



From Enforced Closure to Regulated Mobility: The Need for a Paradigm Shift in Migration Policies

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The Need for a Paradigm Shift in Migration Policies**

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Ladies and gentlemen,

I would like to thank the organisers, and in particular my colleague and friend Prof. Idil Atak, for inviting me to this exchange with you. It is a rare occasion and I'm very grateful for the opportunity.

I was asked to share with you a number of ideas coming from my experience as UN Special Rapporteur on the human rights of migrants, especially on the relationship between criminalisation, precariousness, and human rights protection.

The thoughts I'm sharing with you are mostly based on my knowledge of international human rights and refugee law, my country visits – Albania, Tunisia, Turkey, Italy, Greece, the European Union (Brussels), Qatar, Nepal, Sri Lanka, and Malta – and my various thematic reports on the detention of migrants, climate change and migration, the management of the external borders of the European Union, Global Migration Governance, the labour exploitation of migrants, and the human rights of migrants in the post-2015 sustainable development agenda.

They are also inspired by the most recent policy announcements made by the European Union, including the European Migration Agenda announced today in Brussels.

1. Migration, including irregular migration, is normal and here to stay

Migration is in the DNA of mankind. We all come from the same woman ancestor 200,000 years ago in the Rift Valley in Eastern Africa, and we have conquered the world ten times over since then. We're all migrants.

Stopping migration isn't really possible over the long term. Diverting it only lasts until other countries react with similar policies. When needed, migration will happen, no matter what. The huge investment of the American authorities in border controls have not prevented 50,000 Central American youths from reaching the US last summer. And the Italian Mare Nostrum operation picked 170,000 persons from the Mediterranean last summer as well.

States must accept that migrants will come, because there are either push factors or pull factors for them to do so. Any attempt at "sealing" borders, as the nationalist populist discourse stridently calls for (i.e. preventing irregular migrants from entering the States' territory without offering many more legal avenues for migration), will continue to fail on a massive scale, as this creates a market for opportunistic smuggling rings. Unless geography allows it, sealing international

borders is impossible, as Italy and Greece have recently recognised, and migrants will continue arriving despite all efforts to stop them, often at a terrible cost in lives and suffering.

2. Criminalising migration has little deterrent effect, but huge consequences as to the human rights of migrants

Irregular migration has been “criminalised” over the course of the last three decades. The language used by politicians and the media is criminalising. The systematic detention policies of irregular migrants are a form of criminalisation. The treatment of migrants – such as forced returns to the country of origin while being restrained and helmeted, like a criminal is shackled – is criminalising.

Irregular migrants are portrayed as criminals. Being smuggled is often presented as having participated in a highly criminal activity, which taints the migrants themselves. The smuggling of migrants is systematically associated with trafficking in persons and often the expressions are used interchangeably, although these are very different activities with very different consequences for the individuals. The most recent example of this confusion is in the European plan of action disclosed today (on May 13, 2015).

This portrayal of migrants has extremely negative consequences on the migrants themselves. Irregular migrants will fear speaking up, even when they are exploited by employers or landlords. Their rights will be trampled by people who know that they will not protest or mobilise. Unionisation is most often out of the question. Their marginalisation and exploitation is therefore further entrenched by the criminalising attitude, adding to the difficulties they already know, such as the language barrier, sexual harassment, and lack of social support.

3. Administrative law has become the most dangerous law of the land

The criminalisation of irregular migration is in the discourse and in the practice, more than in the law proper. Until recently, administrative law was not an area of domestic law that was as invasive of individual rights as criminal law. The stringent guarantees which evolved over a few centuries in criminal law – being the only legal arena which could result in death, torture or imprisonment – have not yet reached the core of administrative law, resulting in serious human rights concerns regarding the treatment of migrants. For example, administrative law has not adopted proof beyond a reasonable doubt or stringent rules regarding the admissibility of evidence, even though the consequences of a decision may be very similar to that of a criminal culpability judgment. Although Graham Hudson, in a panel this afternoon, demonstrated that such a process of acculturation was under way.

In many countries that do not have the death penalty and do not extradite where the death penalty may be contemplated, such as Canada and most European countries, the administrative judge today is the only domestic judge who can

send people to face extrajudicial execution, torture or arbitrary detention. It is a heavy burden to shoulder.

