

FORCED MIGRATION AND REFUGEES' RIGHTS

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I. INTRODUCTION

Illegal migration is an increasingly difficult challenge for most countries. Traditional immigration control tools such as valid passport and visa requirements, border examination and in-country enforcement measures are being increasingly challenged by the sheer numbers of people on the move as well as by sophisticated methods to falsify documents and the involvement of organizations profiting from migrant smuggling. As increasing numbers of migrants are by-passing entry controls and competing for jobs, negative if not openly antagonistic domestic reactions have been elicited.

On the other hand, refugees are forced to migrate because of human rights violations and conflict in their countries and find themselves in an especially vulnerable situation abroad; host States are expected to do their utmost to avoid further rights violations in their territories. As many refugees have to flee without proper documentation and have no option other than to use people smugglers in order to reach safety, their proper identification and separation from other economic migrants is a key challenge that requires not only adequate legislation but also properly trained immigration personnel. Law-enforcement officials need to be aware of basic human rights rules protecting refugees and asylum-seekers.

II. INTERNATIONAL HUMAN RIGHTS RULES APPLICABLE TO ASYLUM SEEKERS AND REFUGEES

The most important international treaties on the subject are the *Convention Relating to the Status of Refugees* (hereinafter CSR)¹ and its *1967 Protocol*². They define who is a refugee and establish a set of rights attached to such status.

Regional treaties and declarations have expanded the refugee definition in the last few decades: in Africa, the *1969 OAU Convention*; in Latin America, the *1984 Cartagena Declaration* -the Declaration's refugee definition has been included in some national legislation in the area. In the closely related subject of group refugee determination through alternative forms of protection, in Europe, the EU has already agreed upon a plan over the granting of Temporary Protection regarding certain populations, in an attempt to harmonize the national systems applied throughout the 1990s for the protection of refugees from the Former Yugoslavia. UNHCR also has had its Mandate expanded for refugees fleeing *en masse* -without resort to individualized status determination; perhaps the better-known examples in East Asia started with Chinese fleeing to Hong Kong in the 1950s, followed by Indochinese in the 1970s and 1980s (before the 1989 Comprehensive Plan of Action); more recently, Myanmar (in Thailand and Bangladesh) and East Timorese.

In sum, refugees recognized under the CSR, refugees fleeing civil and international wars as well as events seriously disturbing public order³ and asylum-seekers are all in need of international protection⁴. We will not touch upon in this paper other categories of persons in need of international protection such as IDPs and stateless persons.

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¹ Final text approved at the special UN Conference in Geneva on 28 July 1951; entry into force: 22 April 1954

² Protocol relating to the status of refugees of 31 January 1967; entry into force: 4 October 1967.

³ Using elements of the expanded definition of the OAU Convention, the Cartagena Declaration and EXCOM Conclusion No. 22.

III. WHAT INTERNATIONAL REFUGEE PROTECTION INCLUDES?

International protection encompasses a range of specific human rights related to asylum seekers and refugees: the right to seek asylum, protection against forcible return, various rights in asylum countries -including what is seen from another perspective as entitlements to “humanitarian assistance”, the right to return, among others. In turn, refugees have the obligation to respect the laws, regulations and measures taken for the maintenance of public order in the country of asylum⁵.

A. The Right to Seek Asylum

The right to seek asylum is found in the *1948 Universal Declaration of Human Rights*: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

The right to seek and enjoy asylum has been respected in most situations of displacement in the past decades. As of today, over 12.1 million refugees have found asylum -though of varying quality. Most of these refugees have not been officially recognized as such under the CSR but under the “expanded” refugee definition and remain mostly in developing countries.

The exercise of the right to seek asylum requires the refugees’ very ability to cross international borders. Not all persecuted can do so. First, if they were to leave their own country legally, refugees would need to obtain a passport and maybe an exit visa from the very government they try to escape persecution. If they are forced to leave illegally, they risk being shot at by border guards -as thousands trying to cross the various “iron” or “bamboo walls” have experienced. Second, refugees should be able to gain entry into a safe country: Whenever they intend entry illegally in neighboring countries, this often involves serious risks: how could refugees cross borders closed for security reasons if these are strictly guarded and perhaps scattered with land mines? If they intend entry legally, how to do so if entry visas are required -and routinely denied by industrialized countries to the destitute of the world? How would they be able to even board a plane or ship for safety if airlines and other carriers that may bring refugees to various industrialized countries are requested to conduct document controls to detect forgeries and are routinely punished if nevertheless some individuals manage to arrive? And even after some refugees arrive with proper documents, they may still be denied entry by an immigration officer who feels the stated purpose of entry (tourism, business, etc.) may hide a purpose to stay? Too often some immigration officers ignore asylum applications whenever there are no witnesses to such denials of access and as we have been told in some countries, for reasons as mundane as “just to avoid a lot of extra work”.

People smuggling and trafficking have complicated the issue further, as more and more refugees and asylum-seekers use the same channels as illegal economic migrants in order to reach an asylum country. However, taking into account the above circumstances, is it far-fetched to conclude that it is close to impossible for most refugees to enter legally in countries of asylum? If so, there should be no surprise to find that Iraqis, Afghans and Turks, the highest smuggled nationalities of individuals entering illegally into 28 industrialized countries today, also have the highest refugee recognition rates.

