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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

The situation of migrants and asylum-seekers fleeing recent events in North Africa

Report of the United Nations High Commissioner for Human Rights*

Summary

The present report is submitted pursuant to Human Rights Council resolution 17/22, in which the Council requested the Office of the United Nations High Commissioner for Human Rights to pay particular attention to the situation of migrants and asylum-seekers fleeing recent events in North Africa, to report to the Council at its eighteenth session, and to provide updates thereon.

The report seeks to describe the human rights implications of the cross-border movement of migrants and asylum-seekers fleeing recent events in North Africa in the period from January to August 2011. It describes the displacement of migrants and asylum-seekers during this period and highlights human rights concerns, as well as the relevant normative framework. It describes the international response to the situation of migrants and asylum-seekers fleeing recent events in North Africa, and ends with conclusions and recommendations aimed to protect the human rights of migrants and asylum-seekers in this context.

* Late submission.

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I. Introduction

1. In its resolution 17/22, the Human Rights Council requested the Office of the United Nations High Commissioner for Human Rights (OHCHR) to pay particular attention to the situation of migrants and asylum-seekers fleeing recent events in North Africa and to report to the Council at its eighteenth session. Accordingly, on 12 July 2011, OHCHR addressed a note verbale to Member States and intergovernmental and non-governmental organizations in which it sought their views and information. Written submissions were received from a small number of States, intergovernmental organizations, and non-governmental organizations.¹ In addition, OHCHR has relied on other credible governmental and non-governmental sources with knowledge of the situation of migrants and asylum-seekers described in resolution 17/22. The present report will seek to describe the human rights implications of the movement of migrants and asylum-seekers fleeing recent events in North Africa during the period between January and August 2011.²

2. As events in the Middle East and North Africa unfolded in early 2011, the momentous political changes taking place in countries across the region were accompanied by significant population movements within and out of the region. In these flows were various groups of persons on the move, including refugees and asylum-seekers, migrant workers, stateless persons, trafficked and smuggled persons, unaccompanied and separated children, and migrants in search of reunification with family, or those in search of economic opportunity. Migrants moved within both regular and irregular channels. Some moved between different legal categories as their situation and need for protection changed during the course of their journey.

3. The protection and promotion of the human rights of all migrants is a priority of OHCHR. In her opening address to the Human Rights Council at its seventeenth session, the High Commissioner highlighted the extreme vulnerability of migrants to human rights violations, particularly in the context of recent events in North Africa. Human rights mechanisms have also expressed similar concerns; for example, in April 2011, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families expressed its alarm at the situation of thousands of migrant workers and their families who had fled armed conflict in the Libyan Arab Jamahiriya and were staying in overcrowded transit centres without access to basic amenities, or who were subject to dangerous interception at sea and at inland borders.³

4. The armed conflict in the Libyan Arab Jamahiriya, which broke out late in February 2011, was the main cause of population movement in the region. On 7 August 2011, it was

¹ Submissions were received from the Governments of Canada, Greece, Malta and the United Kingdom of Great Britain and Northern Ireland, the European Union, the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the International Labour Organization (ILO), the International Federation of Red Cross and Red Crescent Societies, the Parliamentary Assembly of the Council of Europe, Amnesty International, the International Federation for Human Rights, Caritas Italiana and the International Commission on Eritrean Refugees.

² While the number of internally displaced persons is also significant (as at 7 July 2011, the Office of the Coordinator for Humanitarian Affairs reported that 218,000 people were internally displaced in the Libyan Arab Jamahiriya), the present report will focus on the cross-border movement of displaced persons and migrants.

³ "UN Committee alarmed by disastrous consequences of Libyan armed conflict for migrant workers' rights", OHCHR press release, 13 April 2011.

reported that around 846,000 people had left the country since the start of the conflict.⁴ Of these, some 648,083 were migrants, including 299,763 people from third countries (namely, not from the Libyan Arab Jamahiriya or the neighbouring countries into which they had arrived). The scale of movement was often staggering: in February, humanitarian organizations reported that up to 14,000 people had crossed the border between the Libyan Arab Jamahiriya and Tunisia in one day.⁵

5. Apart from the estimated 186,000 Libyan nationals who remain displaced outside their country,⁶ migrants who arrive in neighbouring countries, such as Tunisia and Egypt, are located in various sites at the border until they can be evacuated or returned to other countries.

6. Many thousands of refugees living in the Libyan Arab Jamahiriya prior to the uprising remain stranded there or in border camps, unable to return to the country because of the ongoing instability or to their countries of origin for fear of persecution and other human rights violations.

7. By early August, nearly 48,000 people had arrived at the seaports of Italy and 1,535 people had arrived in Malta.⁷ This movement included thousands of Tunisians who had left their country in the aftermath of the revolution of January 2011.

II. Human rights concerns

8. Human rights concerns have been reported in the contexts described below with regard to the situation of migrants and asylum-seekers fleeing recent events in North Africa.

A. Discrimination and violence against migrants

9. Prior to the outbreak of conflict in February 2011, there were an estimated 2.5 million migrant workers in the Libyan Arab Jamahiriya who were making significant contributions to the economy of the country.⁸ Since the 1990s, large populations of migrant workers had arrived in the country through regular and irregular channels. The majority worked as low-wage labourers in key industries, such as in oil, construction and agriculture. Refugees and asylum-seekers from such countries as Eritrea, Somalia, the Sudan and Côte d'Ivoire came to the Libyan Arab Jamahiriya in search of refuge. Some migrants and asylum-seekers entered the country in the hope of continuing onwards to other countries in the region and beyond.

