

The Identity Project

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Migration Unit
Office of the High Commissioner for Human Rights
United Nations Office at Geneva
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via email: ohchr-migration@un.org

Re: General Assembly Resolution A/RES/76/172 on the protection of migrants

As an NGO primarily concerned with the right to freedom of movement, including the rights of migrants, the Identity Project (PapersPlease.org) welcomes the adoption by the 76th Session of the General Assembly on December 16, 2021, of Resolution A/RES/76/172, “Protection of migrants”¹ and the call by your office for inputs for the preparation of the Secretary-General’s report on the Human Rights of Migrants.

We are pleased that, in Resolution A/RES/76/172, the General Assembly reaffirms “that everyone has the right to freedom of movement and residence within the borders of each State and that everyone has the right to leave any country, including his or her own, and to return to his or her country.”

We share the “deep concern” expressed by the General Assembly “at the large and growing number of migrants... who place themselves in a vulnerable situation by crossing or attempting to cross international borders,... recognizing the obligation of States to respect the human rights of those migrants in accordance with their applicable

1. <https://digitallibrary.un.org/record/3954953>

international human rights obligations, and reaffirming the commitments to take action to avoid the loss of life of migrants... as well as the need to prevent human rights violations in all contexts involving migration,” as well as its “concern about legislation adopted by some States that results in measures and practices that may restrict the human rights and fundamental freedoms of migrants.”

We are also pleased that the General Assembly “Reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the 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,” and “Calls upon States to ensure that their laws and policies, in particular in the areas of counter-terrorism... fully respect the human rights of migrants.”

We also note that the General Assembly “Requests States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints” and “calls upon States to prosecute, in conformity with applicable law, acts of violation of the human rights of migrants and their families... during their transit from the country of origin to the country of destination and vice versa, including transit across national borders.”

Unfortunately, the pattern of violations of the rights of migrants, particularly asylum seekers, by states and common carriers (the latter often both encouraged and given *de facto* impunity by states) discussed in our our previous submissions² to the OHCHR has continued and has become more pervasive and globally normalized.

As we discussed in our previous submissions to the OHCHR, the right to leave any country is routinely and systematically violated through (1) requirements for identity credentials or other documents or information 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 “pre-screening” and approval by destination states of common carrier passengers, prior to departure from origin states, that amount to *de facto* foreign-imposed exit visa requirements, (3) sanctions imposed by states on common carriers to induce carriers not to transport certain passengers on vessels departing from origin states, on the basis of *necessarily* unreliable predictions of admissibility to, or asylum in, destination states, and (4) failure by states to enforce the duties of common carriers (pursuant to common carrier laws and aviation treaties) to transport all would-be passengers, including asylum seekers, regardless of their legal status or possession of documents.

All of these actions involve the assertion of extraterritorial authority by a State X over individuals seeking to depart from the territory of a State Y, on the basis of potential inadmissibility of those individuals to State X, if and when they were to arrive in State X.

2. The Identity Project, “The rights of migrants, refugees, and asylum seekers” (May 30, 2014), <<http://papersplease.org/wp/wp-content/uploads/2014/06/idp-ohchr-30may2014.pdf>> and “Protection of the human rights of migrants: migrants in transit” (November 16, 2015), <<https://papersplease.org/wp/wp-content/uploads/2015/11/idp-ohchr-16nov2015.pdf>>.

These are all, essentially, attempts to conflate exit, entry, and movement, and to convert the requirements established by State X for entry to State X into extraterritorial requirements for exit from State Y and for travel between State Y and State X, including travel by common carrier through international airspace or international waters.

There are (at least) three reasons why any such assertion of extraterritorial authority is fundamentally contrary to international law, including human rights law:

First, the right of State X to control entry to its territory does not imply any right to control exit from State Y or movement between State Y and State X. With respect to international air travel, Article 13 of the Chicago Convention on Civil Aviation³ provides that entry requirements of a state parry apply only “upon entrance into or departure from, or while within the territory of that State”. Extraterritorial authority by a destination state over departure from other states or movement through international airspace or waters would be fundamentally contrary to the freedom of navigation by air and sea.⁴

Second, the right to leave any country, as recognized by Article 12, Paragraph 2 of the International Covenant on Civil and Political Rights, is not contingent on admissibility to any other country.⁵ If a claim for asylum is denied, an asylum seeker may be deported, subject to the prohibition on *refoulement*. But the possibility that they might be denied admission or have their claim for asylum rejected on arrival is not a lawful basis for denial of their right to leave any other country, including by common carrier.

