risk of violence, torture, abuse and exploitation at the hands of private and State actors. For example, more than half of the people interviewed for a report on the situation of sub-Saharan African migrants in transit in Morocco said that they had witnessed violence during the journey to Morocco and 43 per cent said that they had been a victim of some form of violence. Three quarters of those had experienced multiple episodes of violence.[60] In addition to physical wounds, such violence has a profound impact on the mental health of the migrants. Perpetrators are often able to act with impunity and migrants are often reluctant to seek medical help, protection or justice for fear of arrest or other repercussions.

50. Migrants are often subjected to violence by security forces, including indiscriminate raids on communities of migrants in an irregular situation, and violence by border authorities against migrants attempting to cross international borders irregularly.[61]

51. The prohibition of torture is a principle of customary international law and obliges States to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under their jurisdiction (see Convention against Torture, art. 2).

52. States should provide effective police and other criminal justice protection for all persons who are subject to physical or sexual violence, whether inflicted by officials or by private individuals, groups or institutions. At borders, victims of violence and trauma should be referred to medical and psychosocial services.[62] The Committee on the Rights of the Child has called upon States to ensure and implement adequate and accessible measures for

[57] International Detention Coalition, "Does, detention deter?" Briefing paper, 2015.

[58] The International Detention Coalition defines alternatives to detention as any legislation, policy or practice by which persons are not detained for reasons relating to their migration status. IDC has identified and incorporated a number of positive examples of alternatives to detention globally into a single framework, called the Community Assessment and Placement Model. See Robyn Sampson and others, *There are Alternatives: A handbook for preventing unnecessary immigration detention* (see footnote 47), pp. 2 and 19.

[59] Ibid., p. 52.

[60] See Doctors without Borders, *Violence, Vulnerability and Migration: Trapped at the gates of Europe*, p. 8.

[61] On 17 September 2015, the High Commissioner for Human Rights expressed his shock at the disproportionate force used against migrants, including women and young children, who were assaulted with tear gas and water cannons by Hungarian security forces at its border with Serbia. See OHCHR, "Hungary violating international law in response to migration crisis" press release. Available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=16449&LangID=E.

[62] See International Convention on the Rights of All Migrant Workers and Members of Their Families, art. 16 (2); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5 (b); as well as OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, guideline 7.8.

addressing trauma experienced by children during migration.[63]

53. Girls and women are especially at risk of all kinds of violence, including sexual violence, while in transit. Research indicates that a reality of transit migration for women is the likely inevitability of encountering sexual abuse, not only by criminal gang members and male migrants, but also by border authorities, police officers and other officials.[64] Recent reports have highlighted a surge of violence against women and children in the transit of migrants through the Balkans and Central Europe.[65]

54. The Committee on the Elimination of Discrimination against Women has noted that women are vulnerable to sexual and physical abuse by agents and escorts when travelling in countries of transit and asked States to take active measures to prevent, prosecute and punish all migration-related human rights violations that occur under their jurisdiction, whether perpetrated by public authorities or private actors (see general recommendation No. 26, paras. 12 and 25 (b)).

Abusive smuggling, extortion and trafficking

55. As noted previously in this study, migrants in transit are often compelled to rely on the services of "facilitators" for assistance with travel, housing, employment and other matters,[66] which leaves them disproportionately vulnerable to violence, abuse and exploitation.

56. Smugglers occupy an ambiguous position in the facilitation of mobility today. It should be noted

[63] See the Committee's report of the 2012 day of general discussion on the rights of all children in the context of international migration, para. 89.

[64] See Carla Angulo-Pasel, "Complex migration: A woman's transit journey through Mexico", p. 14.

[65] See UNHCR, "UNHCR concerned at reports of sexual violence against refugee women and children", News stories, 23 October 2015. Available from www.unhcr.org/562a3bb16.html.

[66] Although some smuggling networks are organized criminal structures, many are loosely linked chains of individuals who provide a range of services across countries of origin, transit and destination. See Nourhan Abdel Aziz, Paola Monzini, Ferruccio Pastore, *The Changing Dynamics of Cross-border Human Smuggling and Trafficking in the Mediterranean* (see footnote 12), p. 25.