10. While in the Libyan Arab Jamahiriya, migrants and asylum-seekers were vulnerable to human rights violations. Migrants from sub-Saharan Africa were reportedly subject to xenophobic attacks or hostility from the local population, and portrayed in the media as responsible for criminal behaviour. Migrants and asylum-seekers could be subject to arbitrary and prolonged detention, inhumane treatment, degrading conditions, violence, extortion and sexual abuse in detention, as well as being at risk of forced expulsions and

⁴ Office for the Coordination of Humanitarian Affairs, Crisis situation report No. 52, 7 August 2011. As at 7 August, a total of 808,281 Libyans had at one time crossed the border to escape the conflict, with many eventually returning to the country.

⁵ UNHCR press briefing notes, 1 March 2011.

⁶ IOM, Migration crisis from Libya, Daily Statistical Report, 7 August 2011.

⁷ UNHCR submission, 29 July 2011, and submission of the Government of Malta, 11 August 2011.

⁸ United Nations Regional Flash Appeal for the Libyan Crisis, 5 March 2011.

refoulement to their countries of origin. Concerns were raised by human rights groups that a disproportionately high number of migrants were being executed in the Libyan Arab Jamahiriya in proceedings that failed to meet international standards for fair trials, with at least half of those sentenced to death being foreign nationals.⁹

11. Following the uprising in the Libyan Arab Jamahiriya, migrants continued to be vulnerable to human rights violations committed by Government forces and opposition groups, as well as unaffiliated civilians. The international commission of inquiry, established by the Human Rights Council in its resolution S-15/1, reported that mistreatment of migrant workers had taken many forms, including having their houses subject to arbitrary search, being beaten and subject to other cruel and inhuman treatment. The most serious attacks on migrant workers appeared to have been linked to a suspicion that such persons were “mercenaries” on the basis of their national origin or skin colour.¹⁰ The commission also reported that migrants had been subject to forced disappearances and extra-judicial killings. Migrants trying to leave reported being regularly stopped and violently harassed at checkpoints, and there were reports that some had been kidnapped for ransom. The Committee on the Elimination of Racial Discrimination, acting under its urgent action procedure, also expressed its serious concern at the impact of the conflict on migrants and asylum-seekers.¹¹

12. Following the outbreak of conflict, as hundreds of thousands of migrants streamed across borders, transit camps in border areas rapidly became overcrowded and volatile. Early in March 2011, at the Egyptian border with the Libyan Arab Jamahiriya, one Bangladeshi man died after a fight over food distribution.¹² Several violent incidents in May 2011, some involving confrontations between local residents and the camp population, left at least six migrants in Choucha camp in Tunisia dead, and parts of the camp destroyed by fire.¹³

13. Founded upon the inherent dignity and equal and inalienable rights of every human being, the principles of equality and non-discrimination lie at the heart of international human rights law.¹⁴ In the context of conflict, migrants are entitled to the same protections afforded to nationals under international humanitarian law.

14. Article 16 (2) of the International Convention on the Rights of All Migrant Workers and Members of Their Families and article 5 (b) of the International Convention on the Elimination of Racial Discrimination require States to provide effective police and other criminal justice protection for all persons, including irregular migrants, who are subject to physical or sexual violence, whether inflicted by Government officials or by private individuals, groups or institutions. In its general recommendation No. 30 on discrimination against non-citizens, the Committee on the Elimination of Racial Discrimination called on States to take steps to address xenophobic attitudes and behaviour towards non-citizens, in

⁹ Amnesty International, “Libya: Execution of 18 people by firing squad condemned”, 2 June 2010.

¹⁰ See A/HRC/17/44, summary. In March 2011, UNHCR noted that a hotline set up by the agency was receiving desperate calls from refugees in the Libyan Arab Jamahiriya saying that they felt trapped, threatened and hunted. UNHCR briefing notes, 1 March 2011.

¹¹ Committee on the Elimination of Racial Discrimination, Statement on Libya, 28 February 2011. Reports alleged in addition that migrants had been forced to leave the country after being attacked by mobs inside the Libyan Arab Jamahiriya. Human Rights Watch, “Libya. Stranded foreign workers need urgent evacuation”, 2 March 2011.

¹² UNHCR, Press Briefing Notes, 8 March 2011.

¹³ Human Rights Watch, “Tunisia: Protect migrant camp residents”, 23 June 2011.

¹⁴ Universal Declaration of Human Rights, art. 2, International Convention on Civil and Political Rights, art. 2(3), International Covenant on Economic, Social and Cultural Rights, art. 2(2), International Convention on the Rights of All Migrant Workers and Members of Their Families, art. 7.

particular hate speech and racial violence, and also to take resolute action to counter any tendency to target, stigmatize, stereotype or profile such groups.

15. In the context of the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, States affirmed their responsibility to safeguard and protect migrants against illegal or violent acts, in particular acts of racial discrimination and crimes perpetrated with racist or xenophobic motivation by individuals or groups.