Third, because eligibility for asylum can only be determined after an asylum seeker arrives in a destination country, it is *per se* impossible for anyone – even government authorities, much less common carrier staff – to determine prior to departure from a country of origin whether an asylum seeker will be found eligible for asylum if and when they reach a particular destination country and apply for asylum. Any attempt to determine eligibility for asylum prior to departure from a country where an individual is in fear of persecution is necessarily premature and unreliable, and must be rejected as categorically impermissible and a violation of the right to seek asylum on arrival.

3. <https://www.icao.int/publications/Documents/7300_orig.pdf>
4. While some states including the United States have claimed that the Chicago Convention provides a basis for demands for passenger information prior to departure from other states, this is contradicted by the text of the Convention. Article 29 of the Chicago Convention, “Documents carried in aircraft”, provides that, “Every aircraft of a contracting State, engaged in international navigation, shall carry the following documents...(f) If it carries passengers, a list of their names and places of embarkation and destination.” The fact that this information is to be carried *in the aircraft* makes clear that it is to be available to authorities of the destination state on landing, and not before. And the Convention spells out exactly what three data items must be included about each passenger: name, place of embarkation, and destination. The Chicago Convention provides no authority for demands any other passenger information or for its provision prior to arrival.
5. See the discussion of Paragraph 2 of Article 12 in General Comment No. 27 of the Human Rights Committee, “Freedom of movement”, <<https://digitallibrary.un.org/record/366604>>.

The right to leave any country and the right to travel by common carrier must be recognized as essential to the human rights of asylum seekers, including their right to life.

Today there is no practical, affordable, or safe alternative to air travel as a way to leave many countries. Denial of access to travel by common carrier amounts to denial of the right to leave the country and of the possibility to seek asylum anywhere else.

Restrictions on the right to leave any country, including restrictions on departure by common carrier, can endanger the lives of persecuted individuals by trapping them in situations of persecution or by forcing them to resort to irregular and dangerous means of transport as the only way to flee a country where they are suffering persecution.⁶

Restrictions on travel by common carrier force asylum seekers – desperate to escape persecution – to risk their lives to travel by irregular means. Many of them die.

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” or walking across mountains and deserts, and some of them die, solely because airlines or other common carriers improperly refuse to sell them tickets or deny them boarding.

Many, perhaps most, deaths of asylum seekers in transit are *directly* attributable to “carrier sanctions” that incentivize common carriers to deny passage to asylum seekers.

Carrier sanctions kill, and they must be strongly and unequivocally condemned.

Article 31 of the Convention Relating to the Status of Refugees⁷, as made applicable by the Protocol Relating to the Status of Refugees⁸, prohibits the imposition of penalties on refugees for illegal entry or presence. “Carrier sanctions” are an attempt to circumvent Article 31 by penalizing carriers of refugees, thereby incentivizing carriers to derogate from their duty as common carriers to transport all qualified passengers. The consequence of carrier sanctions is to impose an indirect but in some cases fatal penalty on asylum seekers: denial of access to travel by common carrier to escape persecution.

Protection of the rights of asylum seekers requires elimination of carrier sanctions and enforcement of the obligation of common carriers to transport all passengers.

Requirements for would-be travelers to provide information about themselves and their travel plans in advance of travel can also endanger asylum seekers, especially if information about would-be travelers and their travel plans is shared with authorities of states where they fear persecution and which they are seeking to flee. Sharing of advance passenger information with governments, including mandates for sharing with both origin

6. See the Identity Project, “Asylum Requires Traveling to a Border” (March 29, 2022), <<https://papersplease.org/wp/2022/03/29/asylum-requires-traveling-to-a-border/>>

7. <<https://www.ohchr.org/sites/default/files/refugees.pdf>>

8. <<https://www.ohchr.org/sites/default/files/protocolrefugees.pdf>>

and destination governments, can expose asylum seekers and their families and associates to greater persecution or allow persecutors to prevent their flight.⁹ Required information sharing should be limited to what is required by Article 29 of the Chicago Convention.

States should require common carriers to transport all would-be passengers, regardless of their legal status or possession of documents and without attempting to guess whether, after arrival in a destination state, they will be granted asylum.

We authorize publication of this submission on the OHCHR website. We would be happy to discuss these issues further with the OHCHR or U.N. member states.

Sincerely,

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

9. See analysis of the impact of carrier sanctions and advanced passenger information requirements for air travel on asylum seekers in comments of the Identity Project, Government Information Watch, Restore The Fourth, Privacy Times, and the Electronic Privacy Information Center to U.S. Customs and Border Protection, “Advance Passenger Information System: Electronic Validation of Travel Documents”, USCBP-2023-0002 (April 3, 2023), <<https://papersplease.org/wp/wp-content/uploads/2023/04/IDP-APIS-comments-3APR2023.pdf>>.