



TACKLING TAHRIIB IN SOMALILAND

THE LEGAL RESPONSE TO
IRREGULAR MIGRATION

Discussion Paper 2

MARCH 2020

“Tahriib has affected every family in Somaliland. If your brother or sister haven’t attempted to go, your cousin definitely has.”

- Gudoon Ahmed Mohamoud, a prosecutor in Burao, Togdheer Region

“In the smuggler camp we were forced into a large hall filled with hundreds of people. The hygiene was unbearable. It was extremely hot and we rarely got water to drink. The smugglers wouldn’t give us any food for days at a time. People died. When you’re on tahriib, you see death all around you.”

- Abdikarim Ahmed Naleye, a Somaliland migrant held for ransom by smugglers in Sudan on his way to Europe in 2017

Horizon Institute works to promote human rights and the rule of law. We envision a fair, accessible and equitable system of justice built on robust and accountable institutions and a public that is empowered to claim their rights. At the core of our work is a grassroots approach that enforces legal protections and encourages the public to understand they have rights, as well as responsibilities, and to be an active and integral part of the search for solutions and in holding institutions to account.

Our reports and discussion papers explore issues identified through our work. They provide information and analysis intended to stimulate debate among the public, government institutions, the media, human rights groups, NGOs, independent bodies and donors and promote government policies based on respect for human rights, the rule of law and the encouragement of self-reliance.

Founded in 2013, *Horizon's* portfolio has included managing a justice sector project in Somaliland, funded by the Department for International Development (DFID), and work on civil service reform and revenue generation in Somaliland funded jointly by DFID and DANIDA. In 2017, we conducted a baseline study in Somaliland to inform justice sector investment and interventions. The research and writing of *Tackling Tahriib in Somaliland: The Legal Response to Irregular Migration* was made possible by DFID.

For more information, visit us online at www.thehorizoninstitute.org or contact us at info@thehorizoninstitute.org. We can also be followed on Twitter @Horizon_SL and Facebook @HorizonInstituteSomaliland.

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Acronyms & Terminology

AGO	Attorney General's Office
HAKAD	Counter Trafficking Agency of Somaliland
MESAF	Ministry of Employment, Social Affairs and Family
MMTF	Mixed Migration Task Force
MoJ	Ministry of Justice
MRC	Migrant Response Centre
MRRR	Ministry of Resettlement, Rehabilitation and Reconstruction
NDRA	National Displacement and Refugees Agency
UNICEF	United Nations International Children's Emergency Fund
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Office on Drugs and Crime

Migration: The movement of people either across an international border or within a state.

Illegal Migration: Movement that takes place outside the regulatory norms of countries, meaning the migrant does not have legal documentation such as a visa, entry or residence permit.

Irregular Migration: Similar to “illegal migration”—migrating without legal documentation. *Horizon Institute* uses the term “irregular migration” to avoid the connotations that migrants should be criminally liable that “illegal migration” carries.

Tahriib: In Somaliland, migrating is known colloquially as “*tahriib*.” Somalilanders will describe a person as “having gone on *tahriib*.” While the term can refer to migrating legally, it is most commonly used to describe people who attempt to migrate without legal travel documents. This Discussion Paper uses “*tahriib*” and “irregular migration” interchangeably.

Smuggling: Used to describe the criminal networks that facilitate the movement of irregular migrants across international borders attempting to reach Europe/cross into Europe.

Trafficking in Persons/Human Trafficking: Movement of persons without their consent. This can include minors who cannot give consent, or using force, threat, coercion, abduction, deception or fraud to gain consent. A person who agrees to be smuggled as an irregular migrant can become a victim of trafficking if they lose the ability to leave a situation. This Discussion Paper addresses the legal response to irregular migration, and not human trafficking, because most of the families and migrants interviewed were primarily worried about irregular migration.

Executive Summary

Somaliland is at the centre of the migrant crisis in the Horn of Africa. With outflows of people from Somaliland trying to reach Europe, and inflows of foreigners from bordering countries like Ethiopia transiting through en route to Yemen and the Gulf countries, Somaliland has been profoundly affected by the current global phenomenon of mass migration.

The government is confronting this crisis. *Horizon Institute* undertook research from November 2017 to December 2019 to document how the Somaliland government is responding to irregular migration. It found that with moves towards law reform and prosecutions of alleged smugglers, Somaliland's criminal justice system is playing a leading role. *Tackling Tahriib in Somaliland: The Legal Response to Irregular Migration* details these findings and sets out recommendations for building on these efforts.

The key findings, based on 167 interviews with migrants, family members, prosecutors, judges, Immigration and other government officials, are detailed below:

Criminal Prosecutions of Smugglers

- Somaliland has prosecuted smugglers since 2013. The Regional Courts in Hargeisa, Gabiley, Borama, Berbera and Erigavo, amongst others, have all done so. The Berbera Regional Court alone prosecuted seven cases, with 23 accused, between May and June 2018. However, in common with other countries who have sought to discourage smuggling through prosecutions, it is not the masterminds who stand trial, but low-level drivers and recruiters.
- The most common basis for the arrest of alleged smugglers is when law enforcement apprehends them at border crossings and checkpoints transporting groups of migrants. Often the migrants that the alleged smugglers are transporting act as witnesses in prosecutions.
- Migrant smuggling is not criminalised under the law and the lack of an appropriate legal framework is a major drawback. Prosecutors use penal provisions that criminalise slavery, seizure of a person, and attempting to endanger public safety to charge alleged smugglers. Criminal provisions under Somaliland's Immigration Law are also used.
- Because charging is not uniform, the sentences available under the law for convicted smugglers vary dramatically from one to twenty years. But judges commonly sentence smugglers to one-year imprisonment. Since sentences of one year and less can be converted into a fine, the convicted smuggler can avoid prison altogether.

Law Reform Initiatives

- There have been moves towards making migrant smuggling a crime under Somaliland's laws. The Ministry of Justice (MoJ) drafted a bill, as did the Attorney General's Office (AGO) and Solicitor General jointly. At the time of publication, these two draft bills reportedly had been consolidated, presented to the President's cabinet and submitted to Parliament.