B. Trafficking and smuggling of migrants and asylum-seekers

16. For years, the mixed movement of people across the Mediterranean Sea has provided a lucrative income for smugglers and an opportunity for traffickers to prey on vulnerable and desperate migrants and asylum-seekers. It has been noted that increasingly tough controls at the external borders of Europe have increased the risks and raised the stakes of movement, forcing migrants and asylum-seekers into dangerous modes of travel, sometimes in conditions that violate human rights.¹⁵ Insufficient legal opportunities to migrate also added to the compulsion of migrants and asylum-seekers to rely on smugglers to facilitate movement. Some reports indicate that, in the context of recent events, migrants and asylum-seekers have felt compelled to leave overcrowded border camps to search out smugglers who could facilitate the sea crossing to Europe.¹⁶

17. Some migrants have been left alone and adrift on unseaworthy boats by smugglers, who have forced them to crew the boat themselves despite having no knowledge of how to operate the vessel or to navigate at sea. Others have been subject to violence and cruel, inhuman and degrading treatment by the people facilitating their movement. Still others who had thought that they had simply paid a smuggler to transport them to their destination have been forced into a situation of trafficking upon reaching destination.

18. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime is the first international instrument to identify trafficked persons as victims of crime. Although not a human rights instrument, the Protocol contains important provisions in respect of protection for the victims of human trafficking. The High Commissioner has stated that trafficking itself is first and foremost a human rights violation.¹⁷ States have accordingly been urged to adopt a human rights-based approach to trafficking by a wide variety of human rights bodies.¹⁸

¹⁵ A recent Europol report noted that “Increasing control of external borders, the introduction of higher quality travel documents and other protective measures implemented by destination countries are making illegal immigration more difficult for individual migrants, forcing them to seek the services of organised crime groups ... Transiting migrants are frequently exploited in illicit labour, thus marking a point of contact between illegal immigration and trafficking in human beings.” Europol, EU organized crime threat assessment, The Hague, 28 April 2011.

¹⁶ Médecins Sans Frontières, “Trapped in transit: Neglected victims of the war in Libya”, 30 June 2011. UNHCR similarly reported that “a number of people who had fled Libya [crossed] back into Libya, with the intention of boarding boats to reach Europe. While refugees appear to be aware of the high death toll in such perilous journeys, most feel they have little to lose by the attempt.”

¹⁷ OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking Commentary, New York and Geneva 2010. Jurisprudence of the European Court of Human Rights adopts the same approach, where the Court concluded in the case of *Rantsev v. Cyprus and Russia* that “there can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded

19. Regional standards that protect the human rights of victims of trafficking include the Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197), 2005.

20. In 2002, OHCHR developed a set of recommended principles and guidelines on human rights and human trafficking in order to provide practical, rights-based policy guidance on the prevention of trafficking and the protection of victims of trafficking. Their purpose is to promote and facilitate the integration of a human rights perspective into national, regional and international anti-trafficking laws, policies and interventions. In 2010, OHCHR published a commentary on the recommended principles and guidelines, which aims to provide further concrete guidance on the prevention of trafficking and the protection of victims of trafficking.

21. Like the Trafficking Protocol, the primary aim of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime is to combat transnational crime. However, in affirming that the “protection of the rights of persons who have been the object [of smuggling]” is a State obligation, article 4 of the Protocol extends its scope beyond the prevention, investigation and prosecution of migrant smuggling offences to also ensure the human rights of smuggled migrants. In addition, article 19 provides a broad “savings clause” to ensure that States acting in pursuit of their obligations to combat human smuggling must do so in full compliance with their obligations under international law, including international human rights law. Under the Protocol, persons (or institutions) are not liable to criminal prosecution if they procure the illegal entry or permit the illegal residence of a migrant in a receiving State for reasons that do not involve financial or material gain.¹⁹ This would apply to individuals who smuggle family members, for example, or charitable organizations that assist the movement of asylum-seekers.

C. Interception and deaths at sea

22. In recent months, thousands of migrants and asylum-seekers from South Asia, as well as from sub-Saharan and North African countries, have sought to leave the Libyan Arab Jamahiriya and other North African countries by sea, most relying on unseaworthy vessels. Most migrants and asylum-seekers who have fled on this route have arrived on the small Italian island of Lampedusa,²⁰ with a small number reaching Malta. Reports also indicate that some vessels have been intercepted off the coast of Tunisia to prevent them making the journey towards Europe.

23. The boats in which the journey have been made are often overcrowded and in a poor state of repair. As a result, boats have broken apart in the water, or have drifted for days or weeks while migrants on board ran out of food and water. Vulnerable individuals were particularly at risk during such voyages; agencies reported that, in recent months, a woman gave birth at sea while awaiting rescue, while two other women suffered miscarriages

in the [European Convention on Human Rights].” Application no. 25965/04, European Court of Human Rights, 7 January 2010 (para. 282).

¹⁸ See Human Rights Council resolution 11/3, General Assembly resolutions 58/137, 59/166, 61/144 and 63/156, and Commission on Human Rights resolution 2004/45.

¹⁹ *Travaux préparatoires*, art. 6C. Interpretative notes, para. 1(b). See also Legislative Guide for the United Nations Convention against Transnational Organized Crime and the Protocols thereto, paras. 54 and 55.

