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Migrants' and Refugees' Rights: A Brief International Law Perspective

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I. Introduction

The issue of migrants and refugees, especially in a Mediterranean context, has become the subject of political sabre-rattling, emotive language and fractious debate. All of this may be understandable to some extent, but the argument put forward in this paper is that beyond emotion and debate there are rules of international law, which are applicable to migrants and refugees. In essence the paper seeks to remind that migrants, refugees and asylum seekers are human beings who are entitled to the protection which international human rights law establishes. In the 1990s the UN human rights system adopted the mantra that “Women’s Rights are Human Rights”. Within the emotive and controversial arena of migration and refugees we would do well to remind ourselves that “migrant and refugee rights are human rights” too.

The *raison d’être* of international law rules that seek to protect migrants and refugees is that they are persons who require special protection due to their vulnerability being outside the jurisdiction of the state of their nationality. Thus, international law rules provide a dual form of protection for migrants and refugees: (i) general protection under human rights treaties applicable to all persons and (ii) specific protection applicable to particular categories of persons (in this case migrants and refugees). This paper will examine some of the ways in which both types of rules assist in the protection of refugees and migrants (whether

migrating willingly or persons who are victims of human trafficking).

II. Some Relevant International Law Treaties

At the outset it is important to distinguish between migrants and refugees. A refugee is a particular type of migrant who leaves his or her country of nationality for very specific reasons. The most relevant international law treaties in this respect are the Convention Relating to the Status of Refugees (the Refugee Convention) of 1951 and the Protocol Relating to the Status of Refugees of 1967. The Refugee Convention fundamentally does two things: it defines the term refugee and it establishes the rights of refugees under international law. The Convention defines refugee as any person who is “*outside their country of origin and unable or unwilling to return there or to avail themselves of its protection, on account of a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular group, or political opinion.*” The notion of persecution is a particularly poignant one as it underscores the reason why refugees require special protection. Within this context, the most important right granted to refugees under the Convention is the right not to be returned to the country from which they have fled. This is known as the principle of *non-refoulement*.

States may not, in any circumstance, return a person who is a refugee or claims to be a refugee, to the country from which she or he is fleeing. Most importantly, the UNHCR has affirmed that the principle of *non-refoulement* constitutes a norm of customary international law and is thus obligatory for all states, not simply for states who are parties to the Refugee Convention. The Convention, in Article 31, also stipulates that refugees may not be punished

“on account of illegal entry or presence...provided they present themselves ...to the authorities and show good cause for their illegal entry...”

One of the key concerns in terms of how states deal with influxes of persons claiming refugee status relates to policies of mandatory detention of any person entering the state irregularly. This policy has been adopted by a number of states and thus it should be scrutinized against the rules of international law. The Refugee Convention clearly provides that restrictions on the movement of refugees shall be limited to only those that “*are necessary*” and “*such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country*”. In 1999, the UNHCR’s “Revised Guidelines on Standards relating to the Detention of Asylum Seekers”¹ re-affirmed that the detention of asylum seekers should be an exceptional measure and not a normal procedure. While referring to Article 31, the Guidelines state that detention should only be resorted to in cases of necessity. The detention of asylum-seekers who arrive in a state in an irregular manner “should not be automatic or unduly prolonged”. Thus it is clear that detention should be the exception in specific cases, which are listed, and not the rule.

In this context it is also clear that where detention does occur in cases of necessity, there should be procedural safeguards for such detention. These safeguards include the right to legal counsel, the right to have the detention decision subjected to automatic independent review, and the right to challenge the necessity of the detention.

The matter of detention of refugees (or even of migrants in general) is also subject to the rules stipulated within the International Covenant on Civil and Political Rights (ICCPR), which in its Article 9 provides as follows:

¹ United Nations, 1999. UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers. [pdf] Office of the United Nations High Commissioner for Refugees. Available at: < <http://www.unhcr.org.au/pdfs/detentionguidelines.pdf> > [Accessed 23 Oct 2014].

“Everyone has the right to liberty and security of person...” and “Anyone ...deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of...detention and order...release if the detention is not lawful.”