Limited Prosecutions of Foreign Irregular Migrants

- Somaliland's Immigration Law effectively criminalises foreign irregular migrants. Under Article 37, a person can be criminally prosecuted for "entering or being found illegally" in Somaliland and sentenced to one-year imprisonment.
- In reality, however, Immigration officials view foreign irregular migrants as "victims" and rarely pursue criminal prosecutions. But if a police officer arrests a foreign migrant and they enter the criminal justice system, *Horizon Institute* found that some migrants have been prosecuted.

No Administrative Detention Facilities for Migrants

- Immigration does not have a referral or detention centre. As such, they try to release irregular migrants as soon as possible and connect them to resources like the Migration Response Centre (MRC) in Hargeisa which provide humanitarian support services to foreign migrants, including temporary housing.
- Somalilanders caught trying to migrate irregularly are held in police stations for lack of an alternative. Police apprehend would-be Somaliland migrants and detain them until their family comes to the station for them. Without a network of social workers or non-custodial detention centres, this is the only option to stop individuals from migrating irregularly. The effect is to subject people to the criminal justice system for non-criminal behaviour.

No Law Enforcement Mechanism for Tracking Missing Migrants

- Somaliland migrants often leave their families without warning. But the police and Immigration do not have a formal system to track down missing persons suspected of migrating irregularly.
- Law enforcement officials cite the lack of technology, and effective partnerships with neighbouring countries, such as Djibouti and Ethiopia, as the reasons they cannot help families locate missing persons suspected of migrating irregularly.

Improving the Legal Response is an Opportunity for Regional Collaboration and Donor Investment

- Somaliland has made strides towards addressing irregular migration. This presents the wider region of the Horn, and the international community, with an opportunity to partner with an origin and transit point to reinforce initiatives that are proving successful, such as the expansion of the MRC offices in the regions and at well-known border crossings. These MRC offices could be used as an alternative to the detention of would-be Somaliland migrants at police stations.

Methodology

Between November 2017 and December 2019, *Horizon Institute* undertook a qualitative study on irregular migration in Somaliland. The analysis is based on 167 in-depth individual interviews carried out in-person in Somaliland with those directly impacted by irregular migration—people who had attempted to migrate and family members—and the government officials responsible for responding to this crisis.

At the beginning of the study, initial research was undertaken with parents of children who had migrated irregularly. Their voices expressed profound anxiety about their children and desperation for law enforcement to act. Their priorities and perspective helped define the research focus of the legal response to *tahriib*.

Irregular migration is a widespread phenomenon in Somaliland, so much so that it is uncommon to find a family that has not been affected. Family member and migrant interview subjects were chosen at random and often interviewees recommended others who would be willing to be interviewed.

The approach to identifying government interview subjects was more systematic, concentrating on those with a direct role in addressing irregular migration. Senior Immigration officers and a spokesperson of the Somaliland Police were interviewed, as well as officials at the Ministry of Justice, Ministry of Interior and other relevant government agencies. *Horizon* also interviewed prosecutors and judges working on smuggler prosecutions.

To build as clear and comprehensive a picture as possible, interviews were conducted in all six regions of Somaliland. The interviews were conducted principally in urban areas and regional capitals since that is where most of the courts with jurisdiction to handle serious offences, such as smuggling, are located. The cities and towns where *Horizon* conducted interviews are:

1. Hargeisa (Maroodi-Jeex Region)
2. Gabley (Maroodi-Jeex Region)
3. Wajale (Maroodi-Jeex Region)
4. Baligubedle (Maroodi-Jeex Region)
5. Salahley (Maroodi-Jeex Region)
6. Berbera (Saahil Region)
7. Borama (Awdal Region)
8. Burao (Togdheer Region)
9. Erigavo (Sanaag Region)
10. Las Anod (Sool Region)

Tackling Tahrib: The Legal Response to Irregular Migration was researched and written by Caitlin Lambert, Legal Advisor.

INTRODUCTION

Migrants from the Horn of Africa, like all migrants across Africa, risk everything to reach Europe. Parents recount unimaginable stories about their sons and daughters being tortured by smugglers in order to force families to pay exorbitant ransoms. Other migrants are left for dead en route if they contract a disease. Still some are sold into slavery in Libya by criminal networks or die at sea when overcrowded boats capsize in the Mediterranean. With migrants continuing to attempt the journey to Europe irregularly in search of a better life, and losing their lives in the process, this is one of the foremost humanitarian crises of our time.

The commitment of the international community to address the migrant crisis focuses largely on what is happening to Europe and in Europe. This standpoint has resulted in policies designed to keep migrants out of Europe. Countries like Italy and Spain have increasingly militarised their borders and provided financing to bordering countries like Turkey and Libya to prevent migrants from crossing into Europe.¹ The consequences of these policies have been disastrous, with migrants being stranded on rescue ships in the Mediterranean.² This European-centric approach also overshadows the steps that the home countries of migrants are taking to protect their citizens by discouraging them from embarking on these treacherous journeys.

Somaliland is one such example. Confronted with thousands of its people trying to make it to Europe through Sudan and Libya, and foreign migrants from bordering countries like Ethiopia passing through to reach Europe via Yemen and the Gulf countries, Somaliland finds itself besieged by the problems of migration.³ Migrants enter and leave without legal documentation, compromising its borders. Leaving close-knit families unexpectedly, and forcing them to pay thousands of dollars they do not have to smugglers, migrants impose unbearable burdens on their relatives, economically and emotionally. The departure of mainly young people, and their absence, weakens an already fragile economy. Instead of investing in the local economy, and contributing to local development, people all over Somaliland are being forced to pay criminal networks of smugglers to ensure the safety of their loved ones. With the stakes so high, Somaliland has seen the need to act.

¹ Jon Henley, *EU Migration Deal*, The Guardian (28 June 2018) available at: <https://www.theguardian.com/world/2018/jun/29/eu-summit-migration-deal-key-points>.

² Angela Giuffrida, *Italy's Salvini refuses to back EU deal on rescue ship migrants*, The Guardian (9 January 2019) available at: <https://www.theguardian.com/world/2019/jan/09/malta-allow-49-people-stranded-mediterranean-rescue-ships-disembark-eight-european-nations>.

³ For more on migration routes through Somaliland, see Nimo-Ilhan Ali, *Going on Tahriib*, Rift Valley Institute (2016).