²⁰ UNHCR reported that 488 vessels have arrived at Italy’s borders from January to mid-July 2011. This comprised some 410 vessels arriving from Tunisia, carrying an average number of 60 passengers, and some 78 vessels arriving from the Libyan Arab Jamahiriya, with an average of 300 passengers.

during the ordeal at sea or just after being rescued. Hundreds of migrants have not survived the perilous journey across the Mediterranean, with reports suggesting that more than 1,400 migrants may have perished in the crossing since the beginning of 2011 (see table below).

<i>Number of migrants on board</i>	<i>Date of departure (d) or rescue (r)*</i>	<i>Missing/fatalities</i>
250	27 March (r)	All rescued, no reported fatalities
330 (estimated)	22 March (d)	330 (estimated)
72	25 March (d)	61
180	26 March (d)	All rescued, no reported fatalities
18 (estimated)	29 March (r)	7
Not known	2 April (d)	250
750	6 May (d)	550
220	12 May (d)	All rescued, no reported fatalities
850	28 May (d)	270
300 (estimated)	30 July (r)	25
More than 300	4 August (r)	304 rescued, unknown number of fatalities

* Date of rescue is indicated where the date of departure of the vessel is unknown.

24. In the most recent incident, Italian ships rescued around 370 refugees on 4 August 2011 from a boat drifting near Lampedusa. Relief organizations say the migrants told of at least 30 people, most of them women, who had died of dehydration and exhaustion during the time that the rickety boat was in the water. Reports noted that the 20-metre vessel had left from near Tripoli on 30 July, vastly overcrowded and lacking water and food. Even as the boat was rescued, according to some reports the vessel had been allowed to drift for days despite having come to the attention of other vessels in the vicinity.²¹

25. The non-exhaustive table above indicates the fate of boats carrying migrants seeking to reach Europe from North Africa in recent months.²²

26. Concerns have been expressed that vessels operating in the Mediterranean are refusing to rescue migrants in distress at sea. In recent months, United Nations agencies and others have appealed to States to urgently put in place more reliable and effective mechanisms for rescues on the Mediterranean. Ship masters have also been called on to continue to adhere to the long-standing maritime obligation of aiding people in distress. Strong calls have been made to States, commercial shipping companies and others present in the Mediterranean to consider that, in the present circumstances, all boats leaving the Libyan Arab Jamahiriya for Europe are likely to require assistance.

²¹ Gaia Pianigiani, "NATO crew failed to aid migrant ship, survivors say", *New York Times*, 5 August 2011. Reports also claimed that the Italian authorities had called for an inquiry into allegations that NATO air and naval units had been aware of the boat but had failed to come to its aid.

²² Statistics and data mainly sourced from the UNHCR submission for the present report, and from other credible sources.

27. Reports have also alleged that boats carrying rescued migrants have been unable to disembark the migrants at the nearest safe port.²³ Concerns have been raised also that, as boats continue to arrive, States could revert to previous problematic interception policies that involved screening of protection needs at sea, or even to summary pushbacks.

28. All persons, regardless of where they are, their legal status, nationality or mode of travel, are entitled to protection of their right to life.²⁴

29. Also guaranteed to all persons, regardless of their legal or other status, is the right to protection from refoulement.²⁵ It should be noted that the principle of non-refoulement, which is recognized as a rule of customary international law, is equally applicable to all places where the intercepting State exercises jurisdiction and control, including on the high seas.²⁶

30. Article 98.2 of the United Nations Convention on the Law of the Sea codifies the obligation of shipmasters to render assistance to any person found at sea in danger of being lost and to proceed with all possible speed to the rescue of persons in distress, if informed of their need for assistance. In addition, coastal States have an obligation to “promote the establishment, operation and maintenance of an adequate and effective search and rescue service.” The obligation of rescue is also provided in the International Convention for the Safety of Life at Sea. The International Convention on Maritime Search and Rescue obliges States to “ensure that assistance be provided to any person in distress at sea ... regardless of the nationality or status of such a person or the circumstances in which the person is found” (chap. 2.1.10).

31. In the context where a State has intercepted a ship suspected of smuggling migrants, article 9 of the Protocol against the Smuggling of Migrants by Land, Sea and Air (see

²³ One such incident took place in July 2011, when disagreement among several States, including Malta, Spain and Italy, over disembarkation led to more than 100 migrants being stranded on a vessel under NATO command for several days. See “Migrants’ rescue: Malta awaits NATO’s explanation”, *Times of Malta*, 14 July 2011. The Council of Europe expressed concerns in relation to the treatment of migrants and asylum-seekers rescued at sea, stating that “the absolute priority in the event of interception at sea is the swift disembarkation of those rescued to a “place of safety”... Yet it is clear that the notion of “place of safety” should not be restricted solely to the physical protection of people, but necessarily also entails respect for their fundamental rights.” Council of Europe resolution 1821 (2011), para. 5.2.

²⁴ Universal Declaration of Human Rights, art. 3; International Covenant on Civil and Political Rights, art. 6 (1).

²⁵ Namely the return of anyone to a country where they would be at risk of torture, cruel, inhuman and degrading treatment. See Convention against Torture, art. 3, and (in the case of refugees) Convention relating to the Status of Refugees, art. 33.