From the above it clearly emerges that any form of detention for whatever reason (including detention on the grounds of irregular entry into a state) has to be amenable to judicial review. This was confirmed by the Human Rights Committee (HRC) which held, in its General Comment No.8 of 1982, that the right to judicial review provided for in the above quoted article is applicable to all types of arrest or detention, including in cases of alleged breaches of immigration control.² The HRC has also dealt with this matter in a number of complaints lodged against Australia which concerned individuals being detained for breaches of immigration rules. In these cases the HRC held that any detention should be open to “periodical review” to “*reassess the necessity of detention*” and detention “*should not continue beyond the period for which a State Party can provide appropriate justification*”.³ The HRC specified that when considered together with illegal entry, certain factors, such as the risk of flight or lack of cooperation, may justify detention for a period of time but that

² UN Human Rights Committee, 1982, 1994. General Comment 8, Art. 9. [online] Available at: < <http://www1.umn.edu/humanrts/gencomm/hrcom8.htm> > [Accessed 23 Oct 2014].

³ Shafiq v. Australia, D., 2006. Communication No. 1324/2004, UN Doc. CCPR/C/88/D/1324/2004. [online] UN Human Rights Committee. Available at: < <http://www1.umn.edu/humanrts/undocs/1324-2004.html> > [Accessed 23 Oct 2014]; A. v. Australia, 1997. Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993. [online] UN Human Rights Committee. Available at: < <http://www1.umn.edu/humanrts/undocs/html/vws560.html> > [Accessed 23 Oct 2014]; Bakhtiyari, A. A., Bakhtiyari v. Australia, R., 2003. Communication No. 1069/2002, U.N. Doc. CCPR/C/79/D/1069/2002. [online] UN Human Rights Committee. Available at: < <http://www1.umn.edu/humanrts/undocs/1069-2002.html> > [Accessed 23 Oct 2014].

“Without such factors detention may be considered arbitrary, even if entry was illegal”.⁴

When examining ICCPR State Party Reports, the HRC has made a number of recommendations on issues relating to detention of non-citizens, including *inter alia* on the following matters:

- conditions of detention;
- the possibility of lodging complaints regarding allegations of ill-treatment; and
- the detention of asylum seekers and victims of trafficking.

For example, the HRC commented on the conditions and duration of detention of persons detained pending immigration procedure. It also commented on allegations of lack of adequate opportunity to apply for asylum and conditions of detention for non-citizens (in this case, on Italy's Lampedusa).⁵

The issue of detention of children of migrants, whether alone or accompanied, has also been a matter of grave concern within the Mediterranean context. Thus a reference to the Convention on the Rights of the Child (CRC) is a pertinent one. Article 37 of the Convention renders detention of children a measure of last resort and, then, only for the shortest possible period of time. If such a detention is at all necessary, the child in detention is to be treated in a manner which takes into account the needs of persons of his or her age. The CRC also makes specific reference to child refugees and child asylum seekers. A child who is seeking refugee status or who is considered a refugee in accordance with law has a right to receive appropriate protection and humanitarian assistance in the enjoyment of the rights which he/she has under international law.

⁴ Ibid. (A. v. Australia, 1997).

⁵ UN Human Rights Committee, 2006. UN Doc. CCPR/C/ITA/CO/5. [online] Available at: < <http://www1.umn.edu/humanrts/hrcommittee/italy2006.html> > [Accessed 23 Oct 2014].

The Committee on the Rights of the Child, in its General Comment 6, explained its views on the matter of the detention of children as a measure of last resort:

*“Where detention is exceptionally justified for other reasons...all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation.”*⁶

Media attention in the Mediterranean (as well as more globally) have in recent years focused on the issue of irregular migrants and refugees but it is also worth considering the situation of migrants (whether entering legally or not) who are already in a third country working in, usually, difficult conditions. As with all vulnerable groups migrant workers are in need of special protection given that they are outside the jurisdiction of their state of nationality. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990 (ICMW) seeks to provide some basic guarantees to this category of workers. Two key provisions within this Convention are the following:

- i. Migrant workers cannot be subject to collective expulsion; and have the right to equal remuneration as nationals as well as the right to join trade unions.
- ii. Migrant workers shall be free from slavery, serfdom and forced labour.

These two provisions are singled out for attention given the frequency with which migrant workers are exploited by employers who pay them less than other workers and impose on them harsh working conditions which unionised labour would object to. The

⁶ Committee on the Rights of the Child, 2005. General Comment No. 6 (2005). [pdf] Available at: < <http://www2.ohchr.org/english/bodies/crc/docs/GC6.pdf> > [Accessed 23 Oct 2014].

situation of migrant workers is especially acute when they have entered the country of employment irregularly. In such situations the migrant worker is even more vulnerable and at the mercy of his/her employer. This scenario may lead to slavery-like working conditions.

