

## Intervention by Peggy Hicks

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### Introduction

- Around the world, the human rights of millions of migrants<sup>1</sup> are insufficiently protected or at risk of abuse. This is especially true for migrants without the legal right to remain in the countries in which they reside, and who may be subject to forced returns or otherwise incentivised or coerced to return voluntarily. As OHCHR has consistently pointed out, migration can be a positive and empowering experience for many migrants. Yet, all too often migrant women, men, boys and girls find themselves in a precarious situation, suffering the consequences of severe human rights protection gaps along migratory routes and in countries of transit and destination—and increasingly at risk of unlawful, forced, or coerced returns.
- In 2017, OHCHR’s Migration Team undertook a series of monitoring missions where we spoke directly with migrants who had been returned or were in the process of being returned. The picture you see in front of you is one such child, who was traveling together with his mother when they were forcibly returned to Guatemala. The child was seeking to reunite with his father, who works in the United States. The child’s mother explained to OHCHR that this was their second time being deported, and that—as any of us would do—she would keep trying to migrate so that here children could grow up with their father.
- Other migrants interviewed by OHCHR shared stories of being forced to sign return documents they could not read and did not understand. Others were coerced under threat of detention into withdrawing applications for protection and accepting “voluntary return”, including children traveling alone.
- As one returning migrant told us, “I think people see us deported migrants as a burden, like I shouldn’t be here.” In addition to the physical load that returnees carry with them, one social worker at a reception centre for returned migrants shared with us that many migrants carry with them an emotional burden, including the sense of failure and stigmatization that comes when being forced to return to your community without having achieved one’s goals.
- While States exercise a sovereign prerogative to govern the conditions of entry, stay and exit of non-nationals, this prerogative is not absolute. States must always govern their borders in light of their human rights obligations. This means that the human rights of all migrants must be respected, including in the context of return.
- On 19 September 2016, at the high-level Summit of the General Assembly on addressing large movements of refugees and migrants, 193 States unanimously adopted the New York Declaration for Refugees and Migrants, in which they acknowledged a shared responsibility to govern large-scale movements in a humane, sensitive, compassionate and people-centred manner, recalling their obligations to fully protect the human rights of all migrants, regardless of their status (para. 22).
- States reaffirmed their support for the principle of non-refoulement (para. 24) and recognized the special needs of all people in vulnerable situations (para. 23), including migrants who do not qualify

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<sup>1</sup> OHCHR has stated that, in the absence of a universal definition, an international migrant (migrant) refers to “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”. In common usage, refugees are often distinguished from other migrants due to their specific entitlements under international refugee law. Similarly trafficked persons, migrant workers, stateless persons, and persons with disabilities have also been recognized in specific international instruments.

for refugee status but who are nevertheless unable to return home. (para. 53) There was also “strong encouragement” of international cooperation to ensure that migrants can return in a safe, dignified, and preferably voluntary, manner and agreement that any type of return, whether voluntary or otherwise, must be consistent with States’ obligations under international human rights law, including respect for due process and ensuring the best interests of children. (para. 58)

- Now, as States embark on the negotiation of a Global Compact for safe, orderly and regular migration, aimed at ensuring that the governance of migration is both more effective and more principled, their challenge is to translate the aspirational commitments of the New York Declaration into a concrete plan of action. In doing so, it is clear that the issue of returns will be an essential issue.

### Issues of concern

- In the view of OHCHR, current return practices are leading to a number of serious human rights concerns that must be addressed, not only in the Global Compact but in migration governance more generally.
- In the absence of systematic monitoring and reporting it is difficult to know the scope of potential human rights abuses in the context of return, however a number of UN and civil society reports indicate that migrants are at heightened risk of being returned to places where they may face torture or other cruel, inhuman or degrading treatment or punishment (‘ill-treatment’) and other serious human rights violations in violation of the **principle of non-refoulement**.
- Others face **arbitrary or collective expulsion** or may be returned back to situations where they are unable to return to their former homes, including the risk of **internal displacement**.
- The rush to return is **weakening due process and procedural guarantees**, including a lack of individual assessment of the many situational and personal vulnerability factors that may make it difficult for migrants to access appropriate protection of their rights during, or upon, return.
- Once returned, migrants routinely face **discrimination and marginalization**. Many end up destitute. Others have few remaining ties to their ‘home’ countries, or may not even speak the local language.
- International experts have highlighted that such **unsustainable return** practices heighten the vulnerability of migrants to precarious re-migration, putting them at risk of violence, exploitation and abuse, especially when returns do not address the important, but often hidden, feelings of shame, stigma or “dishonor” migrants face when returning to their families and communities, particularly when scarce financial resources are involved.
- Furthermore, in the absence of adequate **post-return monitoring**, departing States are generally unaware of what is happening to returnees, and receiving States are often inadequately able, or willing to conduct such monitoring of their returning nationals.
- Despite these serious concerns, we note that **returns are on the rise** in nearly every region of the world, and some receiving States are even taking steps to “disincentivise stay” by restricting or denying migrants their rights in an effort to increase return rates.
- **Terminology** in the field of returns is also problematic, as the words used to describe the phenomenon—such as “safe”, “dignified”, “voluntary”, “sustainable”, or even “return” itself—often imply human rights due diligence, yet are not frequently grounded in the international human rights framework. These terms are in need of further definitional and conceptual clarity, especially from the perspective of States’ human rights obligations.