²⁶ In its general comment No. 31, the Human Rights Committee noted that “the enjoyment of Covenant rights is not limited to citizens of States parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum-seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party.” Similarly, the Committee against Torture affirmed that the non-refoulement obligation contained in article 3 of the Convention against Torture applies in any territory under a State party’s jurisdiction. See, for example, CAT/C/USA/CO/2. In the regional context, the Council of Europe noted that “the high seas are not an area where States are exempt from their legal obligations, including those emerging from international human rights law and international refugee law.” (resolution 1821). See also the judgement of the European Court of Human Rights in the case *Medvedev and others vs France* (no. 3394/03), where the Court held that the exercise of full and exclusive control on the high seas was tantamount to jurisdiction. Also see UNHCR, Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, 26 January 2007.

paragraph 22 above) requires the intercepting State to, inter alia, “ensure the safety and humane treatment of the persons on board”. In order to avoid arbitrary expulsions, all persons – including smuggled migrants – rescued at sea should be screened individually to determine whether they face particular risks to their dignity and safety if disembarked to a foreign State.

32. According to amendments to the International Convention on Maritime Search and Rescue adopted in 2004 that entered into force in 2006, States are obliged to cooperate and coordinate so that rescued persons are disembarked and delivered to a place of safety. The IMO Guidelines on the Treatment of Persons Rescued at Sea define such a place of safety as a “place where the survivors’ safety of life is no longer threatened and where their basic human needs (such as food, shelter and medical needs) can be met.”²⁷

33. The IMO Guidelines also highlight the “need to avoid disembarkation in territories where the lives and freedoms of those alleging a well-founded fear of persecution would be threatened is a consideration in the case of asylum-seekers and refugees recovered at sea.” The UNHCR Executive Committee has further specified that interception measures should not result in asylum-seekers and refugees being denied access to international protection or result in those in need of international protection being returned, directly or indirectly, to the frontiers of territories where their life or freedom would be threatened.²⁸

34. In order to protect the physical integrity of migrants travelling at sea, States should be mindful to avoid dangerous interception practices. As the Inter-American Commission on Human Rights notes, “a policy of attempting to stop, board and/or tow fully loaded or overloaded crafts in poor conditions on the high seas is inherently a high risk operation which not only jeopardizes many lives, but has resulted in the loss of human life.”²⁹

D. Reception, detention and collective expulsion

35. Particularly in the early months and weeks of the crisis, concerns were raised in relation to inadequate reception arrangements for migrant arrivals, including overcrowding and lack of appropriate facilities in reception centres. Overcrowding and inadequate facilities were reported in neighbouring countries as well as further afield.³⁰ In the initial months, as reception centres rapidly filled to capacity, the numbers of arrivals in Lampedusa led the Government of Italy to declare a state of emergency on the island.

²⁷ Maritime Safety Committee, Guidelines on the Treatment of Persons rescued at Sea, resolution MSC.167(78), IMO Doc. No. MSC 78/26/Add.2, annex, para. 6.12-6.17.

²⁸ UNHCR, conclusion No. 97 (LIV) Protection safeguards in interception measures, ExCom, fifty-fourth session, 2003, para. (a)(iv).

²⁹ *The Haitian Centre for Human Rights et al. v. United States*, Case 10.675, Report No. 51/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 550 (1997), para. 166.

³⁰ In late June, Médecins Sans Frontières reported that, “In Italy and Tunisia, refugees and asylum seekers are now confined in camps and transit centers for an indefinite period of time, their freedom of movement severely limited. Existing transit facilities and services are not equipped for long-term stay, and confinement in these centers is tantamount to detention. This situation is having a serious impact on the mental and physical health of the most vulnerable people, including unaccompanied minors, children, pregnant women, and victims of torture, violence, or human trafficking. In both Tunisian and Italian centers, the existing accommodation is inadequate for anyone staying longer than a few days.” MSF, “Trapped in transit: Neglected victims of the war in Libya”, 30 June 2011. In July 2011, riots erupted at an immigration centre in Bari, Italy, as asylum-seekers protested against delays in the processing of asylum claims. “African migrants found dead on overcrowded boat bound for Italy”, *Guardian*, 1 August 2011.

36. By late July 2011, concerns were reported in relation to lengthy delays in the registration and processing of migrants at the border in Tunisia and Egypt, as well as continuing concerns about inadequate living conditions for the migrants who remained in these locations.³¹ Agencies reported that migrants had been forced to sleep outside in the bitter cold, as available shelter at the border was filled to capacity. Recent reports indicate that smaller numbers of migrant workers, many from sub-Saharan Africa, continue also to be stranded inside the Libyan Arab Jamahiriya, living in the open with limited access to food, water and health services.³²

37. Agencies have reported concerns that some countries operate a mandatory detention policy for irregular migrant arrivals by sea from North Africa, leading in some cases to prolonged detention. Concerns have also been expressed about the situation of unaccompanied migrant children in reception facilities, particularly where there is overcrowding and where conditions are otherwise inadequate.³³

38. While no reports of mass or collective expulsions have been received at any of the borders to which migrants and asylum-seekers are arriving, isolated incidents of refoulement have been reported, particularly at land borders, and there are ongoing concerns that border guards may lack the necessary training and technical tools to be able to identify accurately protection needs in the context of mixed flows.

