EDITORIAL

THE SUBJECT OF RIGHTS IMMERSED IN A "SEA OF TROUBLES"

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Given the multiple human rights issues implicated by migratory flows, the topic of this special issue of our journal may appear excessively open-ended. In reality, however, the themes addressed by our contributors represent controversial flashpoints in the Mediterranean migratory process as well as in the legal and political responses such migration provokes. These include the replacement of traditional intra-regional migration by more globalised migration, the rise in both the number of undocumented "irregular" immigrants and in mixed migratory flows, the increasingly restrictive immigration policies imposed by Southern European states, the concomitant tendency to resort to asylum law in order to identify legitimate immigrants, and the more prominent role being assumed by EU laws and policies in the field.

A recent lecture[1] by the distinguished law professor James Hathaway provides us with a good point of entry into these controversies. In this lecture Hathaway criticized what he sees as

[1] I am here referring to the lecture he delivered in London in October 2006, which can be found here: http://www.heythrop.ac.uk/images/stories/hirepl/events/2006_jrs_london_lecture.pdf

a growing tendency to move away from a human rights based understanding of refugee law and to replace it with a "therapeutic" model. This new model views the refugee not as the holder of an internationally recognised status endowing her with certain fundamental rights, but as a pathologically stateless victim in need of a permanent cure for her condition. Hathaway pointed out that this kind of thinking, which seeks "solutions to refugee-hood", is used to justify certain ill-judged attempts to "voluntarily repatriate" refugees, which are neither voluntary nor safe. By contrast, a human rights based approach would not seek to impose a permanent top-down "solution" to the refugee's "problem". Instead it would aim to respect the refugee's rights in the interim period until the cause of flight is eliminated or until the refugee herself can determine her own future. Such a human rights based approach to international refugee law is also one of the best ways to enforce respect for human rights internationally as:

> "The surrogate protection of human rights required by refugee law is too valuable a tool not to be widely understood and conscientiously implemented".[2]

Hathaway argues that we cannot respect the human rights of refugees unless we treat them as choice making actors with the ability to determine their own future. This implies that recognition as a refugee should give a stable, clear and precisely defined legal status to the person so recognised within the hosting state. It is the lack of such legal clarity that the articles by Chiara Marchetti and Lena Karamanidou attempt, in their differing ways, to pinpoint and explain. Thus, Marchetti's article explores the Italian asylum adjudication system following the Bossi-Fini law and stresses the contrast between the high percentage (46.8%) of asylum seekers granted humanitarian protection and the much smaller proportion (9.5%) who are actually recognised as Convention refugees. She argues that these statistics point to a blurring of the boundaries of the refugee category, which had previously been defined in an essentialist way. While the recognition of humanitarian protection is positive insofar as it acknowledges the need for more

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[2] *Ibid*, p.20

differentiated forms of protection, it also leads to reduced protection for genuine refugees, since the decision to grant some form of protected status comes to be seen as political and not legal in its nature. In addition, as more and more refugees are granted humanitarian status, they are popularly perceived as not being "genuine" (political) refugees but rather are seen as economic migrants.

In her article, Lena Karamanidou makes a parallel argument by analysing the policy discourses surrounding asylum seekers in Greece, claiming that in recent years these discourses have tended to re-categorise asylum seekers as illegal immigrants. The resulting discursive opposition between refugees and illegal immigrants has rendered the asylum-seeker category structurally invisible and therefore tended to legitimate restrictive Government policies, reflecting:

> "the preoccupation of Greek policy with the prevention of irregular immigration, which is linked to wider objectives of European Union policy with regards to the protection of its external borders and the prevention of asylum seeking and irregular migration."[3]

In another contribution, Katerina Kratzmann explores certain impacts of these policies on irregular immigrants and asylum-seekers. She focuses on undocumented migrants in Austria, showing how they are burdened by their awareness of their own extra-legal status. This preoccupation not only influences their anxiously conformist public behaviour, but even the ways in which they construct and perceive their own identities. This is significant as it suggests that the negative effects of the fuzzy legal status of these immigrants are not limited to arousing suspicion in the hosting population but also motivate immigrants themselves to turn their backs on their immigration status and prefer to identify themselves in terms of their ethnic background. On the strength of her analysis, Kratzmann stresses the need for host states to adopt policies based

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[3] See Karamanidou, L. "Refugees, 'Illegal Immigrants' and Asylum Seekers: Use of Discursive Categories and Legitimation of Asylum Policies in Greek Political Discourse", in this issue.

both on national *and* human rights grounds, echoing Hathaway in her argument that what are needed are not permanent solutions but the recognition of minimally secure and stable rights in such fields as work, accommodation, healthcare and family reunification, while the refugee remains on the territory of the host state.