The Somaliland government has sought to address irregular migration. The National Displacement and Refugees Agency (NDRA) has been instrumental in providing a humanitarian response to migration, including overseeing a centre since 2009 where foreign migrants can receive shelter and medical attention.⁴ A number of coordinating bodies have also been formed. From 2013 to 2015, the then President, Ahmed Mohamed Mohamoud “Silaanyo,” set up a ministerial committee. Also in 2013, the Mixed Migration Task Force (MMTF) was established to consolidate endeavours among government and non-governmental bodies. In 2016, the Ministry of Interior formed the Counter Trafficking Agency of Somaliland (HAKAD). There have also been initiatives by Somaliland’s criminal justice system to identify people smugglers and bring them to justice.

Horizon Institute began research into irregular migration in November 2017 to understand the impact of *tahriib* and document what is being done in Somaliland to counter this crisis. Families left behind by those who have gone on *tahriib* voiced a deep concern for their loved ones and urgency for law enforcement to act. Their views refined the goal of the research to identify ways the government and international actors alike can work to ensure that the lives of migrants do not continue to be put in jeopardy. *Tackling Tahriib in Somaliland: The Legal Response to Irregular Migration* details the findings of this research. It is based on 167 interviews with migrants, family members, prosecutors, judges, immigration and other government officials.

Horizon’s research found that with moves towards law reform and prosecutions of alleged smugglers, Somaliland’s criminal justice system is playing a leading role in the attempts to counter irregular migration. However, some findings are worrisome. For example, there is no mechanism for the public to report missing persons, leaving families with little choice other than to simply chase after loved ones to try and stop them from migrating. *Horizon* also found evidence that the detention of migrants is the first response of law enforcement. There are also laws that effectively criminalise foreign irregular migrants.

There is no doubt that Somaliland can improve its legal response to irregular migration. Equally clear is that law enforcement measures, however much a deterrent, should only be one part of a multifaceted government strategy to discourage and combat *tahriib*. If irregular migration is to be dealt with effectively, criminal justice initiatives should not be seen as the key to the solution, since the causes of migration are rooted in social and economic issues. Nevertheless, the strides Somaliland has already made should not be overlooked or discounted. Instead, both the wider Horn of Africa region, and the international community, which are directly affected by these problems, should partner with Somaliland to deepen and expand these efforts.

⁴In 2018, the Ministry of Resettlement, Rehabilitation and Reconstruction (MRRR) was renamed the National Displacement and Refugees Agency (NDRA).

1

PROSECUTION OF SMUGGLERS

MAXKAMADDA
DEGMADDA ERBERA



Somaliland has prosecuted smugglers since 2013. The Regional Courts in Hargeisa, Gabiley, Borama, Berbera and Erigavo, amongst others, have all prosecuted alleged smugglers. The Berbera Regional Court alone prosecuted seven cases, with 23 accused, between May and June 2018. At the time of publication, the Attorney General's Office (AGO) in Hargeisa was prosecuting a case against suspected smugglers accused of causing the deaths of three Ethiopian migrants.⁵

The impact of these prosecutions in curbing irregular migration is yet to be seen. There are no Somaliland-wide coordinated efforts to arrest and prosecute. Prosecutions are also hindered by the lack of a legal framework specific to smuggling migrants. And, by all accounts, including that of Judge Mohamed Omar Dhimbiil who worked in the border town of Wajale at the time of the interview, the accused are only low-level smugglers working as recruiters or drivers.

*We do capture some smugglers but they are the low-ranking members of a criminal network. We catch drivers and others who are assisting the head smugglers. Unfortunately, the smugglers we prosecute are often very poor and simply asked to take people from point A to point B.*⁶

However, despite these challenges, Somaliland's prosecutions are a welcome attempt to bring to justice the criminal networks that seek to profit from the vulnerabilities of migrants and their families.

Arrest

The most common basis for the arrest of alleged smugglers is when they are caught at borders or checkpoints transporting groups of migrants. Police have arrested suspected smugglers when they receive tips from members of the public, and when disgruntled would-be migrants have turned smugglers in.

Hargeisa prosecutor, Abdirahman Mohamed Mohamoud, described how plain-clothes officers have, on occasion, also infiltrated communities to identify smugglers.

*Immigration places plain-clothes officers who are young enough to fit the demographic of someone who would want to go on tahriib into communities. These officers work to spot smugglers. If they are successful, they call the police to come and arrest the suspect.*⁷

⁵ Meeting with Ali Mohamed Odey, Deputy Attorney General, in Hargeisa on 25 February 2020.

⁶ Interviewed in Wajale on 21 October 2019.

⁷ Interviewed in Hargeisa on 18 February 2018 and 27 October 2019.

Investigations

While the Somaliland police have successfully arrested smugglers, their ability to investigate the crime is still developing. According to the AGO, training the police how to investigate smuggling is a major need.⁸ A prosecutor working in Hargeisa scrutinised police investigations and concluded:

*They don't have the training, technical expertise, materials or the attitude to do a proper [smuggling] investigation.*⁹

Horizon Institute also found that procedures meant to ensure a fair trial are not always followed. When the police make an arrest, they must take the suspect before a judge within 48-hours.¹⁰ In July 2018, *Horizon* interviewed seven suspected smugglers in Berbera. None had been taken to the court within 48-hours of their arrest. Four were presented before a judge after being held by the police for three days; one after five days; and three were held at the police station for ten days before they were taken to court.

While they were held at the police station, all seven complained of abusive investigation techniques. One suspect said the police drove him around Berbera for three days asking him “where the boat to smuggle people was” and verbally insulting him. Another recounted the police forcing him to confess.

*They beat me until I admitted to being a smuggler. I pleaded guilty just so they would stop hurting me.*¹¹

This person was Yemeni and only partially understood what was happening because he spoke limited Somali.

My family doesn't know I've been arrested because I haven't been able to contact anyone. I have nothing but the clothes on my back. I have no support and I'm losing hope. I only want to be treated fairly.

A prosecutor working in Maroodi-Jeex Region confirmed the use of abusive investigation technique. In a 2019 case involving an alleged smuggler, the police beat the individual so severely that it compromised the prosecution.¹²

Smuggling is a serious crime and the police should investigate to the full extent of the law, but procedural safeguards must be followed. If they are not, the system risks convicting innocent persons and undermining the legitimacy of prosecutions.

⁸ Meeting with Attorney General Hassan Ahmed Adan and Solicitor General Abdisamad Omar Maal on 11 September 2019.

⁹ Interviewed in Hargeisa on 27 December 2019.

