



Contributions to the High Commissioner for Human Rights' Report *"on the promotion and protection of the human rights of migrants in the context of large movements"*, requested by the United Nations Human Rights Council in Resolution A/HRC/32/14

These comments were jointly elaborated by Centro de Estudios Legales y Sociales (CELS, Argentina)¹; Centro de Derechos Humanos de la Universidad Diego Portales (Chile)²; Programa Migración y Asilo del Centro de Justicia y Derechos Humanos de la Universidad Nacional de Lanús (Argentina)³; Comisión Argentina para los Refugiados y Migrantes (CAREF, Argentina)⁴; Servicio Jesuita a Migrantes (SJM, Chile)⁵; Iniciativa Frontera Norte de México: Programa de Defensa e Incidencia Binacional - Acción Articulada Noreste (Mexico)⁶; International Network on Migration and Development (INMD); Fundación para la Justicia y el Estado Democrático de Derecho (FJEDD, Mexico)⁷; Caritas Arquidiocesana de São Paulo (Brazil)⁸; Conectas Direitos Humanos (Brazil)⁹; Defensoria Pública

¹ CELS is a non-governmental organization that has been working to promote and protect human rights since 1979. CELS has a broad agenda that includes, for the last few decades, the defense of migrants' human rights. This work is carried out today through strategic litigation both within Argentina and before international human rights organisms (Inter-American Human Rights Commission, Treaty Bodies, Special Rapporteurs etc.) as well as through research, publications and other activities. CELS has participated, among other regional and international processes, elaborating contributions to the Recommended Principles and Guidelines on Human Rights at International Borders of the High Commissioner for Human Rights.

² The Centro de Derechos Humanos at the University Diego Portales promotes human rights studies and has a specialized legal clinic for litigation of public interest and another clinic specialized in migration and refugee protection. Since its creation in 1996, the Center has focused its work on the visibility of violations of fundamental rights and the study and analysis of institutional responses to such violations. The Legal Clinic for Migrants and Refugees promotes strategic litigation, research and development of community activities as well as mechanisms to facilitate the effective exercise and enjoyment of human rights of migrants and refugees.

³ The Centro de Justicia y Derechos Humanos de la Universidad de Lanús (CJDH/UNLa) was created in December 1996. Its mission includes research, teaching and the promotion of human rights as a component of public policy and democracy. Currently, the Migration and Human Rights program carries out a range of initiatives including research, teaching, and, influencing policy-making regarding the human rights of migrants.

⁴ CAREF is a civil association that works for the rights of migrants, refugees and asylum-seekers since 1973. It provides professional advisory services, counseling, training and social and legal assistance and also takes actions on the definition of State policies. Since 2002, CELS, CAREF and the University of Buenos Aires (UBA) Law School have a Clinic for Immigrant and Refugee Rights. The Clinic advises and sponsors an annual average of 300 cases of migrant and / or refugee people. In turn, both organizations had an important role during the reform process of the Migration Act of Argentina (Law 25,871 of 2003) and in developing its regulatory decree adopted in 2010, which inaugurated a new paradigm of migration in the country from a human rights perspective. Both organizations participated in the High Level Dialogue on Migration and Development of 2013.

⁵ The Servicio Jesuita a Migrantes is a non-profit organization of the Society of Jesus. The SJM promotes and protects the dignity and rights of people migrating to Chile, accompanying the process of social inclusion through a multidimensional model work and influencing society to recognize the richness of diversity.

⁶ The Programa de Defensa e Incidencia Binacional (PDIB) is an alliance on the northern border of Mexico, which promotes respect for human rights of Mexicans deported from the United States, and the Mexican state's responses in favor of their nationals. It carries out its work through the documentation of cases, the legal analysis, advocacy, strategic litigation and the joint work of organizations in both countries, on topics such as due process, detention centers and belongings. This partnership involves the following organizations: Centro de Recursos para Migrantes, Iniciativa Kino para la Frontera, Derechos Humanos Integrales en Acción, A.C., Casa del Migrante Nazareth and Albergue Senda de Vida.

