

Rejecting Criminalisation and Externalisation: Moving from Enforced Closure to Regulated Mobility

Remarks at the Samuel Dash Conference on Human Rights*

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Ladies and gentlemen,

I thank the organisers for inviting me to share with you a number of ideas coming from my experience as U.N. Special Rapporteur on the Human Rights of Migrants, especially from the two reports I've prepared on the protection of the rights of migrants at the borders of the European Union.

I. MIGRATION IS NORMAL AND HERE TO STAY, AND IT WILL BE IRREGULAR IF WE DON'T CHANGE ATTITUDE

Migration is in the DNA of mankind. We all come from the Rift Valley in Africa some 200,000 years ago, and we have conquered the world ten times over since then.

Stopping migration isn't possible over the long term. Diverting it only lasts a short time. When needed, migration will happen, no matter what. The huge investment of the American authorities in border controls has not prevented over 65,000 Central American youths from reaching the United States last year, at the same time as the Italian Mare Nostrum operation rescued 160,000 persons from the Mediterranean despite huge investment of the EU and EU countries in increasing cooperation with neighbouring countries.

“Sealing” international borders is impossible, especially in democratic States. Democratic borders are porous by nature and migrants will continue

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arriving despite all efforts to stop them, often at a terrible cost in lives and suffering.

II. CRIMINALISING MIGRATION HAS LITTLE DETERRENT EFFECT, BUT HUGE HUMAN RIGHTS CONSEQUENCES

Irregular migration has been “criminalised” during the past three decades. The language used by politicians and the media is criminalising. The systematic detention policies are a form of criminalisation. Being smuggled is often presented as having participated in a highly criminal activity, which taints the migrants themselves. Smuggling and trafficking are systematically associated, and often the expressions are used interchangeably, even as they describe very different activities.

This portrayal has very negative consequences, adding to all the barriers migrants already experience, such as language or social isolation. Irregular migrants will fear speaking up, even when exploited by employers or landlords, who know that they will not protest or mobilise. And unionisation is most often unavailable.

In many countries, the criminalisation of irregular migration is in the discourse and in the practices, more than in the law and policies proper, as migrants are most often dealt with under administrative law, not criminal law.

Until recently, administrative law wasn’t invasive of individual rights. But now, administrative immigration regulations, proceedings, and policies mimic the criminal justice system in many ways, including the importation of criminal categories, criminal law enforcement mechanisms, institutions of criminal punishment, and crime-control rationales. However, the stringent guarantees that evolved over a few centuries in criminal law—for example, the burden of proof or the admissibility of evidence—have not reached administrative law, which is why States prefer it to criminal law as a more flexible and “efficient” tool.

Yet, in many States that do not have the death penalty and do not extradite towards the death penalty, such as Canada and most European countries, the administrative judge today is the only judge who can send people to face execution, torture, or arbitrary detention.

And administrative detention has increased exponentially, without effective oversight mechanisms that could address the issues relating to the

criteria for, duration of, and conditions of detention. The idea of detention as a last resort, only if absolutely necessary, is applied almost nowhere, and alternatives to detention haven't been seriously developed in any country I've visited. I've also seen children detained in all the countries I've visited so far, although the U.N. Committee on the Rights of the Child has made very clear that detention can never ever be in the best interest of a child, and that therefore unaccompanied minors and families with children should neither be detained, nor be separated, by reason of their immigration status alone. For children, I've never seen good guardianship arrangements or adequate best-interest-of-the-child determination procedures. Here again, administrative law is failing the test of human rights protection in most countries, and administrative judges aren't empowered and trained to make sure that human rights guarantees are included and implemented in such administrative issues. For example, in 2012, Greece announced Operation Xenios Zeus, in which all apprehended irregular migrants were to be detained, whatever their circumstances, including children and families with children. Not one single European State objected to this manifest violation of international and European human rights law, and the European Commission never discussed bringing an infringement procedure against Greece.

Moreover, this criminalisation drives all irregular migrants further underground, into the hands of smugglers and exploitative employers and landlords. If the host States' objective is effectively to control borders, such criminalisation is counterproductive, since it entrenches mobile, creative, and tech-savvy smuggling rings that take over the control of cross-border movements of persons.

III. EXTERNALISATION CREATES EVEN WORSE HUMAN RIGHTS VIOLATIONS

Many countries have attempted to externalise border controls—that is, make transit countries bear the brunt of the detection, detention, and deportation of irregular migrants or the processing of asylum claims. There's a political argument, an efficiency argument, and a legal argument against such practices.

The *political argument* is that the only reason Global North States do this is because they figured out quickly in the '90s that, in the context of a liberal democracy, arresting, detaining, and deporting migrants is difficult

and costly, because lawyers, civil society organisations, judges, politicians, national human rights institutions, and the media “get in the way” and “make life difficult” for immigration enforcement, based on a variety of legal or political grounds, such as protection needs, length of stay in the host country, age of arrival, etc., which are all human rights-based.