¹⁰ Art. 27 Somaliland Constitution.

¹¹ Interviewed in Berbera on 24 June 2018.

¹² Interviewed in Gabiley on 21 October 2019.

Charges

Current criminal statutes also jeopardise prosecutions. Somaliland does not have a law that specifically criminalises smuggling. Instead, prosecutors use a number of provisions in the Penal Code and Immigration Law to charge alleged smugglers.

Somaliland's Penal Code—adopted from the Italian penal code of colonial Somalia—does not include penalties which can adequately respond to the smuggling of migrants. Prosecutors therefore opt for charging with crimes which are similar in behaviour. One article used is 456, which criminalises dealing and trading in slaves. According to this provision “whoever deals or in any manner trades in slaves or persons in a condition similar to slavery, shall be punished with imprisonment from five to twenty years.”

Somaliland's courts have found that smuggling puts migrants in “a condition similar to slavery” and have convicted smugglers under this article. Borama Deputy Attorney General, Farah Khadar Nur, feels strongly about applying the slavery provision because she views smuggling as similar behaviour to trafficking in persons.

Helping youth to leave on tahriib is purely human trafficking. Smugglers are keeping people like slaves. Article 456 clearly fits this behaviour.¹³

Not all prosecutors use Article 456. Some use Article 460 (seizure of a person) or Article 332 (attempting to endanger public safety). Article 283 (withholding information of a crime), Article 297 (assisting a suspected person), and Article 298 (aiding and abetting) are used to prosecute individuals who assist smugglers, such as drivers hired to transport migrants and landlords who knowingly lease properties to smugglers for the purpose of temporarily housing migrants.

The prosecution also relies upon Article 37 of the Immigration Law which criminally sanctions persons who help another to enter or leave Somaliland without legal travel documents.

But because the Penal Code does not specifically criminalise migrant smuggling, some people accused of smuggling are never charged. The facts of some cases simply do not fulfil the elements of the current criminal statutes so the prosecution is powerless to bring charges. According to Jama Duale Saeed, a prosecutor working in Burao, “the biggest challenge is the lack of a legal framework.”¹⁴

With law reform ongoing, Attorney General Hassan Ahmed Adan has proposed a draft charging strategy to the Chief Justice, Adam Haji Ali Ahmed, to help mitigate these challenges.¹⁵ If implemented, this policy would draw a stark line between human smuggling and trafficking. Recognising that the seriousness of trafficking in persons is greater than smuggling, the Attorney General recommends using the crime of dealing

¹³ Interviewed in Borama on 25 March 2018.

¹⁴ Interviewed in Burao on 30 July 2018 and 4 November 2019.

¹⁵ Letter submitted to the Chief Justice from the Attorney General on 10 September 2019.

and trading in slaves only in cases of human trafficking. While Article 37 of the Immigration Law and Articles 505 (not observing a public order) and 332 (endangering public safety) of the Penal Code can be used to charge alleged human smugglers. If implemented, this policy would unify charging and encourage prosecutors to continue to bring charges.

Evidence

When the prosecution does charge an alleged smuggler, witness testimony is the main form of evidence. This includes the statement of the arresting officer, but also the testimony of any migrants who were stopped with the alleged smuggler. Prosecutor Jamal Jama Hashi, who is in charge of smuggling cases in Berbera, said physical and documentary evidence is a rarity.

*The police might get receipts from the pockets of the smugglers or other evidence from searching their houses. But witness statements are the most common type of evidence we have.*¹⁶

Ahmed Dalmar Ismail, who presided over smuggler prosecutions when he was the Chairman of the Hargeisa Regional Court, confirmed the Berbera prosecutor's finding.

*Sometimes the prosecution produces the car used to transport the migrants. But the strongest evidence is testimony and the main witnesses are those who were going on tahriib.*¹⁷

Conviction and Sentencing

According to Judge Abdiaziz Yusuf Mohamoud of the Gabiley District and Regional Court, if there are migrants to testify, then the accused will most likely be convicted and sentenced.

*90 per cent of the smuggler cases presented to the court end in convictions because the police make sure to arrest the migrants as well.*¹⁸

Because charging is not uniform, the sentences given to convicted smugglers vary. If a conviction is made under Article 37 of the Immigration Law, then a judge can sentence a person to up to 12 months' imprisonment, a fine or both. Under the Penal Code's slavery provision (Article 456) the sentencing range is five to twenty years. But judges commonly overlook the mandated sentencing range under this provision and sentence smugglers to just one year. The explanation given for this leniency is that slavery is a far worse crime than smuggling, so judges sentence the convicted person to a term of imprisonment they consider fitting of the crime.

¹⁶ Interviewed in Berbera on 5 September 2018 and 10 October 2019.

¹⁷ Interviewed in Hargeisa on 5 March 2018.

¹⁸ Interviewed in Gabiley on 4 March 2018.

Sentencing also depends on whether the convicted person is a recidivist. Judge Abdillahi Mohamoud Aw-Abdi in Baligubedle increases the length of sentences if the person has been convicted for smuggling before.

I convicted a smuggler once and then he committed the act again. So I gave him four years because he was a recidivist.¹⁹

The Appeal Court may reduce or increase these sentences, which also accounts for some of the variance.

Moreover, if the convicted person is sentenced to one year or less of imprisonment, they can purchase their sentence and avoid prison all together.²⁰ This practice converts the imposed prison time into a fine. The recidivist who was given four years by Judge Aw-Abdi had purchased the first sentence. In the view of this judge, allowing smugglers to purchase sentences weakens the force of the law.

We need to forbid the purchase of the prison term for smuggler cases. Then this might keep people from committing the crime again.

There is a growing consensus among the members of the judiciary that the length of prison terms provided by law are too short to deter smugglers. Judge Ahmed Yusuf Abdi, sitting on the Berbera Regional Court, believes that if he could give higher sentences, potential smugglers would think twice.

Under Article 332 of the Penal Code, we can only sentence someone to one to five years in prison, which is really too low for the act of smuggling. Ideally, I could punish them to 10-20 years. If smugglers got higher sentences, this would deter them from committing the crime.²¹

¹⁹ Interviewed in Baligubedle on 11 March 2018.

²⁰ Art. 125 CPC.

²¹ Interviewed in Berbera on 5 September 2018 and 23 October 2019.

