

The Identity Project

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Office of the High Commissioner for Human Rights
United Nations Office at Geneva
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Re: Human Rights Council Resolution A/HRC/29/2 on “Protection of the human rights of migrants: migrants in transit”

As an NGO primarily concerned with the right to freedom of movement, the Identity Project (PapersPlease.org) welcomes this resolution of the Human Rights Council and the invitation from the Office of the High Commissioner for Human Rights (OHCHR) for submissions from NGOs such as ourselves, for your use in preparing your report to the Human Rights Council concerning the human rights of migrants in transit.

We welcome the adoption by the Human Rights Council on July 2, 2015, of Resolution A/HRC/29/2, "Reaffirming that the Universal Declaration of Human Rights proclaims that everyone has the right to freedom of movement and residence within the borders of each State and the right to leave any country, including his or her own, and to return to his or her country."

We share the concerns expressed in Resolution A/HRC/29/2, which, "Expresses concern at legislation and measures adopted by some States that may adversely affect the full enjoyment of the human rights and fundamental freedoms of migrants, including those in transit;" and "Reaffirms that, when exercising their sovereign right to enact and implement migration and border security measures, States have a duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants."

The OHCHR has asked specifically for, “views and information, including on particular laws, public policies or programmes, action plans or other relevant measures; ... in relation to... [e]xit restrictions in countries of origin and the externalisation of border controls which could have an impact on the human rights of migrants in transit.”

As we discussed in our previous submission to the OHCHR concerning the human rights of migrants, refugees, and asylum seekers,¹ the right to leave any country is routinely and systematically violated – even where there is no explicit requirement for an “exit permit” – through (1) requirements for identity credentials or other travel documents as a condition of travel by common carrier, without respect for the right to leave any country and to return to the country of one's citizenship regardless of what, if any, credentials or documents one possesses, (2) requirements for “screening” and approval of common carrier passengers that amount to *de facto* exit visa, transit visa, and/or entry visa requirements, (3) sanctions imposed on common carriers to induce carriers not to transport certain would-be passengers, on the basis of decisions not made, and not subject to appeal, through effective judicial procedures, and (4) failure by governments to enforce the duties of common carriers to transport all would-be passengers, regardless of their legal status or possession of documents.

Some of the most important decision-makers for asylum seekers, refugees, and other migrants are airline and other common carrier ticket sellers and check-in staff. Many eligible asylum seekers are unable to reach places of refuge, and others die trying, as a direct result of improper denial of transportation by common carrier staff.

Many eligible asylum seekers could afford to purchase airline tickets or tickets on other common carriers (ferries, trains, buses, etc.) to travel to countries where, on arrival, they would be eligible for asylum. They risk their lives as “boat people”, and some of them die, not for financial reasons, but because airlines or other government-licensed common carriers improperly refuse to sell them tickets or deny them boarding.

When airlines or other common carriers deny passage, they often claim that they are doing so in compliance with government mandates or government-authorized carrier “discretion”. But decisions about these “mandates” and how to apply them, and about the scope of common carrier “discretion”, are enforced not by judicial or police personnel but by airline or other common carrier staff, or by contractors, at the points of ticket sales, check-in, or boarding. As a result, it is almost impossible for would-be passengers to obtain judicial review of carrier decisions to refuse ticket sales, check-in, or boarding.

Asylum seekers who are trying to leave a country where they are subject to persecution, and who are denied transport, are unlikely to have access to effective judicial review and redress through the courts of the country that is persecuting them. Airlines know that they can violate the rights of asylum seekers with *de facto* impunity.

1 The Identity Project, “The rights of migrants, refugees, and asylum seekers” (May 30, 2014), available at <<http://papersplease.org/wp/wp-content/uploads/2014/06/idp-ohchr-30may2014.pdf>>.

Respect for the right to freedom of movement requires significant changes in the practices of carrier staff. To fulfill their human rights obligations, governments need to ensure that common carriers are aware of, and respect, the right to freedom of movement.

As outlined above, the following are some of the government and common carrier policies and practices that are used to deny migrants the right to freedom of movement:

1. Requirements for identity credentials or other travel documents.

When airlines or other common carriers, or their contractors, deny passage to individuals without documents or with documents that carrier staff (who have no judicial competence to make such decisions) believe to be unsatisfactory, they invariably claim to be enforcing conditions of carriage that require all passengers to have whatever documents are “required” by the countries of origin, transit, and destination of travel.

Most of these decisions are erroneous. Governments should be reminded of their obligation to ensure that carriers operate in accordance with human rights law.

The right to freedom of movement is a human right. As such, by definition, it does not depend on one's identity, citizenship, nationality, or possession of identity documents.