⁷ FJEDD was created in 2011 to promote processes of justice, truth and reparation for victims of disappearance and serious human rights violations, particularly migrants passing through Mexico. It carries out its work through supporting groups and committees of families, strategic litigation and creation, monitoring and evaluating of public policies. Among its major achievements are, along with other organizations in Mexico and Central America, the creation of the Forensic Commission and the Unit for Migrants and also the Mexican Mechanism for Support Search and Research, both in the Procuraduría General de la República (Prosecutor's Office).

⁸ Caritas Arquidiocesana de São Paulo (CASP) is a civil society organization, registered as a non-profit association that maintains the Reference Center for Refugees in Sao Paulo. It has an agreement with the United Nations High Commissioner for Refugees and represents civil society at the National Commission for Refugees (CONARE-MJ). The organization conducts direct support to asylum seekers and refugees by four programs: counselling, integration, protection and mental health. The direct support, work done for more than 30 years, is also accompanied for activities related to training and expansion of network protection, and the monitoring and promotion of public policies

⁹ Conectas was founded on September 11, 2001, in Sao Paulo, Brazil, with the mission of promoting respect for human rights and contributing to the consolidation of the Rule of Law in the Global South – Latin America, Africa and Asia. Its vision is one of a more just world, with a truly global, diverse and effective human rights movement, where national institutions and the international order are more transparent, effective and democratic. To accomplish its mission, the organization has been developing programs and projects at the national, regional and international levels. Conectas develops its activities through four programs - South-South Cooperation, Foreign Policy and Human Rights, Justice, and Business and Human Rights - that interact together and encompass national, regional and international activities, including in the field of the rights of migrants and refugees.

da União (DPU, Brazil)¹⁰; Missão Paz - São Paulo (Brazil)¹¹; Instituto Terra Trabalho e Cidadania (ITTC, Brazil)¹² and Serviço Franciscano de Solidariedade (Brazil).

We, the signatory organizations, welcome the creation of this space of dialogue in the framework of the High Commissioner for Human Rights' report "on the promotion and protection of the human rights of migrants in the context of large movements." We understand that this consultation occurs within a more general process taking place at the United Nations, including the Summit to be held on September 19 in New York and the adoption of a Global Compact for Migrants in 2018. We have participated and accompanied those discussions and we consider that the diagnoses and responses that are being developed are still far from the challenges that exist today to achieve respect, protection and guarantee of human rights of migrants and refugees. In this sense, we would like to present three essential aspects that should be present in the High Commissioner's report.

1. THE ROLE OF RESTRICTIVE AND SECURITARIAN MIGRATION POLICIES IN HUMAN RIGHTS VIOLATIONS SUFFERED BY MIGRANT AND REFUGEE POPULATION

The current debate at United Nations provides the international community with the opportunity to recognize and warn that the grave humanitarian crisis going on throughout the Mediterranean –also seen in other latitudes, such as Central America and the border between the US and Mexico – is also the product of restrictive migration policies that some States have designed, implemented or authorized. Indeed, these policies can be considered one of the deep, structural causes of irregular migration and situations of vulnerability faced by the migrant and refugee population. The increase in border control policies, "policing" or even military approaches to borders reflect how States' protection of entry and permanence within their territories has unbearable consequences on the human rights of thousands of people on the move. In this sense, the role of restrictive and securitarian migration policies in generating human rights violations suffered by migrant and refugee population should be raised clearly in the High Commissioner's report.

The militarization and securitization of borders in order to "stem" migration plays a part in the creation of zones in which, under the guise of protecting national security, human rights violations are committed, through practices such as the detention of migrants and refugees and the indiscriminate use of non-voluntary return. Against this backdrop, it is imperative that the High Commissioner's report highlights that measures to be adopted in these zones must be framed within a clear policy that is consistent with and respectful of human rights, as established in the Recommended Principles and Guidelines on Human Rights at International Borders.