Immigration regulations, proceedings, and policies now "mimic" the criminal justice system in many ways, including the importation of criminal categories, criminal law enforcement mechanisms (immigration enforcement officers and border guards are now almost equivalent to police officers, sometimes to military personnel, in their powers to arrest and detain, or to gather intelligence, and they often request the collaboration of other agencies to help them in they work), institutions of criminal punishment (many immigration detention centres around the world are prison-like), and crime control rationales (the public debate is often full of references to the criminality of "illegal aliens"). However, these shifts have not been accompanied by increased legal safeguards of the kind found in criminal law.

The continued insufficiency of human rights guarantees within administrative proceedings relating to migration, coupled with the increasing use of punitive sanctions and regimes akin to criminal law, often place irregular migrants in a very precarious position.

Moreover, as once said by former IRB Chair Peter Showler, the administrative determination of refugee status has become the most difficult judicial task in the country. My colleague and friend Audrey Macklin, who was an IRB member for a time, also said, rolling her eyes, "It's an impossible task!" The difficulty in appreciating the evidence provided, coupled with the potential consequences of a wrong decision, place a heavy burden upon the shoulders of decision makers.

4. We all need to understand migration logics and the strategies of migrants

The vast majority of migrants and asylum seekers aren't criminals. Most of them aren't even frauds. They are trying to make the best of the situation that is theirs, a situation which is often dire to start with.

Migrants who don't see a future for themselves or their loved ones will try to seek that future elsewhere, like all of our forebears have done. If legal avenues for migration are open, they will use them. If not, they will find other ways. Because they need to. Because their options are limited. They are what Alexander Betts call "survival migrants".

If they are refugees, they most often cannot get to a country of refuge legally: all host countries have adopted mechanisms and strategies to prevent asylum seekers from reaching their shores.

If they are low-wage economic migrants, their options are also limited. They can go to countries in the Gulf, but they face such levels of exploitation there that many are deterred. They can also try their luck at crossing borders irregularly towards the Global North.

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, as there's no victim.

The use of false or forged documents has been made into a crime by most States, but it is often the only way for the asylum seekers to actually reach their destination, and it should not then be considered a crime: it has been done to "help protect", not to defraud. In history, many refugees have used forged documents, such as Armenians fleeing genocide a hundred years ago, Jews fleeing the Shoah in the 30s and 40s, Latin Americans fleeing dictatorships in the 70s and 80s. Their descendants today owe their lives to the fact that their forebears used forged documents, and they are grateful for it and often show this with pride. Raoul Wallenberg, for example, is celebrated for having improperly distributed travel documents.

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. They are mostly doing this because they don't see any other option open to them. We don't have the moral high ground here: migrants are most often extremely courageous and resilient people, they are survivors who want to do the right thing for themselves, their children, and their family.

One needs to recognize the agency and dignity of these migrants and refugees when they decide that this is the best course of action to create a future for themselves and their loved ones. They face very difficult choices and make courageous decisions. They may be facing exclusion, marginalisation, discrimination, harassment, violence on a daily basis, and yet they endure and persist. It is an act of survival, often performed out of love.

5. 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. No one died *en route*. There was no smuggling industry. Yet there were border controls everywhere. It was the same at the American-Mexican border. There was no 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.

We value mobility inside our countries as the best means for matching labour needs and professional skills. Europe encourages mobility across its internal borders, inside the common European territory, for the same reasons. Why should it be different across international borders?

With our prohibition policies, we have created 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 underground labour markets need in order to thrive in sectors of our economies

where huge numbers of irregular migrants are employed, such as agriculture, construction, hospitality, or caregiving.

When I hear European authorities wanting to bomb the smuggling operators, I see essentially political posturing. I cannot believe that they are naïve enough to think that this will deter the smuggling rings. I understand that the consequence would be to make the passage more costly and more dangerous.

6. Banking on mobility would be much more efficient and would mean regaining control of many borders

Banking on mobility means that the overall goal is to have most migrants using official channels to enter and stay in host countries. Paradoxically, in the name of securing borders, many states have actually lost control over their borders, as flexible and opportunistic smuggling rings will generally be ahead of the game. Prohibitions and repressive policies, without regular migration channels for asylum seekers and much needed low-wage migrants, only entrench smuggling operations and underground labour markets where unscrupulous recruiters and employers exploit undocumented migrants and increase the precariousness of migrants' situations, resulting in more deaths at sea and more human rights violations.