## OHCHR key messages on returns

- With this expert meeting, OHCHR is seeking to better understand the human rights consequences, State obligations, and possible remedies in the context of current return practices, both voluntary and involuntary.
- OHCHR has previously recommended a number of concrete and practical steps that governments and other stakeholders can take to respect the human rights of migrants, including in the context of return. With this expert meeting we aim to further develop the policy guidance coming from the High Commissioner on this important topic by addressing new or emerging human rights protection gaps.
  - In 2014 OHCHR published policy guidance in the form of [Recommended Principles and Guidelines on Human Rights at International Borders](#) with a view to translating the international human rights framework into practical border guidance measures, including a number of concrete recommendations on return.
  - In 2016 OHCHR produced, upon the request of the Human Rights Council, a report on the [Promotion and protection of the human rights of migrants in the context of large movements](#) and later, a report on the [Situation of migrants in transit](#) which both contain recommendations relevant to return.
  - And the High Commissioner has intervened as a third party before the European Court of Human Rights on three occasions to directly address issues of *non-refoulement* and collective expulsion of migrants ([Hirsi Jamaa and others v. Italy](#); [N.D. and N.T. v. Spain](#); and [Raoufi and others v. Greece](#)).
  - Finally, through the Global Migration Group's Working Group on Human Rights and Gender, OHCHR has helped to develop [Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations](#), which are being presented to the Human Rights Council as part of the High Commissioner's annual report on Thursday of this week. These *Principles and Guidelines* specifically address issues of return of migrants falling outside the protections of refugee law but who may nevertheless require protection under the international human rights framework.
- Among these recommendations, we have highlighted that:
- **Non-refoulement and collective expulsion.** The principle of non-refoulement and the prohibition of arbitrary or collective expulsion comprise customary norms of international law and apply to all human beings at all times, including to all migrants, regardless of their migratory status. States, therefore, have an obligation to ensure that no person is returned to a place where there are substantial grounds to believe that he or she would be at risk of torture or other cruel, inhuman, or degrading treatment or punishment, or other serious human rights violations, including enforced disappearance, serious forms of discrimination and arbitrary interference with the right to a family and private life.
- **Due process and procedural safeguards.** The prohibitions on non-refoulement and collective expulsion imply that, prior to being returned, migrants have a right to an individual assessment, in accordance with due process and fair trial guarantees. This individual assessment requires an in-depth, substantive understanding of each migrant's situation and the risks that she might face upon removal, as well as access to fair and efficient protection procedures.
- **Sustainability.** There is an urgent need to address the sustainability of returns from a human rights perspective. When migrants are sent back to countries in which they face the same conditions that compelled them to leave, such returns will not be sustainable. Instead, they may lead to repeated cycles of migration through increasingly dangerous routes and in increasingly perilous conditions. States should implement measures that will ensure returns are sustainable, principally by ensuring

returning migrants are able to enjoy all of their human rights upon return, and tailored reintegration programmes should be developed to address the different needs of women, men and children, among others.

- **Children’s best interests.** Children should only be returned where it has been determined through a formal, adequate and participatory process that return is in the best interest of the child. Return should not cause children to be separated from their parents, to become homeless, or to go without proper care and custody. If determined that it is in the best interests of the child to be returned, an individual plan should be prepared, together with the child where possible, for her sustainable reintegration.
- **Voluntary return should be given preference over forced return.** Voluntary return should be given preference to forced return, including by providing information about voluntary return processes in accessible formats and languages migrants are known to understand. Returns can be called “voluntary” only if migrants are fully and meaningfully informed of the choice they make and if consent is given free of any coercion, including actual or implied violence, torture, ill-treatment, indefinite detention or arbitrary detention, including detention in inadequate conditions.
- **Monitoring and accountability.** Independent mechanisms for ongoing human rights monitoring post-return should be instituted in order to ensure that the return did not violate the principle of *non-refoulement*, the right to seek asylum, or the prohibition of arbitrary and collective expulsions; to guarantee that all allegations of human rights violations during return processes are promptly and impartially investigated; to monitor the human rights situation of migrants who have been returned in both forced and voluntary processes; and to ensure access to effective complaints mechanisms and remedies.

## Conclusion

- With these key messages and concerns outlined, I look forward to a productive and fruitful discussion and want to thank you for taking the time to be here with us today to help OHCHR to better understand the human rights consequences of State return practices, and to help guide our future policy work in this area.