2 FOREIGN MIGRANTS



Foreign irregular migrants who enter and transit through Somaliland are subject to immigration law. Signed into law in 1995, the Somaliland Immigration Law controls the conditions for the entry and stay of all foreigners in the territory. While this is largely an administrative law, it does provide criminal sanctions for persons who break this law. The criminal punishments apply to foreign irregular migrants. However, Somaliland Immigration officials by and large do not seek criminal prosecution of foreign irregular migrants.

Detained and Repatriated

Immigration officers can arrest foreign irregular migrants who enter Somaliland. Under the Immigration Law, officers can arrest, without a warrant, any person who enters the territory without legal travel documents.²² The purpose of arrest is not to prosecute, but to determine if a foreigner is an irregular migrant, asylum seeker or victim of trafficking, and then link them with available services.

Immigration tries to process arrested foreign migrants as soon as possible because Somaliland has no administrative detention facility. There is no referral or detention centre at any of its offices in Somaliland, including at headquarters in Hargeisa. There is a room at headquarters dedicated to investigations where irregular migrants may be questioned in order to learn their legal status. But it is not a holding facility as Immigration Officer Hussein Ali Samatar stressed.

*We don't have any holding spaces or referral centres. Not in Hargeisa or Berbera. Nowhere. Immigration only has a rented facility in Borama and there are no offices at all in the East.*²³

Hassan Muhumed Ibrahim, an immigration officer working in Las Anod, Sool Region, confirmed that they had nowhere to hold migrants or any resources to assist them.

*There is no Immigration office in Las Anod. We don't have a room to question people or to do the work we need to do. We don't even have any money to help anyone and are forced to let people go, especially Oromos, because we don't have the necessary facilities or funds to help them. One of the saddest things to see is Oromo marching back to Ethiopia without any food or money. [Immigration] has nothing for them.*²⁴

Without holding facilities, Immigration tries to repatriate irregular migrants as soon as possible, as underlined by Immigration Officer Dahir Isse Mire.

*We rush the questioning of migrants because we don't want them to sleep [in the Immigration compound]. We don't have bedding materials for them and can't separate women from men. That is why the vast majority of people we detain are freed within less than 12 hours.*²⁵

²²Arts. 2(a) and 30(d) Immigration Law.

²³Interviewed in Hargeisa on 29 April 2018, 10 December 2018 and 9 October 2019. Interviewed in Berbera on 3 November 2019.

²⁴Interviewed in Las Anod on 4 December 2019.

²⁵Interviewed in Hargeisa on 5 May 2018.

In rare cases, irregular migrants may have to sleep in the compound of Immigration headquarters in Hargeisa until officers are able to determine their status and/or arrange repatriation to their home country.

Immigration also works with the National Displacement and Refugee Agency (NDRA), which operates the Migration Response Centre (MRC). With facilities only in the capital city of Hargeisa, the MRC provides foreign migrants support services like food and medical attention while they assist them to return to their home country. During this process, migrants are housed in hotels or other temporary shelters. However, these services are limited and cannot provide housing for every foreign irregular migrant.

Moreover, if a migrant is apprehended outside of Hargeisa, for example in Erigavo, Sanaag Region, where Saeed Egeh Mohamed works for Immigration, migrants will most likely be held at police stations.

Immigration has no offices in Erigavo. We share a room with the governor. There is no detention centre in Erigavo or anywhere else in Sanaag Region. When we detain migrants or children on the move, we keep them in police stations. We know it is not in the best interest of the child, but we have no other option.²⁶

Once Immigration determines that an individual is an irregular migrant, they do not have legal status to stay in Somaliland under the Immigration Law and are usually deported back to their home country without facing criminal sanctions in Somaliland.

Criminalised Under Immigration Law

If, however, a foreign migrant enters the criminal justice system, there is a chance that he or she may be prosecuted instead of being repatriated immediately. While Immigration officials said they view migrants as “victims” not criminals, the prosecution of foreign migrants does happen, albeit rarely by all accounts.

Domestic law effectively criminalises irregular migration. Under Article 37 of the Immigration Law, a person can be criminally prosecuted for “entering or being found illegally” in Somaliland. This means that it is not only a crime to enter the territory without travel documents, but also to stay in Somaliland without a visa or residency permit. If arrested and convicted, such persons face a fine and imprisonment for up to 12 months. This applies to foreign migrants who irregularly enter and transit through the territory.

Officer Mire said that Immigration might threaten foreign migrants with arrest and prosecution to scare them, but that these tactics are not followed up.

²⁶Interviewed in Erigavo on 24 December 2019.

We tell them they will be arrested if they don't abide by our instructions [to return to their home country]. Some migrants are caught multiple times, but we don't really arrest them. [If they're Ethiopian], we just take them to Ethiopian Immigration authorities.

Nevertheless, when a foreign migrant is apprehended by a police officer and enters the criminal justice system, *Horizon* found that they face a risk of being prosecuted under Article 37. Osman Ibrahim Dahir, a defence lawyer in Berbera, represented three foreigners in July 2018 who were originally charged as smugglers.

When the court found my clients only came to Somaliland illegally, and weren't smugglers, they were convicted to one-year imprisonment under the immigration law.²⁷

²⁷Interviewed in Berbera on 12 July 2018 and 5 September 2018.

3

SOMALILAND MIGRANTS



Unlike foreigners, Somaliland migrants are not subject to the criminal sanctions in the Immigration Law because they are nationals. Attempting to migrate is not criminalised –nor should it be—in Somaliland’s penal laws. This means the movement of Somaliland migrants is not unlawful until they cross into another country. However, because there is no other option, law enforcement is still involved in stopping would-be Somaliland migrants. Police arrest and detain persons at checkpoints and border crossings who they suspect of attempting to go on *tahriib* and hold them until family members come for them. While their ability to help families search for persons suspected of migrating is limited, individual law enforcement officers sometimes do try to help families find loved ones.

Reporting Missing Migrants to Law Enforcement

Families of those who attempt *tahriib* describe them as leaving without warning, even when they are as young as 16 or 17. Migrants gather whatever money they have and start their journey without a word to their families so they cannot prevent them from going. Yet, when someone leaves unexpectedly, there is no law enforcement agency set up to track missing migrants.