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that smuggling, as seen through a human rights lens, does not in itself constitute a human rights violation and can be the relatively neutral provision of a service that could enable a migrant to escape persecution or deprivation. In a study of child mobility in West Africa, it was noted that such actors play a very important role in the phase between departure and arrival, as they are regarded as a trusted and vital source of protection and assistance by travellers, including children on the move.[67]

57. At the same time, migrants who have turned to smugglers often have little other choice in how they move and, in that unequal power relationship, smuggled migrants are particularly at risk of abuse and exploitation, including being forced into situations of trafficking. In 2015, there were reports of severe abuse by smugglers of migrants travelling from Myanmar and Bangladesh, including violence and deprivation of food and water. The Office of the United Nations High Commissioner for Refugees (UNHCR) estimated that 11 or 12 out of every 1,000 people on smugglers' boats in the Andaman Sea died from starvation, dehydration or violence.[68]

58. Migrants in transit have also become easy prey to criminal actors who have kidnapped and imprisoned migrants, often for the purposes of extorting money from their families. Reports indicate that kidnapping and extortion have become a ready source of income for some of the many militia

[67] Terre des Hommes, *Locally-Developed Child Protection Practices Concerning Mobile Children in West Africa*, 2014, p. 44. See also Maybritt Jill Alpes, "Law and the credibility of migration brokers: The case of emigration dynamics in Cameroon", Working Papers Series, No.80 (International Migration Institute, December 2013), pp. 4 and 8, in which it is noted the first point of departure for many aspiring migrants in Anglophone Cameroon is not the embassy, but a migration broker or a member of family. Migration brokers are not "other" to aspiring migrants, but rather "allies" and "helpers" in a quest for both geographic and social mobility.

[68] UNHCR Tracks, "Abandoned at Sea", Stories of refugees and aid workers, 26 August 2015. Available from http://tracks.unhcr.org/2015/08/abandoned-at-sea/.

groups active in Libya.[69] Similar practices have been recorded in South-East Asia,[70] Mexico,[71] the Sinai Peninsula and elsewhere.

59. Trafficking is always a human rights violation and is often accompanied by high levels of violence.[72] Migrants in transit can be trafficked for various forms of exploitation, including labour exploitation in various sectors as well as sexual exploitation.

60. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, contains important provisions in respect of protection for victims of human trafficking. In 2010, the High Commissioner for Human Rights called upon States to adopt a human rights-based approach to trafficking.[73]

61. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power universally recognizes the right of all people to access justice and to prompt redress.[74] Migrants in transit should have the same rights in national law as other victims of crime.

62. The Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, affirms that the protection of the rights of persons who have been the object of smuggling is a State obligation. Article 4 extends the scope of the Protocol beyond the prevention, investigation and prosecution of migrant smuggling offences to also ensuring the human rights of smuggled migrants. Article 6 requires States to criminalize the smuggling of migrants as well as aggravating circumstances that endanger lives or safety, or entail inhuman or degrading treatment of migrants. States are called upon to ensure that all measures aimed at addressing irregular migration or combatting the smuggling of migrants do not adversely affect the human rights of migrants.[75]

[69] Tuesday Reitano, "A Perilous but profitable crossing: The changing nature of migrant smuggling through sub-Saharan Africa to Europe and EU migration policy (2012-2015)" (see footnote 13), p. 10.

[70] In October 2015 Mohammed Alam, 21 years, reported how his family had to sell all its cattle to secure his freedom. It has been two years since he returned penniless to Sonarpara, Bangladesh, after spending 19 days at sea on a trawler with 420 other people on board before being held hostage in southern Thailand for 17 days until his family paid 170,000 taka (about $2,200). See Bruno Stagno-Ugarte, "The Other Refugee Crisis: The Plight of Bangladesh's Migrants", *Foreign Affairs*, 21 October 2015.

[71] In 2010, 72 migrants were massacred in Tamaulipas state and buried in shallow graves by the drug-trafficking cartel Los Zetas after their families failed to pay a ransom. See "Mexico rescues more than 100 kidnapped migrants", *BBC News*, 7 May 2015.

[72] A survey in the Greater Mekong Subregion found that nearly half (47.4 per cent) of the 1,015 participants who reached their destination reported experiencing physical and/or sexual violence during the time they were trafficked. See Cathy Zimmerman and others, *Health and human trafficking in the Greater Mekong Subregion* (see footnote 39), p. 35.

[73] OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking – Commentary* (Geneva, 2010).

[74] See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, General Assembly resolution 40/34, annex.

[75] OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, principle A.5.



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IV. Conclusions

63. The main conclusion of this study is that there exists today a clear protection gap for migrants in transit. Across the world, an increasing number of women, men and children embark on perilous journeys in search of safety and dignity, and face abuse and exploitation in transit. The lack of a rights-based response to such migration results in greater risks for migrants in transit and leads to death, injuries and other human rights violations.