The analysis being developed here clearly has various implications for policy making by host states. Two of them are developed in the next two articles that will be reviewed. In their article on "The Regularisation of Undocumented Migrants," Ruth Ferrero and Gemma Pinyol focus on regularisation as a legal instrument for ensuring the protection of immigrants' rights, as they point out that: *"the first step towards a good social integration is to have rights."*[4] After carefully distinguishing the various kinds of regularisation that have been attempted by various European states, the authors zoom in on the Spanish regularisation programme of 2005, which they praise for its attempt to comprehensively legalise those immigrant workers who could prove that they had been living and working in Spain for a certain amount of time, while at the same time clamping down on irregular employment and increasing border control. Ferrero and Pinyol argue that such a regularisation scheme has the advantage of directly tackling the informal economy and thereby simultaneously supporting workers and migrants' rights, while also helping to control irregular migration. On the other hand, Ferrero and Pinyol acknowledge that Spain's efforts to regularise immigrant workers exposed various tensions and conflicts between Spain and other states in the European Union, which felt that Spain's policy might increase the collective "pull" factor experienced by irregular immigrants towards the EU more broadly. In this context, the authors stress the need for greater consultation and collaboration at the EU level in framing and implementing regularisation programmes.

The importance of EU-wide collaboration and also of developing a holistic approach towards migrants that does not impose top-down

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[4] At the same time, the authors observe that there is a clear difference here between EU states and the U.S.A., since in the latter country the hiring of irregular foreign workers does not generate a black labour market, given the flexibility of its labour market.

solutions to their "problems" is also emphasised by Andrea Gallina. In his contribution he focuses on the best way to concretise the linkage between migration and development that is becoming a prominent item on the EU agenda. The basic thinking here is that instead of addressing migration and development in separate policy frameworks, the EU should seek to integrate them: using the skills and local knowledge of migrants to ensure that development assistance does not create passive welfare recipients but operates in tandem with and promotes local entrepreneurship. Gallina argues that this process would be facilitated if the EU were to adopt a resource-based conception of migrants that is open to the various ways in which they can contribute to the development of their home societies. Because it sees immigrants as partners in developing their countries of origin and because it builds on the choices that immigrants are already making regarding the sending of remittances and so on, Gallina's proposed approach meshes well with the emphasis on the human rights of migrants advocated throughout this volume. Central to both approaches is the idea that immigrants are best thought of as individuals capable of making free and rational choices.

In contrast to Gallina's article, the next cluster of contributions we publish raise the question whether the EU is part of the problem or part of the solution when it comes to respecting immigrants' human rights. This is because they broaden their geographical scope of investigation beyond the internal space of the EU and in the process highlight the negative external impact of EU policies on sending and transit countries. Thus Jose Rodriguez Mesa argues that there is an intimate relationship between the increase in illegal immigration from Morocco and the restrictive approach that European regulations and visa constraints have imposed since the 1990's on Moroccans who wish to travel to Spain. He shows how the increase in illegal migration and the development of a new route for entering Spanish territory via the Canary Islands cannot be understood unless one factors in the development of a range of immigration control mechanisms. Massimo Frigo takes this argument a step further by showing, with particular reference to the relationship between Italy and Libya, how the process of externalising EU border control is forcing prospective immigrants to the EU to reside in Libyan detention centres. In these detention centres, genuine refugees face various other forms of human rights

abuse and a very real possibility of arbitrary repatriation back to their home countries. Since the EU emphasises collaboration in migration management in its relations with Libya but then declines to insist vigorously on strong human rights preconditions, the stance taken by the EU exposes the gap between its own rhetoric on human rights and the real effects of its policies. After carefully analysing the relevant human rights duties of the EU as a whole and each of its member states, Frigo observes that immigrants are being pushed into legal black holes, as:

> "this (EU) policy does not respect the principle and purposes of the UN Charter... defies the human rights duties contained in the International Bill of Rights...can give rise to international responsibility for wrongful acts and, finally...is not consistent with EU basic law. This notwithstanding, there is no mechanism for enforcing these obligations."[5]