With time, continued repression of irregular migration is counterproductive, as it drives migrants further underground, thereby empowering smuggling rings and creating conditions for alienation and marginalization that foster human rights violations, such as discrimination and violence against migrants. States can thus be seen as co-responsible for creating conditions that encourage smuggling and make it more dangerous. While bringing unscrupulous smugglers to trial for the suffering they inflict on migrants should remain a priority, states will not succeed at fighting resourceful and adaptable smuggling rings unless they destroy their business model, which was created when barriers were erected and which excels 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 prohibiting 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 legalisation, regulation, and taxation.

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. In the end, it is better to recognise this effective mobility as an inescapable fact, a direct consequence of globalisation, to offer refugees and migrants what they need and therefore create incentives to register officially, to ultimately regain control over entries and exits from the smuggling rings and labour markets from unscrupulous underground employers.

7. For many 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. The Global North in general, and the EU in particular, cannot expect Syrians to live in camps or cities in Lebanon, Jordan, or Turkey indefinitely, with most having no prospects for a better life for themselves or their families, while rich countries stall in making a commitment to a meaningful refugee resettlement programme. If nothing else is available to them, they 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.

Most refugees would, however, wait in line and contribute some money for a meaningful opportunity of resettlement in the Global North. We are missing here a great opportunity for active cooperation in a global resettlement programme. Altogether, taking as a model the Comprehensive Plan of Action for the Indochinese refugees of the 80s, one could imagine one million refugees being selected abroad (for example in Turkey, Lebanon, and Jordan for the Syrians), over five years, with the help of UNHCR and civil society organisations, according to priority criteria, and resettled in the Global North. For Canada, this would mean resettling fewer than 9000 such refugees per year.

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.

We hear that the European Union is offering to welcome 20,000 refugees from the Middle-East per year by 2020. Divided by the number of countries, that is only a few hundred per year. This is woefully insufficient as compared to the need: it will not reduce irregular migration in any significant way.

8. For so-called economic migrants, acknowledgement of our real labour needs, especially for low-wage labour, would mean creating many avenues for low-wage migrants to come and establish themselves

Global North States must also 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 programmes must be flexible, and migrants need to be able to exercise their agency in order for them to find the best way to integrate in and contribute to their host society.

In fact, we should allow a lot more people to easily come and look for work and change their visa into a work permit if they find a job. This would respond to employers’ needs, individuals’ mobility, and would be the best means of responding to labour market needs and allocating skills.

This should be accompanied with a sharp increase in the effectiveness of labour inspections for ensuring the respect of labour conditions, as well as a real effort in the repression of unscrupulous exploitative employers. Migrants are smart:

they go where jobs are available. Migrants know that there are jobs for them in the many underground labour markets that we have allowed to flourish in many sectors of our Global North economies: agriculture, construction, care, hospitality.

Reducing such underground labour markets would create an entirely new framework for legal and better regulated labour markets, thus reducing an important pull factor for irregular migration. This would respond to the employees' needs, as empowering individuals to complain, whatever their status, is the best means of ensuring the implementation of labour standards and avoiding the unfair competition of "illegal employers".

Temporary migrant worker programmes, such as the ones implemented by Canada, do not respond sufficiently to the needs of the Canadian labour market, particularly in sectors where there is traditionally labour exploitation, and they certainly create their own precariousness and human rights violations. Furthermore, our labour inspection mechanisms are too weak.

9. Undocumented migration is only normal if other avenues are not available

Until we have established a better system based on the facilitated and controlled mobility of migrants that represses their exploitation, we will not rid ourselves of smuggling rings and unscrupulous employers. We should therefore not blame the refugees and migrants for using smuggling rings: this is often the only course of action open to them. Demonizing them, rather than their oppressors, is counterproductive, as it drives them further underground and into exploitation.

In particular, a sharp understanding of the challenges facing refugees and migrants on the move should allow us to realize that, despite numerous exactions and losses, many made the right choice for themselves and their families by using the services of smuggling rings, to escape Nazi Germany or the present Syrian civil war, or to escape sheer poverty in Mexico or in the Sahel. They and their children will become good citizens and taxpayers. Many of us here are descendants of irregular migrants and are grateful for the courage they showed.

We should encourage and facilitate mobility and recognise it as the best strategy ever invented to cope with political, economic, and environmental stress.

I thank you for your kind attention.