The right to leave any country is independent of one's identity, and cannot, consistent with international human rights law, be conditioned on who one is or on the possession of any particular identity or other documents. Any restrictions on the right to leave any country, including any restrictions on departure from the country by common carrier, are subject to the strictest scrutiny and the strongest presumption of invalidity.

No identity documents are, or can be, “required” for *departure* from any country.

Nor, consistent with international human rights law, can asylum seekers be expected or required to have any particular documents as a condition of *entry*. Inability to obtain identity, travel, or other documents may itself be evidence of persecution that supports a claim for asylum. Eligibility for asylum can only be determined by qualified authorities of the country of asylum, after arrival. Airline staff have no competence to make guesses about who will later qualify, after arrival in another country, for asylum. Airline staff have no right to deny transportation on the basis of such guesses.

An airline or other common carrier that refuses to sell a ticket or provide transportation to an otherwise-qualified passenger on the basis of lack of documents should not be permitted to claim that it is enforcing a government “requirement” for documents, since any such requirement would violate the right to freedom of movement and, with respect to asylum seekers, would violate international humanitarian law.

2. Requirements for “screening” and approval of common carrier passengers

“Screening” of passengers is a euphemism for “control”. Passengers are “screened” to decide who will be allowed to travel, and who will not.

In the USA and some other countries, “screening” of passengers includes “watchlist checking”. These are more euphemisms. These lists include “no-fly” lists and other blacklists. These are not merely lists of people to be “watched” or “checked” or searched before they are allowed to board. These are lists of people to be denied transportation, often on an extrajudicial basis and for secret reasons.

Passenger “screening” in countries including the USA also includes real-time profiling, on the basis of which would-be passengers may be denied transportation even if they aren't on any list and are the subject of only a profile-based no-fly decision.

All of these procedures can place asylum seekers and other migrants at special disadvantages and greater likelihood of being denied transportation. Their nationality or place of origin in a conflict zone may cause them to be deemed “risky” according to the profiling and “risk scoring” algorithms. There may be limited, inconsistent, or nonexistent records pertaining to migrants in irregular situations in the databases used for profiling and risk scoring, and screening algorithms may equate uncertainty with risk.

In order not to violate the right to freedom of movement, denial of transportation as part of “screening” or otherwise must be based on valid substantive grounds, and must be made by qualified officials through procedures that ensure due process and are subject to effective judicial review, taking into consideration the special difficulties that asylum seekers in countries where they are subject to persecution are likely to face in obtaining access to the courts of destination countries in which they want to seek asylum.

3. Inducement to carriers not to transport certain would-be passengers

More and more countries are following the bad example of the USA in providing financial incentives to airlines and other carriers to refuse to transport passengers who lack passports, visas, or other documents, even if those passengers might be determined, once they arrive in the destination country, to be eligible for asylum.²

As discussed above, lack of documents is not, and cannot lawfully be deemed to be, proof of ineligibility for asylum. In many cases, lack of documents is likely to be part of the evidence supporting eligibility for asylum.

Since carriers can, as also discussed above, violate the rights of asylum seekers with *de facto* impunity, the natural consequence of these laws is to induce carriers to make their own decisions about who to transport, and who not to transport, and to err on the side of denial of transportation. Freedom of movement is a right, and the burden of proof should be on those who want to deny that right. These financial sanctions induce carriers to shift that burden to travelers to “prove” that they are eligible for admission to the country of their destination – a task which is, by definition, impossible for an asylum seeker who can never be certain, in advance, if they will be granted asylum.

² 8 US Code § 1323 imposes a US\$3,000 fine on the carrier for each passenger who is transported to the US “who does not have a valid passport and an unexpired visa, if a visa was required.” No exception is made for asylum seekers, who cannot lawfully be required to have passports or visas for admission.

Governments should make explicit, and should remind carriers, that documents and proof of admissibility are not, and cannot be, required of asylum seekers.

Carriers should not be subject to sanctions for transporting asylum seekers.

4. Failure to enforce the duties of common carriers to transport all passengers

For migrants who will otherwise have to resort to irregular and unsafe means of transportation, denial of transportation by a common carrier can be a death sentence.

Common carriers are not qualified, and should not be authorized, to adjudicate asylum or other immigration matters. Decisions to deny transportation by common carrier should be made solely by competent government officials subject to judicial review.

Governments should require common carriers to transport all would-be passengers, regardless of their legal status or possession of documents. Governments should ensure that effective oversight and enforcement mechanisms are in place to ensure that common carriers are fulfilling their obligations as common carriers. Effective and ongoing oversight, enforcement, and redress mechanisms should be put in place, taking into consideration the special difficulties that asylum seekers are likely to face in obtaining access to courts or redress through private action.

We authorize publication of this submission on the OHCHR website.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project
(PapersPlease.org)