Moreover, even though international cooperation for development plays an important role related to the structural causes of migration in countries of origin and transit, as it is well acknowledged in the debates held by the UN, it is important that the High Commissioner's report specifies that such cooperation must not be conditioned by measures that prioritize the retention or containment of migration. This type of cooperation causes a tightening of control mechanisms in States that are not destinations, or that could be termed mixed (transit and destination), operating as border control for the arrival of migrants and refugees to other States. Experience shows that these States have not only been unable to effectively contain flows, they have further aggravated the violation of migrant and refugees' human rights.

It should also be noted that in the context of violations generated by restrictive migration policies and crimes committed against migrants, it is necessary to establish states' international responsibility by action or omission. It is therefore important that the High Commissioner's report promotes the creation of mechanisms that guarantee access to justice, the right to truth and full reparations for migrants who are victims of violations of their human rights and victims of crimes in each of the countries where these events happen, even if the victims do not reside there. In other words, geographical location is not an impediment to the full exercise of rights. Moreover, victims and survivors must be at the center of these policies and the mechanisms that are generated at the global, regional and national levels.

¹⁰ Permanent institution of the Brazilian State responsible for the comprehensive and free legal assistance to vulnerable groups, including migrants and refugees, at judicial and administrative processes and collective action.

¹¹ Missão Paz is a Brazilian philanthropic institution, member of the Scalabrini International Migration Network (SIMN), that shelters and supports immigrants and refugees. Missão Paz provides regularization services; juridical support; social assistance; psychological and health care; Portuguese lessons; work mediation between companies and immigrants, with subsequent follow-up visits to the employers, prevention of forced labor, and welcoming and protection of victims. It also has the Migration Studies Center (CEM) with a specialized library, a bi-annual magazine called TRAVESSIA, and promotes awareness campaigns with a strong presence advocating at local, state and federal levels to change national laws and strengthen migration policies based on human rights and the migrants' protagonism.

¹² ITTC is a human rights organization founded in 1997 aiming to eradicate gender inequality, guarantee rights and combat mass incarceration. ITTC's mission is to promote access to justice and the rights of prisoners, and to produce knowledge, through constant and systematic action in the following areas: direct assistance, advocacy and rights education.

2. MIGRATORY REGULARIZATION POLICIES AS A KEY SOLUTION TO THE CHALLENGES SET FORTH IN THE REPORT

It is essential to modify the paradigm of migration regularization. This change means that “regulating migration” must cease to be synonymous with impeding, limiting, prosecuting and criminalizing, and instead become synonymous with guaranteeing the conditions for dignified and safe passage and permanence. Indeed, it should become synonymous with regularizing, granting national documentation to migrant persons, whereby the regularization becomes a recognized right for all migrants, not the exception. That is, the state bureaucracy should be aimed at promoting migration regularization and not at imposing obstacles to its attainment.

Based on our experience in the field assisting and advising migrants who are already in their country of destination, it is possible to confirm that when policies place access to local documentation – or migratory regularization – at their core, their impact on the effective exercise of migrants’ rights is enormous. In fact, it has been made evident that possession of local documentation is an important symbolic instrument and source of empowerment and integration for the migrant population. Migratory regularization also affects many dimensions of daily life such as renting a home, having a formal job, enrolling children in school, receiving health care, opening a bank account or accessing justice.

As a result, we believe guaranteeing access to regularization is one way to shape the operability of the 2030 Sustainable Development Goals, which includes access to quality education, health, decent work and reduction of inequalities, among others. In summary, while we do recognize that rights are held regardless of migration status, we believe that, in order for people to fully and effectively exercise their rights, access to documentation allowing migratory regularization must be included in the current debate. Therefore, the State practice for documentation procedures should be established with clear, accessible and affordable mechanisms and must promote the migration regularization as a State obligation to guarantee rights. This obligation should not exclude more flexible mechanisms that have been established by the States themselves for access to rights; for example, the use of the document from the place of origin for access to health services, education, housing, among others¹³.