39. The Universal Declaration of Human Rights (art. 25) and the International Covenant on Economic, Social and Cultural Rights provide that everyone is entitled to enjoy the right to an adequate standard of living (art. 11), the right to health (art. 12)³⁴ and to education (article 13, and article 26 of the Declaration). The Committee on Economic, Social and Cultural Rights has clarified that the prohibition of non-discrimination also includes discrimination against non-nationals on the grounds of nationality.³⁵

40. In line with the requirements of non-discrimination, reception arrangements to meet the immediate material and psychosocial needs of migrants, such as accommodation, food, clothing and medical services, should be provided to all persons, regardless of status, until referral is possible to the appropriate services and procedures. Reception centres that house children should include appropriate facilities for education, as well as play.

1. Detention

41. Under international human rights law, and because of the drastic impact of detention on the individual human being, the deprivation of liberty should in all cases be a measure of last resort and the result of an individual determination. The right to liberty and security of person is a fundamental human right enjoyed by everyone, regardless of legal status. Articles 3 and 9 of the Universal Declaration of Human Rights and article 9 of the International Covenant on Civil and Political Rights provide accordingly that everyone has

³¹ International Federation of Human Rights submission, 28 July 2011.

³² IOM reported in mid-July that some 1,000 Chadian migrants were still stranded near the southern Libyan town of Gatrour. Reuters, "IOM: Thousands of migrants still stranded in Libya", 16 July 2011.

³³ Caritas Italiana submission, 4 August 2011.

³⁴ In paragraph 34 of its general comment No. 14, the Committee on Economic, Social and Cultural Rights referred to the obligation of States to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including asylum-seekers and illegal immigrants, to preventive, curative and palliative health services.

³⁵ In its general comment No. 20, the Committee affirmed that "the Covenant rights apply to everyone, including non-nationals, such as refugees, asylum seekers, stateless persons, migrant workers and victims of international trafficking, regardless of legal status or documentation."

the right to liberty and security of person, and that no one should be subjected to arbitrary arrest or detention. Therefore, while international law allows that administrative immigration detention may legitimately be applied in certain individual cases, it is widely held that such a deprivation of liberty should be exceptional, and used only as a measure of last resort.

42. In addition, international law provides that the detention of children, including children in the context of migration, should generally be avoided. The Special Rapporteur on the human rights of migrants has affirmed that it is never in the best interests of children to be detained, and that children should not be detained on the basis of their migratory status or irregular entry to the country.³⁶

43. The prohibition of arbitrary detention means that any decision to detain must be guided by principles of reasonableness, necessity, proportionality and non-discrimination. These principles also require States to consider other ways to achieve their objectives without interfering with the right to liberty and security of person. So-called “alternatives to detention” can take the form of reporting requirements, bails or bonds, open centres and directed residence, or electronic monitoring. The Working Group on Arbitrary Detention advised that “alternative and noncustodial measures, such as reporting requirements, should always be considered before resorting to detention.”³⁷ In the regional context, article 15 (1) of the European Union Returns Directive asserts that immigration detention should be preceded by a consideration of “other sufficient but less coercive measures [that] can be applied effectively in a specific case.”

44. The impulse to use detention as a deterrent measure could also be questioned in the light of recent research, which indicates that there is no empirical evidence to support the conclusion that detention deters irregular migration or discourages persons from seeking asylum.³⁸

2. Collective expulsion

45. The absolute prohibition of collective expulsion is well established in international and regional human rights law.³⁹ Article 22 (1) of the International Convention on the Rights of All Migrant Workers and Members of Their Families provides that “migrant workers and members of their families shall not be subject to measures of collective expulsion. Each case of expulsion shall be examined and decided individually.” Article 4 of Protocol 4 to the European Convention on Human Rights similarly provides that “collective expulsion of aliens is prohibited.”

46. In accordance with this principle, all non-nationals enjoy protection from collective expulsion, including those with an irregular status. Accordingly, each person in a group of non-nationals intercepted by a State has the right not to be returned or removed without

³⁶ See A/HRC/11/7. See also A/HRC/15/29.

³⁷ See E/CN.4/1999/63/Add.3, para. 33. See also E/CN.4/1999/63, para. 69, guarantee 13.

³⁸ UNHCR, “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants”, April 2011. See also International Detention Coalition, “There are alternatives: A handbook for preventing unnecessary immigration detention”, 2011.

³⁹ In its general comment No. 15, the Human Rights Committee confirmed that “laws or decisions providing for collective or mass expulsions” would entail a violation of article 13 of the International Covenant on Civil and Political Rights. The Inter-American Commission on Human Rights further elaborated that “an expulsion becomes collective when the decision to expel is not based on individual cases but on group considerations, even if the group in question is not large.” Report on Terrorism and Human Rights, OAS Doc. OEA/Ser.L/V/II.116, Doc. 5, rev. 1 corr., 22 October 2002.

consent to any other State without a prior reasonable and objective examination of the circumstances of that particular individual's case. This due process right ensures that all grounds under international and national law that may avoid the expulsion of the individual are duly taken into account. Such grounds can include the prohibition of refoulement, family reunification, protection of victims of trafficking, the rights of unaccompanied or separated children, subsidiary or temporary protection considerations, and other grounds arising from health needs, and particular individual circumstances.

47. In order to ensure safeguards against the arbitrary expulsion of migrants, it is important that State officials who make decisions relating to expulsion, including border guards, should be able to appreciate the full range of arguments that weigh against the expulsion of a particular individual, be adequately trained on relevant standards of national and international law (including international refugee law and human rights law) and be in an effective position to corroborate relevant elements where necessary.