Law enforcement does not have a system to search for missing persons suspected of migrating irregularly. Individuals working for Immigration or police can only try to help. Police and Immigration officers are known to search vehicles for people leaving on *tahriib* at checkpoints and border crossings. They also might share the photos and details of missing persons with colleagues via text message if they have a personal cell phone, or approve a request for Telesom, a phone company, to track the missing person’s phone. But there is currently no formalised tracking system as Immigration Officer Hussein Ali Samatar explained.

It may happen now and then that a parent will send us a picture and we will send it to our colleagues in Wajale or other border crossings. Sometimes a police officer will also send us a photograph of a missing person who is believed to have migrated. But there’s nothing formal...and coordination is weak because of the lack of funds and facilities.

Faysal Hiis Elmi, a spokesperson for the police, identified the lack of technology available to law enforcement as one reason why they cannot track missing migrants.

*All we have are radios and walkie-talkies. So the one thing we can do, if a parent believes their child has gone on *tahriib* is to record their statement and then send a radio call to all the checkpoints with the child’s basic information. But we don’t have the capacity to use photos.²⁸*

The result is that families are largely on their own. Some parents chase after their children. Abdilahi Barud Abdi’s oldest son irregularly migrated in 2013. He tried searching for him but could not find him.

²⁸Interviewed in Hargeisa on 6 December 2018.

I went to Wajale [a town bordering Ethiopia] with family members of the other boys my son went on tahriib with. Our hope was that we might be able to reach them in Wajale because they didn't have papers to cross the border. We thought they might still be there trying to figure out a way to cross the border.

We first went directly to the police at the border and then consulted the locals [who] took us to certain small hotels and cafes where many of the people on tahriib stay... We didn't find a single hint about them. Two months later, my son called me from a camp on the border of Sudan and Libya and asked me to send money to smugglers. He is in Europe [now]. He is safe but unemployed. As a parent, I'm thankful he is safe.²⁹

Other families try to contact someone they know working for the government in border towns. Yassin Mohamoud Jama grew up in Aynabo, in the region of Sool, and now works as a prosecutor in Erigavo, Sanaag Region and said he is also known in Togdheer Region.

Parents trying to find their children who have left on tahriib in these areas always contact me to ask if I can help find them. I have a very good relationship with the police and Immigration in the eastern regions, so I do what I can to help locate these kids.³⁰

The absence of effective working partnerships with other countries to track or apprehend migrants, once they have left Somaliland is, as noted by Immigration Officer Samatar, a stumbling block.

Cooperation is weak. So there is no way to track migrants who succeed in going into other countries. Central governments do have formal agreements to work together. But this is just in principle.

Once a migrant crosses into another country, there is nothing at all law enforcement can do. This was the experience of Basra Mohamed Abdi, a mother whose 18-year-old son left from the port in Berbera, who found that the Somaliland police could offer her no solutions.

I went to the police station and asked if they knew whether a boat with youth had left for Yemen. They said they were informed of a boat leaving the night before but that it was already too late to bring them back. [The police] told me there was nothing they could do now because the boat was in Yemeni territory. I left crying and went home to mourn for my son.³¹

²⁹ Interviewed in Hargeisa on 6 December 2018.

³⁰ Interviewed in Erigavo on 23 December 2019.

³¹ Interviewed in Berbera on 11 July 2018.

Detained at Police Stations

Unlike Basra's son, not all migrants succeed in their attempt to exit Somaliland. Police apprehend some would-be Somaliland migrants before they leave and detain them in police stations until relatives can come for them. The police have succeeded in reuniting migrants with worried family members. Although there is no legal basis for arresting and detaining Somaliland migrants at police stations, the response of the police is understandable.³² Without a network of social workers or non-custodial detention centres, Faysal Hiis Elmi, a spokesperson for the police, sees the only available option to stop Somalilanders attempting to migrate irregularly is for the police to arrest and hold them at police stations.

Keeping migrants in the police station is for their security. It is the only option we have. We know what they are doing isn't a crime. But there's nothing else we can do but arrest those who are trying to migrate and keep them until their families come and get them.

Undoubtedly the Somaliland government needs to discourage its people from migrating irregularly given that *tahriib* puts persons at risk of grave bodily harm and death. It also contributes to what is already seen as high levels of emigration that deprives Somaliland of one of its most precious resources – its youth. Yet, detaining would-be migrants in police stations is also problematic because it subjects persons to the criminal justice system for non-criminal behaviour.

There have been some attempts to address this dilemma. The Ministry of Employment, Social Affairs and Family (MESAF), with support from the United Nations International Children's Emergency Fund (UNICEF), have begun to station social workers at border crossings. There are eleven locations where youth migrants can receive assistance: Wajale, Hargeisa, Berbera, Burao, Duruqsi, Aynabo, Las Anod, Erigavo, Borama, Hariirad and Lawyacado.³³ However, the social workers can only provide counselling and help migrants contact family; they cannot provide a non-custodial option to the detention of migrants by the police. The MESAF social worker in Wajale, Fowsia Abdisamad Muhumed, complained that the only option to housing youth migrants while they wait for their families is the police station.

It's not right to keep children in the same place as criminals. Children need counselling and encouragement. But we don't have the facilities to hold these children until they are united with their families. There would be no reason for the police to deal with children going on tahriib if we had spaces to hold them. The police station is, unfortunately, the only available space.³⁴

³² Art. 9 International Convention on Civil and Political Rights; Art. 25(1) Somaliland Constitution.

³³ Child Protect Desks location and contact list provided by the Wajale Child Protection Desk on 21 October 2019.

³⁴ Interviewed in Wajale on 21 October 2019.

Abdimalik Mohamoud Hassan, a MESAF staff member in Las Anod confirmed the detention of children. “While we are waiting for the families of children to come to Las Anod and take them home, we inform the police and they hold them.”³⁵ The social workers can provide “mats, blankets and food,” as described by Yassin Abdi Osman, the MESAF staff member in Erigavo, but no alternative to police detention.³⁶ This was the same situation described at the MESAF field offices, termed Child Protection Desks, in Berbera and Burao.³⁷

Fowsia Abdisamad Muhumed stressed that Somaliland needs the appropriate facilities to hold irregular migrants, especially youth, because “a prison cell is no place for a child.”

If the choice confronting officials is between detaining a young would-be migrant so as to reunite them with their family, or letting them attempt *tahriib* with all the dangers such a journey inevitably involves, their decision is understandable. However, alternatives to police arrest and detention should be sought because attempting to migrate irregularly is not criminal behaviour.