Another phenomenon which is of grave concern to the international community and that also falls within the ambit of migration is human smuggling. Smuggling in persons has been of tremendous concern within the Mediterranean where the southern shores are teeming with persons who, for various reasons, are attempting to cross into Europe. These persons pay significant sums of money to smugglers who pack them in (mostly) unseaworthy vessels. These situations are covered in international law through the Protocol Against Smuggling in Persons of 2004. This Protocol, inter alia, imposes an obligation on State Parties to criminalize smuggling and related acts and also stipulates that smuggled migrants shall not be liable to criminal prosecution under the protocol for having been the object of smuggling.

Finally, a brief reference to the Trafficking in Persons Protocol is also apposite as victims of human trafficking are also migrants (in most cases forced migrants or fraudulently induced migrants). It is self-evident that this category of migrants is an especially vulnerable group of persons. The Protocol to Prevent, Suppress, and Punish Trafficking in Persons was adopted in 2000 with the aim of adopting measures throughout State Parties that would lead to the suppression of trafficking through preventive measures but also through the effective punishment of traffickers. The Protocol, however, goes beyond preventive and punitive measures and encourages State Parties to adopt measures *“for the physical, psychological, and social recovery of victims...such as providing (a) appropriate housing; (b) counselling and information on their rights; (c) medical, psychological, and material assistance; and (d) employment, educational, and training opportunities.”* The Protocol also provides that State Parties should consider adopting measures that permit victims of trafficking to remain in the territory where they have been transported to. Such a measure

would be an inducement for the victims to act as whistleblowers on their traffickers and highlights the role of trafficked persons as victims.

In this context the Convention on the Elimination of Discrimination of Women (CEDAW) is also a relevant and widely accepted international legal instrument. CEDAW stipulates that :

“States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”

In its 2006 recommendations to Malaysia, the Committee on the Elimination of Discrimination against Women stated that the country should:

“ensure that trafficked women and girls are not punished for violations of immigration laws and have adequate support to be in a position to provide testimony against their traffickers.”⁷

III. Conclusion

This cursory look at some of the relevant treaties that impact upon the rights of migrants and refugees should suffice to demonstrate that international law, as a legal system, takes the plight of refugees and migrants seriously. It is also clear that beyond the emotional debate and political expediency that often mires the theme of migration and refugees, there are legal rules being developed which put the migrant and refugee at the centre of their attention. Legal rules alone, however, are insufficient. The

⁷ Committee on the Elimination of Discrimination Against Women, 2006. (31 May 2006). [pdf] Available at: <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/384/40/PDF/N0638440.pdf?OpenElement>> [Accessed 23 October 2014]

implementation of these rules is crucial. In this respect a number of limitations are hampering such implementation.

Firstly, the comparative lack of adequate enforcement mechanisms is of decisive importance. Secondly, there exists, in respect of some treaties, a lack of ratification by states. This lack of ratification has a negative impact on the rights of migrants and refugees if they are migrating to or even transiting from a state which has not ratified such treaties. Some treaties such as the Refugees Convention, the ICCPR, or the CRC have been very widely ratified. However, other treaties, such as the ICMW have very low levels of ratification. In these cases the rules set out in the treaties, exist in theory but not in practice. The ICMW for instance only has 47 State Parties with none of the European Mediterranean states amongst them.

Ultimately, it is also critically important to build public awareness and support for such international law rules that exist. Without such public support the risk that these rules of law remain a dead letter is far greater. With increased public support such rules will not only be implemented more regularly but they will also help to shape public discourse around the issues of migration and refugees.

However, beyond all of the discussions and political point-scoring there lies a fundamental human tragedy. Between January and September 2014 the Mediterranean has witnessed 3,072 migrant border-related deaths⁸. More migrants die crossing the Mediterranean than at any other border in the world. The second most dangerous border (East Africa) witnessed 251 deaths. The magnitude of human loss in the Mediterranean is blatantly clear. These facts need to spur the international community to take the

⁸ International Office of Migration data quoted by the Financial Times, 15 October 2014, p.1

rules of international law more seriously and to render them more effective.