III. Response of the international community

48. The initiatives described below are some of those taken by States and other stakeholders that are of relevance to the situation of migrants and asylum-seekers fleeing recent events in North Africa.

A. Rescue at sea

49. A number of search and rescue interventions have been carried out by countries in the Mediterranean region since January 2011.

50. In its recently published Fundamental Rights Strategy, the European Border Control Agency Frontex noted that the "respect and promotion of fundamental rights are unconditional and integral components of effective integrated border management" and stipulated that Frontex joint operations are to take into account "the particular situation of persons seeking international protection and the particular circumstances of vulnerable individuals or groups in need of protection or special care (e.g. separated and unaccompanied children, women, victims of trafficking, and persons with medical needs)."⁴⁰

51. In June 2011, the Parliamentary Assembly of the Council of Europe appointed Senator Tineke Strik of the Netherlands to head an inquiry into the death of hundreds of migrants in the Mediterranean since January 2011.

B. Protection of vulnerable migrants

52. A number of governmental and non-governmental actors provided emergency humanitarian assistance to migrants and asylum-seekers stranded at borders, including food, water, medical care and psychosocial support.⁴¹ Measures were also taken to improve

⁴⁰ It should be noted that the Parliamentary Committee of the Council of Europe cautioned in its resolution 1821 (2011) that, while welcoming the amendment of rules governing Frontex, "the Assembly is concerned about the lack of clarity regarding the respective responsibilities of European Union states and Frontex and the absence of adequate guarantees for the respect of fundamental rights and international standards in the framework of joint operations co-ordinated by that agency."

⁴¹ See for example "New Tunisian Red Crescent transit camp for migrants fleeing Libya", International Federation of Red Cross and Red Crescent Societies, 15 April 2011.

the condition of migrants in reception centres; for example, in April, the Government of Italy put in place procedures intended to facilitate the rapid transfer of migrants and asylum-seekers from Lampedusa, in partnership with non-governmental organizations.⁴²

53. More than 1,600 of some 37,000 Bangladeshi migrant workers forced to flee the Libyan Arab Jamahiriya have received reintegration grants of 50,000 taka (\$680) each from the Government of Bangladesh through a grant programme, which is managed by IOM and funded by a \$40 million loan from the World Bank.

54. On 5 April 2011, the European Union adopted a Directive (2011/63/EU), which is aimed at harmonizing legislation and penalties, ensuring successful prosecution and better protection of and assistance to victims, and preventing trafficking. The Directive also repeals Framework Decision 2002/629/JHA and represents a crucial step forward in addressing human trafficking in and into the territory of the European Union.

C. International cooperation

55. Neighbouring countries and countries outside the region received hundreds of thousands of migrants and asylum-seekers fleeing the upheaval in the Libyan Arab Jamahiriya. The largest number of migrants leaving the country fled overland to Tunisia and Egypt, while significant flows of migrants went to Algeria and the Niger, as well as to Chad and the Sudan.

56. A joint humanitarian operation, spearheaded by IOM and UNHCR with the support of a large number of countries, has evacuated around 156,566 migrants stranded at border camps in Tunisia and Egypt. Humanitarian agencies approached donors to provide chartered long-haul aircrafts to return migrants to their countries of origin. Tens of thousands of others were taken home by aircraft and ships provided by their Governments. Egypt, Tunisia, France, Germany, Italy, Spain and the United Kingdom of Great Britain and Northern Ireland offered air or sea transport to assist in the evacuation.⁴³

57. A number of countries provided financial support for the humanitarian response, including Australia, Austria, Belgium, Canada, Denmark, France, Germany, Luxembourg, Poland, Spain and the United Kingdom, as well as the European Commission. Nonetheless, the revised Regional Flash Appeal for the Libyan Crisis was still significantly underfunded in early August.

58. Efforts were also made to assist migrants stranded by the fighting inside the Libyan Arab Jamahiriya through air and land evacuations. On 30 July, for example, IOM announced the successful completion of an operation to airlift 1,398 vulnerable stranded Chadian migrants out of the southern Libyan town of Sebha to the Chadian capital N'Djamena.

59. The Parliamentary Assembly of the Council of Europe noted in its resolution 1820 (2011) that “the number of asylum seekers in Europe, and in particular those arriving from the southern Mediterranean, should not pose an insurmountable problem for Europe as a whole, although their concentration in certain regions will pose a much greater problem for those countries or regions in the country concerned.” The European Commission has identified up to €25 million which, under the European Refugee Fund and the External

⁴² Caritas Italiana submission.

⁴³ UNHCR Press Briefing Notes, 4 March 2011.