It appears much more “efficient” to do capacity building in transit States so that their authorities will carry out the arrest, detention, and deportation of irregular migrants, and refugee determination procedures if need be. Most of those countries do not have the same democratic culture, the same human rights protection infrastructure, the same active and vocal civil society organisations caring for migrants, the same investigative journalism, or the same independent and competent judiciary. From a Global North perspective, these deficiencies are actually considered an asset in “migration management” because they do not hamper the swift deportation of migrants.

A stark example of this trend in Europe is offered by the contrast between the very active cooperation between the EU and neighbouring countries on capacity building for migration management—through migration and mobility partnerships—by the DG Migration and Home Affairs on the one hand, and, on the other, the near absence of cooperation between the European External Action Service and the same neighbouring countries on capacity building for national human rights institutions which could better protect the human rights of all, including migrants, in those neighbouring countries.

The *efficiency argument* is twofold. First, most transit States only reluctantly accept to actually create a “refugee and migration problem” for themselves when migrants usually enter and exit the country without much fuss. Turkey has signed an immigration readmission agreement with the EU as a stepping stone to its accession to the EU, but doesn’t effectively clamp down on irregular migration unless actively prodded by some EU States.

Second, forcing transit States to combat irregular migration means that such migration will be driven underground—or further underground—and that smuggling rings and mafias will control the trade, creating additional law-and-order issues for the authorities, and, in the end, reducing the efficiency of migration controls.

The *legal argument* is that Global North States are responsible for their actions. If they knowingly empower other States to commit human rights violations against migrants, they should be held accountable for their co-responsibility in such violations.

The most blatant example of such externalisation is the “Pacific Solution” implemented by Australia since 2001. Australia is able to get away with it for two reasons. One, it ignores the numerous calls of international human rights bodies and civil society organisations documenting the human rights violations in Nauru and Manus Island in Papua New Guinea, violations for which it could be held accountable. Two, its political system is that of quasi-pure British parliamentary sovereignty, without any constitutional human rights protection framework; if the parliamentary legislation is clear, judges have no power to tell the authorities that their course of action is wrong, contrary to most countries of the Global North.

For all these reasons, externalisation of migration control without concomitant capacity building for human rights protections in the neighbouring countries is unacceptable. The ECtHR said so much in the *M.S.S.* case, when it partly dismantled the Dublin system established in the EU to make the country of entry responsible for the processing of the asylum claims and the expulsion of irregular migrants, which is a form of externalisation in favour of the countries in the North of Europe to the detriment of Greece, Italy, and Spain. The ECtHR prohibited northern EU countries to send back asylum seekers to Greece, due to the appalling conditions in which they had to live there.

IV. WE NEED TO UNDERSTAND THE MIGRATION LOGIC AND STRATEGIC CHOICES OF MIGRANTS

The vast majority of migrants and asylum seekers who cross borders irregularly aren’t criminals or even frauds. They are trying to make the best of their predicament, which is often dire to start with. Like most of our forebears, migrants who can’t see a future for themselves or their loved ones at home will seek it elsewhere. If legal avenues are open, they will use them. If not, they’ll find other ways. Because they need to. Because their options are limited. They are “survival migrants,” an expression recently coined by Professor Alexander Betts of Oxford University.

If they are refugees, they most often can’t get to a host country legally: such countries have all adopted mechanisms to prevent asylum seekers from reaching their shores. If they are low-wage economic migrants, their options are also limited to trying their luck at crossing borders irregularly.

We know irregular migration isn't a crime—not against persons, not against property, not against the security of the State. It is a violation of an administrative regulation that obliges us to present ourselves at a specific point of entry with appropriate papers. But a crime it is not.

Refugees and migrants who cross borders irregularly do not have the feeling of committing a crime, even if they know that what they are doing is not authorised. We don't have the moral high ground here: migrants are mostly courageous people who have endured a lot, are resilient, and want to do the right thing for themselves and their family.

V. IRREGULAR MIGRATION IS THE RESULT OF BARRIERS. SMUGGLING IS AN OPPORTUNISTIC INDUSTRY

Irregular migration is the direct result of policies prohibiting immigration. In the '50s and '60s, millions of North Africans and Turks entered Europe to find work. They used the ferries from Algiers or Izmir. No one died en route. There was no smuggling. Yet there were border controls everywhere. It was often the same at the American–Mexican border.

There was little prohibition to come and look for work. Changing a tourist visa into a work permit was facilitated. And many migrants returned home when they lost their job, secure in the knowledge that they could come back when the job market was again thriving. Mobility was the name of the game.

With our present prohibition policies, we have opened a new and lucrative market for smuggling rings, a market which could not exist without this prohibition. Smugglers are actually implementing the labour mobility that our own employers in our underground labour markets need in order to thrive.

VI. BANKING ON MOBILITY WOULD BE MUCH MORE EFFICIENT AND RESPECTFUL OF HUMAN RIGHTS

Paradoxically, in the name of securing borders, many States have actually lost control over their borders, as flexible smuggling rings will generally be ahead of the game. Territorial security should not be equated with the ability to stop people at the border, but with the capacity to identify who crosses the border. With time, continued repression of irregular migration

is counterproductive, as it drives migrants further underground, thereby empowering smuggling rings and leading to exclusion, discrimination, and violence against migrants.