64. The response to transit migration is increasingly militarized and security-centred, which permits States and other actors to employ a range of intrusive, non-transparent and even arbitrary actions, with limited scrutiny and oversight.[76] Harm resulting from those measures may be viewed as an unfortunate side effect of national security, rather than a significant human rights concern in its own right.

65. The lack of research and data on the situation of migrants in transit is an important gap and a major obstacle to the formulation of effective, sustainable and rights-based policy responses. Issues in need of further research and data include the human rights impact of migrant smuggling;[77] immigration detention in transit and alternatives to detention;[78] and violence against migrants and fatalities in transit.[79]

[76] See A/HRC/23/46, para. 75. In addition, the sizeable cost of building fences and employing surveillance systems, military vessels, drones and other equipment in border areas is striking.

[77] More research is needed on the complex dynamics linking migrants' decisions, smugglers' practices and policy responses. See Jacob Townsend and Christel Oomen, *Before the Boat: Understanding the Migrant Journey*, (Brussels, Migration Policy Institute, 2015), p. 13. Available from www.migrationpolicy.org/node/15288.

[78] The Global Detention Project has highlighted a severe lack of information about the number of migrants and asylum seekers in detention across Europe. See Global Detention Project, *The Uncounted: Detention of Migrants and Asylum Seekers in Europe*, 2015.

[79] UNODC observed that data and information is particularly required on the root causes of violence against migrants and their families and on patterns of migration. See UNODC and International Federation of Red Cross and Red Crescent Societies, *Combating violence against migrants: Criminal justice measures to prevent, investigate, prosecute and punish violence against migrants, migrant workers and their families and to protect victims* (Vienna, 2015).



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V. Recommendations

66. The High Commissioner recommends that effective measures be put in place to address the human rights protection gap for migrants in transit, including those who move in large movements. States should sign, ratify and implement all core international human rights instruments and other relevant standards of international refugee law, criminal law, labour law and the law of the sea and ensure that all relevant laws, regulations and administrative practices protect, respect and fulfil the human rights of all migrants in transit without discrimination. In addition, States are encouraged to ensure that migrants have access to regular, safe and affordable channels for migration as well as access to humanitarian assistance and protection in order to reduce opportunities for abuse and violations of the human rights of migrants in transit. The situation of children and other groups that can be discriminated against on multiple grounds (such as women at risk) should receive particular scrutiny.

67. The High Commissioner recommends that States and other stakeholders as relevant, should:

(a) Enable the access of all migrants in transit to justice and to effective remedies, including in cases of violence and abuse, whether inflicted by officials or by private individuals, groups or institutions;

(b) Establish, operate and maintain adequate and effective rescue services at all international borders, including search and rescue at sea services in coastal States;

(c) Ensure that returns from all areas where the State exercises jurisdiction or effective control, including extraterritorially, are only carried out in accordance with international law and with due procedural guarantees. States should make every effort to secure the sustainability of returns;

(d) Develop mechanisms to assess the individual situation of migrants in transit, without discrimination, and to prevent their expulsion until such an assessment has been completed in order to, inter alia, uphold the principles of non-refoulement and the prohibition of collective expulsion;

(e) Ensure that migrants in transit who are victims of violence, physical and mental abuse and exploitation are referred to the appropriate services, including medical and psychosocial services; and provide migrants, in particular girls and women who have experienced rape and other forms of sexual violence during their transit, with the protection and treatment appropriate to their circumstances and situations, including sexual and reproductive health services encompassing access to rights-based, comprehensive and integrated sexual and reproductive health information and services;

(f) Guarantee the human rights of all migrant children in transit and ensure that they are treated as children first and foremost and, in that regard, provide guidance on the operationalization of the principle of the best interests of the child for migrant children in transit;

(g) Develop standards on the establishment of firewalls between public service providers and immigration enforcement authorities in order to, inter alia, protect the rights of all migrants in transit to personal security, adequate health care, education and an adequate standard of living;

(h) Make targeted efforts to end immigration detention of migrants in transit, by, for example, establishing a presumption against such detention in law; expeditiously ending immigration detention of all children, regardless of status; and implementing non-custodial, community-based alternatives to detention as a matter of priority;

(i) Institute multi-stakeholder partnerships and cooperation in order to ensure protection of the human rights of migrants in transit at the local, national, regional and international levels, including to ensure that migrants in transit are able to access reliable, relevant and accurate information on their situation and rights;

(j) Improve the collection of data, disaggregated by age and gender, on migrants in transit, including qualitative research on migrants' experiences of transit, and specific data on the number of migrants killed, injured or victims of crime while attempting to cross maritime, land or air borders.





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