³⁵ Interviewed in Las Anod on 3 December 2019.

³⁶ Interviewed in Erigavo on 24 December 2019.

³⁷ *Horizon Institute* visited and interviewed staff at the Berbera location on 3 November 2019 and the Burao location on 5 November 2019.

4

LAW REFORM INITIATIVES

There have been moves to update Somaliland's laws to criminalise migrant smuggling. The AGO and Solicitor General's Office jointly produced a draft bill in 2016 entitled the Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Act. The MoJ also produced a draft bill in 2018, namely the Countering Trafficking in Person and Smuggling of Migrants Act, with support from the United Nations Office on Drugs and Crime (UNODC) and input from the United Nations High Commissioner for Refugees (UNHCR).³⁸

The law reform process is ongoing. At the time of publication, the AGO and MoJ each independently reported that the different versions of the bill had been consolidated, translated from English into Somali, submitted to the President's Cabinet in November 2019, and then presented to the Parliament.³⁹ Because the bill was before Parliament, they declined to share the consolidated version. As such, this section discusses the key differences between the AGO and Solicitor General's draft and the MoJ's version of the bill.

Both draft bills proscribed migrant smuggling, although to varying degrees. The MoJ's draft defined the offence of migrant smuggling as:

*Any person who, in order to obtain directly or indirectly a financial or other material benefit, intentionally engages in conduct for the purpose of facilitating or enabling a person to cross an international border, attempt to cross, or prepare to cross into or out of Somaliland without the legal documentation required under Somaliland's immigration laws...*⁴⁰

This criminalises smuggling, attempting to smuggle, and preparing to smuggle any migrant, regardless of the migrant's nationality, across Somaliland's borders. This would permit the prosecution to charge persons suspected of smuggling migrants without having to piece together a legal basis from the current penal and immigration provisions to do so.

The AGO and Solicitor General's draft defined the offence of migrant smuggling very similarly, but included assisting migrants to transit through Somaliland.⁴¹ It also listed provisions that specifically address the type of smuggling activity occurring in Somaliland: guiding migrants into or out of the territory; arranging the travel of migrants; transporting migrants; and facilitating travel or identity documents for migrants.⁴²

³⁸ Interview with Yassin Abdi, Director of the Planning and Statistics Department at the Ministry of Justice, on 24 February 2019. Email exchange with Sarah Khan, Head of UNHCR Sub-Office Hargeisa, on 2 March 2020.

³⁹ Meeting with the Attorney General on 29 December 2019. Meeting with Ali Mohamed Odey, Deputy Attorney General, in Hargeisa on 25 February 2020. Email exchange with Yassin Abdi, Director of the Planning and Statistics Department at the Ministry of Justice, on 2 March 2020.

⁴⁰ Draft Countering Trafficking in Person and Smuggling of Migrants Act (2018), Art. 26 (hereinafter: MoJ's Bill).

⁴¹ Draft Prevention and Suppression of Trafficking in Persons and Smuggling of Migrants Act (2016), Art. 9 (hereinafter: AGO's and Solicitor General's Bill).

⁴² Ibid. Arts. 9, 11, 12, 13 and 14.

It additionally criminalised the act of sending ransom money to smugglers when remittance officers do so knowingly.⁴³

Both bills aimed to make sentencing more uniform. But there was a significant difference in the sentencing ranges proposed. The AGO and Solicitor General's version proposes a maximum prison term of twenty years, with repeat offenders facing life imprisonment.⁴⁴ The MoJ's draft sets the prison term for the same crime at three to five years.⁴⁵

The bills also varied in the protection they provide to foreign migrants. Good practice under international law recognises that migrants should not be held liable for smuggling because of their vulnerable status.⁴⁶ The AGO and Solicitor General's version adopted this view and does not allow the prosecution of migrants.⁴⁷ However, this protection was not included in the MoJ's bill because it conflicts with immigration laws, leaving foreign migrants open to prosecution.⁴⁸

It remains to be seen which, if any, version of these provisions Parliament will pass and forward to the President to sign into law. Hopefully, it will include provisions that protect migrants from prosecution in line with the AGO and Solicitor General's bill, and also incorporate the strong points from the MoJ's bill such as the lower sentencing ranges that would help ensure Somaliland's prison do not become more overcrowded.

⁴³Ibid. Art. 15.

⁴⁴Ibid. Arts. 9 and 10.

⁴⁵MoJ's Bill, Art. 26.

⁴⁶Art. 5, UN Protocol against Smuggling of Migrants by Land, Sea and Air (2000).

⁴⁷AGO's and Solicitor General's Bill, Art. 33(1).

⁴⁸Interview with Yassin Abdi, Director of the Planning and Statistics Department at the Ministry of Justice, on 24 February 2019.

The background image shows a close-up of a hand resting on a book with Arabic calligraphy. In the background, a group of people is visible, and a map of Somalia is overlaid on the right side of the image.

5 IMPROVING THE LEGAL RESPONSE

Somaliland is trying to address irregular migration in part by using the law and law enforcement mechanisms. The prosecution of suspected smugglers is especially promising and demonstrates the government is taking this issue seriously. However, there are further steps, many of which are resource sensitive and could benefit from donor investment, which Somaliland could take to improve the legal response. The recommendations detailed below would strengthen the criminal justice system's response to alleged smugglers and help craft a system that can effectively protect migrants.

Creating a System for Families to Report Missing Migrants

A formalised system where families can report persons suspected of migrating could help law enforcement locate Somalilanders before they cross international borders. If Somaliland established formal working relationships with law enforcement in other countries, especially in Djibouti and Ethiopia, this reporting system could extend to these neighbouring states. The government would have to raise awareness of any such reporting mechanism in order to encourage public use.

Finding Alternatives to Detaining Migrants

Detention of any migrant should be a last resort and for the shortest time possible. Ideally migrants would never be detained in police stations. The fact that they are, because of the lack of an alternative, underscores the urgency of finding other options. International best practices for alternatives to detention include “reporting at regular intervals to the authorities, community-based solutions, release on bail or other securities, or stay in open centres or at a designated place.”⁴⁹ The Migration Response Centre (MRC) could serve this function.