States are thus responsible for encouraging smuggling and making it more dangerous. Bringing unscrupulous smugglers to trial for the suffering they inflict on migrants should remain a priority. But States will not defeat resourceful and adaptable smuggling rings unless they take over their market, thus destroying their business model, which was created when barriers were erected and which thrives at evading repressive migration policies.

This is the lesson of the Prohibition era and of the lethal “war on drugs.” In both cases, we tried to eradicate a particular behaviour, thus creating a market for criminal rings. In both cases, we have come to realise that prohibition results only in loss of control over underground markets. In both cases, we changed or are in the process of changing prohibition policies into harm-reduction policies, which include legalising, regulating, and taxing the behaviour in question.

So, if we are to witness a significant reduction of human suffering at our borders, we must bank not on strict closure and repression, but on regulated openness and mobility. This doesn’t negate the power of the State to expel migrants who have no right to stay; it means simply that States should adapt their policies to the facts on the ground and recognise that it is much better to create systems that encourage and incentivise people to abide by the rule, rather than systems that drive massively people to evade the rule.

In the end, it is much better to recognise mobility as an inescapable consequence of globalisation, to offer the refugees and migrants what they need and therefore create incentives to register officially. By offering legal, safe, and cheap mobility services, States will reclaim the mobility market and ultimately regain the control of entries and exits from the smuggling rings and the control of labour markets from unscrupulous underground employers.

Banking on mobility means that the overall goal is to have most migrants incentivised to use official channels to enter and stay.

In particular, we must respond to the needs of two main categories of persons.

A. FOR REFUGEES, MASSIVE RESETTLEMENT POLICIES ARE NEEDED

At present, many people crossing the Mediterranean, thanks to smugglers, are manifestly refugees, such as most Syrians and Eritreans. We cannot expect Syrians to live in camps or cities in Lebanon, Jordan, or Turkey indefinitely, with no prospects for a better life, while the Global North stalls at making a commitment to a meaningful resettlement programme. If nothing else is available, refugees will take their chances with smugglers in order to provide a future for themselves and their children, as many of us would do in similar circumstances.

However, most refugees would wait in line for a meaningful opportunity of legal and safe resettlement in the Global North. We are missing here a great opportunity for a global resettlement programme. Taking as a model the Comprehensive Plan of Action for the Indochinese refugees of the '80s, one could imagine two million refugees being selected in Turkey, Lebanon, and Jordan, over five years, with the help of UNHCR and civil society, according to priority criteria, and resettled in all the countries of the Global North according to a distribution formula. Based solely on the population criterion, for Canada, this would mean resettling less than 18,000 such refugees per year, for the United States around 150,000 per year, and for Germany around 50,000. These figures are entirely manageable, by any measure.

This would considerably reduce the market for smugglers and the consequent suffering of such refugees. It would also reduce significantly the number of asylum applications made by such refugees.

B. FOR LOW-WAGE MIGRANTS, WE NEED TO CREATE LEGAL AVENUES

Irregular migrants aren't stupid. They come because they know there are jobs for them—at exploitative wages and conditions, but still there are jobs offered by our own employers, in underground labour markets that we fail to acknowledge and regulate.

Global North States must wean themselves from their addiction to “cheap labour.” We should recognise our real labour needs, particularly in the low-wage and medium-wage sectors, and facilitate regular migration for such sectors, such as agriculture, care, hospitality, construction, extraction, or fisheries. We should recognise that mobility is actually the best mechanism for matching labour needs with individual skills and thus facilitate

flexible and human rights–based immigration programmes for such migrants, and establish liberalized access to the territory to come and look for work.

This should be accompanied with a sharp increase in the effectiveness of labour inspections for ensuring the respect of labour law, as well as a real effort in the repression of unscrupulous exploitative employers, in order to reduce considerably the underground labour markets.

This would create an entirely new framework for legal and better-regulated labour markets, thus resulting in the reduction of an important pull factor for irregular migration.

VII. SMUGGLING RINGS WILL BE USED IF OTHER AVENUES ARE NOT AVAILABLE

In conclusion, as long as we have not established a better system based on the facilitated but controlled mobility of migrants and on the repression of their exploitation, we will not rid ourselves from smuggling rings and unscrupulous employers.

Criminalisation and externalisation aren't adequate answers to a normal human phenomenon: they are neither efficient deterrence, nor cost-effective, nor human rights–based. Unfortunately, I have little hope for changes in the near future, for lack of political traction.

Despite numerous exactions and losses, many migrants have made the right choice for themselves and their families by migrating irregularly and using the services of smugglers, be it to escape Nazi Germany, the present Syrian civil war, violence in Central America, or sheer poverty in Mali.

One needs to recognize the agency and dignity of those migrants and refugees: they face very difficult choices, as well as exclusion and violence on a daily basis, and yet they endure and persist. As an efficient survival mechanism, migration is always a dignity-seeking journey, often undertaken out of love.

Rather than trying everything we can to prevent them from coming, facilitating and managing their entry and their integration would be a much more productive response.