This *cri de coeur* is also echoed by Zeynep Selen Artan, Atilla Gokturk and Guler Unlu, who highlight the impact of such EU policies on Turkey. Thus, Artan claims that the leitmotif of the EU approach to migration is that it is a *securitised* concept, where:

> "More and more, the emphasis was put upon controlling trans-border movements, stopping migrants before they put foot on EU territory and sending them back to their country of origin."[6]

This approach perceives immigrants as a security threat on various fronts, which range from internal security, the economy, social welfare and cultural cohesion. As a candidate country for EU membership, Turkey cannot avoid adopting and internalising this new securitised concept of immigration. In fact this new understanding of migration is an intrinsic part of the process of harmonisation of migration policies by EU candidate countries, being embedded in the changes which must be made to Turkey's

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[5] See Frigo, M. "Beyond the 21st Century Hadrian's Wall: The externalization of immigration and border control policy by the Europan Union, Conclusions.

[6] See Artan, Z. S. "Securitization of Migration: the case of Turkey", Introduction.

visa policy and external border management, *inter alia.* Moreover, Artan argues that the perception of migrants as potential security threats has started to percolate, via the attitudes adopted by government bureaucrats and policy makers, to the general Turkish public and is increasing the likelihood that human rights abuses will be committed against irregular migrants.

The connection we are tracing between EU migration policies and rights abuses suffered by migrants in non-EU Mediterranean states is highly significant for our purposes. Far from implying that the EU is an innocent bystander in this process, it suggests that the retreat away from a human rights based understanding of refugee law may form part and parcel of new international alignments converging around what observers like Liza Schuster have termed the "New Asylum Paradigm."[7] This paradigm aims as far as possible to contain refugees in their region of origin, to encourage extra-territorial processing of asylum claims and to pressure developing countries (through which irregular migrants travel) to enter into readmission agreements with EU states. Schuster claims that its biggest novelty lies in *"the declared and expressed intention to return people from EU states without examining their claim to asylum."*[8] In this context, the tendency to elide the category of the asylum-seeker noted by Karamanidou as well as the trend to conflate the status of refugee with that of economic migrant documented by Marchetti appear in a new and dangerous light. Far from being purely internal developments within Greek and Italian society respectively, they appear to be a means through which the *refoulement* of asylum seekers could be legitimised, eroding the solid foundations of the Refugee Convention.

Finally, we are publishing two articles that provide an interesting counterpoint to the others we have been considering. This is because they are each concerned with documenting the internal treatment given to refugees and asylum seekers within

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[7] See Liza Schuster, "The Realities of a New Asylum Paradigm", *Working Paper No. 20,* Centre on Migration, Policy and Society, University of Oxford, 2005: http://www.compas.ox.ac.uk/publications/papers/Liza%20Schuster%20wp0520.pdf

[8] Schuster, *ibid,* p.18

non-EU states and they consequently help the reader to understand how the Refugee Convention interacts with other non-European laws and Conventions. Thus Tarek Badawi's rich and interesting paper explores the right to education of refugee children in Egypt. In the process, he guides us through a legal maze, composed of international treaties, domestic legislation, court decisions and *Shari'a* norms, through the medium of which international human rights standards must pass if they are to be implemented within Egyptian society. Moreover, Badawi does not restrict himself to showing how advocating refugee's rights in Egypt is an exercise in legal pluralism but also explores the role played by institutional barriers deriving from the way the educational sector is organised. His conclusion, that formal legal guarantees of the right to education must be supplemented by follow-up legal mechanisms to ensure this law is implemented, reaffirms the importance of guaranteeing the Rule of Law to ensure the effective protection of Human Rights. It is echoed in Michelo Hansungule's wide-ranging survey of the state of African refugees in Africa. In this survey, Hansungule shows how the celebrated broad definition of protected refugees enshrined in the OAU Convention often does not translate into more effective protection at the local level. In a conclusion that can also serve for this editorial, because it epitomises the themes with which this issue is concerned, he states:

> "In contrast, however, the African refugee is the most unprotected in Africa itself... Discrimination against the African refugee . . . is as rampant in Africa as in alien societies. Refugees in Africa simply have no rights to claim when faced with these situations. Asylum and refugee offices around the continent are places where government grounds to a halt."[9]

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[9] Michelo Hansungule, *"African refugees in Africa: Perspectives, Challenges and Prospectives, in this issue, Conclusion.*