Borders Fund, may be mobilized to provide additional support for Member States dealing with mixed flows of migrants.⁴⁴

60. On 20 April 2011, UNHCR launched the Global Resettlement Solidarity Initiative, which calls upon States to consider contributing resettlement places for non-Libyan refugees coming from the Libyan Arab Jamahiriya and who are hosted on the borders of Egypt and Tunisia, as well as for long-term refugees living in urban centres in Egypt. To date, UNHCR has received pledges from 11 countries offering some 936 resettlement places for resettlement out of Egypt and Tunisia. The United States of America has pledged a number of resettlement places, and the Government of Canada reported that it had selected for resettlement a number of refugees in Tunisia, as well as from the Sallum camp on the Egyptian-Libyan border.⁴⁵ On 12 May, the European Commission organized a ministerial pledging conference during which European Union Member States and three associated countries pledged to resettle a total of 718 refugees from North Africa, in particular from Tunisia and Egypt.⁴⁶

61. On 24 May 2011, the European Commission adopted a communication entitled "Dialogue for migration, mobility and security with the Southern Mediterranean countries" (COM (2011)292). In the communication, the Commission proposed establishing dialogues on migration, mobility and security with the southern Mediterranean countries.⁴⁷

IV. Conclusions

62. **The flows of people leaving North Africa in response to recent events are often termed "mixed flows", in that they include people with various motivations and protection profiles, including refugees and asylum-seekers, unaccompanied and separated children, victims of trafficking, irregular migrants and smuggled migrants. Vulnerable groups include in addition women at risk, elderly migrants, migrants with disabilities, and migrants with serious health conditions and needs, including as a result of being caught up in the conflict. International norms provide that every person in a mixed flow is entitled to the individual consideration of his or her particular circumstances; accordingly, this requires States to put in place protection-sensitive responses to such flows.**

63. **Such an approach is preferable to policies that are premised on assumptions about the motivations of migrants based on their country of nationality or of departure, their gender, age or their ethnicity. Under international human rights law, all arriving migrants are entitled to have access to an adequate process to determine their protection needs. Some migrants will need the protection offered by specific legal regimes, such as refugee law or the protection of victims of trafficking. Others will need the protection of universal human rights norms that protect all persons regardless of their status. The advantage of such an approach, in addition to assuring greater protection of human rights, is that it could reduce pressure on the asylum**

⁴⁴ Submission of the European Union, 11 August 2011. The European Commission also reported that any future flows of migrants could enable use of the 2001 Temporary Protection Directive so as to provide immediate protection and reception in the territory of Member States of the European Union for the persons concerned and to promote voluntary solidarity between Member States.

⁴⁵ Submission of the Government of Canada, 10 August 2011.

⁴⁶ Submission of the European Union. On 5 August, the European Commissioner for Home Affairs urged Member States to expedite a Union-wide resettlement programme and to increase the number of refugees currently resettled by European Union Member States.

⁴⁷ Submission of the European Union.

system of receiving countries by enabling officials to channel migrants towards protection systems that are appropriate to their situation.

64. While the immediate humanitarian and human rights challenges relating to migrants and asylum-seekers fleeing recent events in North Africa continue to preoccupy the international community, it is important to bear in mind some potential longer-term consequences of the larger movement of migrants. A significant number of migrant workers are no longer able to send remittances to their families and communities, and a considerable number have been compelled to return to countries with high unemployment rates and fragile or inadequate social support infrastructure. Countries with newly established or transitional Governments, such as Egypt and Tunisia, have been faced with the need to reintegrate large numbers of returning migrants without adequate time to prepare, and are already seeing a drop in remittance flows. Effective international cooperation will need to be ensured so that neighbouring countries are able to shoulder adequately the burden of hosting large populations of migrants and asylum-seekers. In the context of the legislative and institutional reform process currently under way in these countries, it would be important to ensure the inclusion of human rights protections for all migrants in relevant laws and regulations.

65. A major concern for repatriated migrant workers is the financial impact of contracts that have been terminated on short notice, sometimes without the payment of due salaries, and the rescue of data on social security contributions made in countries of employment, which are no longer accessible.⁴⁸ It is important therefore that responses to the current migration crisis take into effective account the longer term need to ensure that any return of migrants to their countries of origin is sustainable and that the human rights of all returnees, including their fundamental economic, social and cultural rights, are respected, protected and fulfilled.

V. Recommendations

66. The High Commissioner recommends that States:

(a) Increase efforts to prevent deaths at sea through prompt and coordinated action; all States, commercial shipping companies and others present in the Mediterranean should consider that all boats leaving the Libyan Arab Jamahiriya are likely to require assistance and act accordingly;

(b) Make efforts to ensure that adequate procedures are put in place at borders in order to clarify individual protection needs under international refugee law and human rights law prior to any lawful expulsion or removal;

(c) Consider granting temporary permits on humanitarian grounds to migrants fleeing recent events in North Africa;

(d) Ensure that all migrants and asylum-seekers are protected from arbitrary detention, and explore the use of alternative and non-custodial measures prior to placing migrants in administrative detention;

(e) Avoid detaining migrant and asylum-seeking children, regardless of their status;

⁴⁸ A/HRC/17/44, p. 68. See also P. Taran, R. Cholewinski, Z. Osorova, Information Note: Displacement of Workers/Migrant Workers from Arab States in Turmoil - Imperatives for Action on a Globalized Migrant Worker Crisis (ILO, Geneva), March 2011 (unpublished).

(f) Increase resettlement places for refugees from the Libyan Arab Jamahiriya additional to their annual resettlement quotas, and expedite the departure from border camps of refugees fleeing recent events in North Africa;

(g) Establish international cooperation, solidarity and responsibility-sharing mechanisms in order to alleviate the burden on countries of first arrival in the region and beyond;

(h) Support legislative and institutional reforms to ensure effective respect for and protection and fulfilment of the human rights of all migrants, including migrants in an irregular situation;

(i) Provide greater and adequate funding to the revised Regional Flash Appeal for the Libyan Crisis.