Expanding the Reach of the Migration Response Centre

The MRC should be expanded throughout Somaliland. It provides support services to foreign migrants, including temporary housing, but it is only located in Hargeisa. If the MRC was funded to open offices in Somaliland's regions and at popular border crossings, it could more readily provide humanitarian services to vulnerable foreign migrants. It could also provide an alternative to detaining would-be Somaliland migrants at police stations.

This expansion would require donor backing. This is an opportunity for the international community to shift the concentration from initiatives focused on Europe, and from one off workshops, to durable local solutions that have shown success and could be built upon.

⁴⁹United Nations Working Group on Arbitrary Detention, Deliberation No. 5, 7 February 2018.

Amending Law that Effectively Criminalises Irregular Migration

Article 37 of the Immigration Law criminalises persons, including irregular migrants, who enter Somaliland without legal travel documents. This effectively criminalises irregular migration, which is contrary to international law. Somaliland should amend this law so it cannot be used to prosecute foreign migrants.

Ensuring the Police Follow Procedural Safeguards

The police should investigate allegations of smuggling to the fullest extent, but this does not necessitate violating legal protections. At an absolute minimum, police officers should obtain arrest warrants when they receive a tip about an alleged smuggler, and present all suspects to a judge within 48-hours of arrest. If the police follow procedural safeguards mandated by Somaliland law, the integrity of investigations and prosecutions will be better preserved.

Finalising Law Reform and Implementing New Laws

Amending the penal law is the starting point for improving Somaliland's prosecution of smugglers. Somaliland should ensure that new laws respond to the challenges the criminal justice system faces in holding smugglers accountable, but do not needlessly criminalise vulnerable migrants. When determining the sentencing range for convicted smugglers, the impact of long prison terms on burdening an already overcrowded prison system must be carefully considered.

Law reform, no matter how progressive, is only the first step. The intention of anti-smuggling laws is to punish and deter smugglers. New penal laws cannot achieve this if they are not implemented. Strong implementation requires that all relevant Somaliland institutions to collaborate in order to bring smugglers to justice. Immigration officers, police, investigators and prosecutors would have to work together to arrest smugglers and investigate their alleged crimes in order to present a strong case in court.

Introducing a Coordinated Strategy to Increase the Certainty of Apprehension of Suspected Smugglers

The certainty of being apprehended, more so than the threat of long prison terms, has been shown to deter people from committing crimes.⁵⁰ A Somaliland-wide strategy on arresting and prosecuting smuggling could go a long way to increasing the perception that there is no safe haven for smugglers in any region of Somaliland. *Horizon* found anecdotal evidence that prosecuting smugglers causes the crime to move to other regions. In December 2018, Prosecutor Abdi Haybe Elmi said that while his determination to prosecute smugglers seemed to halt irregular migration in Borama, smuggling operations simply moved to other parts of Somaliland, such as Wajale. The Chairman of the Awdal Appeal Court, Mohamed Saeed Saweer, confirmed in October 2019 that smugglers still had not returned to Borama but that they were known to be operating in Wajale.

⁵⁰The Sentencing Project, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishing*, November 2010.

Similarly, in October 2019, Judge Ahmed Yusuf Abdi said that while it seemed that the arrest and conviction of smugglers in June 2018 halted irregular immigration in Berbera, smuggling operations shifted to other cities in Somaliland. A co-ordinated strategy to arrest and prosecute smugglers in all regions of Somaliland would ensure a robust legal response to smuggling that increases the certainty of apprehension.

Following Fair Trial Protections

Once a case of alleged smuggling reaches trial, judges should ensure they follow fair trial procedures. All defendants should have explained to them the charges against them, the consequences of pleading guilty or not guilty, and their right to legal representation. Crucially, for smugglers who are foreigners and do not speak Somali, courts need to provide an interpreter for all proceedings.⁵¹

Advancing a Holistic Approach to Irregular Migration

Prosecuting suspected smugglers has a crucial role to play in addressing *tahriib*. But the Somaliland government, and international actors who are involved or concerned, cannot, and should not, look to the criminal justice system alone to combat irregular migration. No criminal justice sector anywhere in the world can address, much less solve, all the ills of a society. Addressing the broader social, economic and political root causes of issues like *tahriib* must go hand in hand with crafting an appropriate legal response.

⁵¹Art. 207 CPC.

CONCLUSION

A photograph of a desert landscape with a sandy path. A person in a purple shirt is walking away from the camera, leading a camel. Another camel is visible on the left. The path is marked with tire tracks and footprints. Long shadows are cast across the sand. Sparse desert vegetation is in the background under a clear blue sky.

The promise of a better life and greater opportunity drives irregular migration all over the world. Migrants from Somaliland, and those transiting through Somaliland, are blinded by the allure of an easy life in Europe, despite the endless graphic stories and images that show how often these perilous journeys end in death, disappearances and torture. Smugglers take advantage of their beliefs, hopes and aspirations, fuelled to a significant extent by misleading information spread through social media.

A legal response to *tahriib* cannot singlehandedly put an end to irregular migration. Amir Mohamoud Adan is a Somaliland youth who was imprisoned in an underground prison cell in Ethiopia for one month after being caught going on *tahriib*. The experience did not hold him back.

*I wasn't scared by any of this. Not even after I was kept in the pit for a month. And I attempted tahriib again. Some of my friends had already made it to Libya and I knew I could do it too. I figured that I had already survived the worst when I was in the pit and so I wasn't afraid to try again.*⁵²

Some migrants will never be deterred. If there is a demand to migrate irregularly, then there will likely always be smugglers, whether or not they face the very real threat of prosecution and imprisonment. Law enforcement has a clear and important role to play in addressing irregular migration, especially when it comes to prosecuting suspected smugglers. But as underlined by Prosecutor Abdirahman Mohamed Mohamoud, it has to be one part of a cross-sector strategy that “brings together all stakeholders – criminal justice actors and the Ministries of Youth, Religion, Interior and Justice.”

Successfully addressing irregular migration out of the Horn of Africa also requires more than a one-sided approach by international actors. European-centric policies miss the potential of capitalising on the efforts of others who are directly affected, like Somaliland, which are working, however imperfectly, to combat people smuggling and discourage migration. As the world has found, irregular migration is a complex problem which also highlights the inter-dependence of nations, whatever the geographical distance. Every option to protect lives must be considered and supported, including initiatives already underway, such as the legal responses to irregular migration in Somaliland.

⁵² Interviewed in Hargeisa on 6 September 2018.

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