National and local policies exist, as of today, which demonstrate that this goal is achievable. Several laws in Latin America have incorporated migratory regularization at the center of their migration policies. The experiences of Argentina and Uruguay, for instance, reflect this paradigm shift. Other legislative changes in the region also indicate developments in this same direction, such as in the cases of Bolivia, the debate on immigration reforms in Brazil and the experience of regularization policies among the member countries of MERCOSUR (Southern Common Market).

3. IMPLEMENTATION OF THE PRINCIPLE OF *NON REFOULEMENT*: RESPECT FOR DUE PROCESS

Expulsions and mass deportations of people that occur in many countries show that there is a systematic violation of the international principle of *non-refoulement*. Therefore, there is a need for expulsion and deportation procedures to be conducted on an individual basis, within a process in which the person is able to explain the reasons why he or she had to leave his or her country of residence or nationality. Thus, if a person in need of international protection expresses it (in any way), the State must ensure access to the refugee status procedure and / or to a mechanism to identify their protection needs¹⁴; as well as the right to appeal the State’s decision. It would be very important that the High Commissioner’s report highlights that such procedures must have certain minimum guarantees: an individual interview, access to a specialized legal advisor (in the field of asylum and migration), to an interpreter or translator, to a reasoned decision, the right to appeal, and even the possibility that this procedure be monitored by civil society, among others. Any immigration procedure either administrative or judicial,¹⁵ (among them, procedures that may lead to expulsion) must ensure all the guarantees of due process.¹⁶

¹³International bodies have ruled, for example, that the right to health should not be subject to immigration regularization. In General Comment 14 (2000), the Committee on Economic, Social and Cultural Rights, said “In particular, States are under the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services”. 22nd period of session, E/C.12/2000/4.

¹⁴ Regarding the right of everyone to seek asylum and the guarantees of the procedure, the Inter-American Court of Human Rights (here after Inter-American Court) referred in the case of Pacheco Tineo Family vs. Plurinational State of Bolivia. Inter-American Court, Pacheco Tineo Family vs. Plurinational State of Bolivia November 25, 2013.

¹⁵ Inter-American Court, Case Baena Ricardo vs. Panamá. February 2, 2001, para. 124, 125 and 127.

¹⁶ In regards to due process, the Inter-American Court has highlighted, in the Velez Llor vs. Panama case, the importance of the right to due process under migration procedures, and that it must be guaranteed to every person, regardless of their immigration status. States have an obligation to ensure that migrants have the opportunity to assert their rights and defend their interests effectively and in full procedural equality. In this context, the Court has indicated that technical, specialized

In this sense, according to their human rights obligations, States must not adopt measures that could impede the right of all persons seeking international protection in another State, either as refugees or through any other mechanism that guarantees complementary protection. Furthermore, the deprivation of liberty at borders while these requests are being processed must not be allowed. In addition, States should refrain from returning, either directly or indirectly, people to a territory where they could face a threat of persecution, risk of torture, deprivation of the right to life, irreparable damage or any other form of serious violation of their human rights¹⁷. The principle of *non-refoulement* also prohibits the return to a state which could subsequently expel, return or extradite the migrant, and also prohibits interception and direct or indirect rejection at the border.

Moreover, the principle should apply both in individual cases and in mass influx circumstances, and to all situations in which States exercise their authority over and responsibility for migrants, for example in military areas and offshore.¹⁸

and free legal assistance is a fundamental component of due process: it is an imperative of justice. Inter-American Court, *Velez Loo vs. Panama*. November 23, 2010.

¹⁷ "The Inter-American system recognizes the right of any foreign person, and not only asylum seekers or refugees, to not be returned when its life, integrity and / or freedom are at risk of rape, regardless of their legal status or immigration status, in the country in which it is found." Inter-American Court *Pacheco Tineo Family vs. Plurinational State of Bolivia*, November 25, 2013, para. 135.

¹⁸ The duty of ensuring all rights to any person under the jurisdiction of a State is not limited to the territory of the Member State, but extends to all people under the State's authority and responsibility. UN-Human Rights Committee, General Comment 31, 2004, para.10.