B. Obligations of Governments: Provide Protection Against *Refoulement* and Against Expulsion

The protection of the CSR to refugees can only be effective through the respect by Governments of two basic rights: the protection against *refoulement*, and the right to remain in the territory until a durable solution is found.

Non-*refoulement* is the refugees’ right not to be returned to persecution, either in their country of origin or in other countries in which they would be at risk. This right mirrors an obligation for States to refrain from being instrumental to the persecution by other States of their nationals on grounds of race, political opinion, religion, nationality or for membership in a particular social group. Refugees are protected from forcible return not only after entry but also or at borders, airports or on the seas⁶. Recognizing its importance, article 33 CSR does not allow reservations by the signatory parties.

⁴ Other categories of persons also in need of international protection are internally displaced persons, returnees (former refugees who are repatriated voluntarily) and stateless individuals.

⁵ CSR Art. 2

The protection against refoulement is widely accepted as a principle of international customary law; this conclusion is based on consistent practice combined with States' recognition that the principle has a normative character. Apart from the CSR, it has been included in various forms under international human rights treaties, inter alia the 1984 UN Convention against Torture, the 1969 OAU Convention, the American Convention on Human Rights and the European Convention on Human Rights (regarding protection against return to torture); it has also been reaffirmed by the UN General Assembly⁷ and by the States members of EXCOM⁸.

One constraint is that many countries, especially among the developing ones, have no legal or administrative structures to distinguish between different categories of persons coming into their territories. If no clear legislation to separate refugees from economic and other migrants smuggled into the country exist and if no administrative guidelines or training are available to immigration officers, how could they be expected to avoid sending people back to persecution?

A State without the basic capacity to identify systematically who is a migrant and who is a refugee would find it extremely difficult to deal with an onslaught of arrivals of increasingly complicated cases. Opting to ignore the problem in the hope that it will be transferred to other countries, is not only selfish and is already affecting good neighborly relations, but this behavior contributes for the problem to grow. More and more people are already coming and remaining illegally in the territories of countries ignoring the problem, while their ports, land and airports are increasingly being used by criminal organizations.

I must also emphasize that the countries not parties to the Refugee Convention do have international responsibilities towards upholding the protection of refugees.

C. Protection of Refugees' Rights in Asylum Countries

The CSR was the first comprehensive international human rights instrument applicable to a special category of persons; it pre-dated agreements applicable to all individuals at the international level. By 2002, an array of Covenants and Treaties have complemented the rights of refugees in asylum countries: the *International Covenant on Civil and Political Rights* (ICCPR), the *Covenant on Economic, Social and Cultural Rights* (ICESCR); the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the *Convention on the Rights of the Child* (CRC), among other Conventions.

IV. DETENTION OF REFUGEES AND ASYLUM-SEEKERS: INTERNATIONAL STANDARDS

Refugees and asylum-seekers who commit crimes in the country of asylum, or who have committed crimes abroad and are prosecuted by local courts exercising legitimate penal jurisdiction, if found guilty, are to serve their sentences in equal circumstances as nationals of the country. In this section, when we discuss "detention", we will not refer to punishment for common crimes resulting in detention, but only to "administrative detention" under the powers of the immigration authorities for violations of regulations on border controls.

⁶ 1951 Refugee Convention Art 33, Prohibition of expulsion or return ("refoulement")

"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

⁷ See United Nations Declaration on Territorial Asylum, adopted by the UN General Assembly on 14 December 1967. Art.3.1 "No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." (Emphasis added)

⁸ See for instance, EXCOM Conclusion No. 6: protection for refugees from refoulement both at the border and within the territory, irrespective of whether or not they have been formally recognized as such.

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International Standards on Detention of Refugees and Asylum-seekers

The CSR provides that refugees shall not be punished for illegal entry or stay under certain conditions (article 31)⁹. In addition, the ICCPR's Article 9:1 is especially relevant, as refugees and asylum-seekers benefit from its provisions as any other individual:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”

The ICCPR Committee has ruled that the right to liberty in Art. 9 does include all deprivations of liberty, whether in criminal cases or in other cases, including immigration detention¹⁰.

What if the procedures established by law are violating the guarantees of liberty in the national Constitution? Are there remedies for such situations? Are habeas corpus procedures available to asylum-seekers kept in indefinite detention because they are non-deportable? These are fundamental questions that are constantly been addressed by national courts¹¹ -now, including those in Japan.

The practice of most industrialized countries suggest that by keeping the minimum possible number of asylum-seekers in detention, they agree that their mandatory detention would only serve to victimize, in the asylum country, those already persecuted abroad -defeating the CSR's very purpose in the process.

Finally, international law is moving towards the punishment of the organizers of illegal migration and their accomplices, and not against the persons smuggled, including asylum-seekers. In this respect, the two Protocols (on the Smuggling of Migrants¹² and Against Trafficking of Persons) of the Convention Against Transnational Organized Crime state that:

“Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law, in particular, where applicable, the 1951 Refugee Convention”

⁹ “Article 31 - Refugees unlawfully in the country of refuge

1- The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2- The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”(emphasis added)

¹⁰ ICCPR Committee General Comment 8 of 1982.

¹¹ In the US, recent decisions have held indefinite detention of non-deportable aliens by the INS to be unconstitutional. The Supreme Court in *Zadvydas v. Davis* and *Ashcroft v. Kim Ho Ma* (June 2001), held that view even in cases where the aliens have criminal records. In another landmark decision, the 6th Circuit Appeals Court in *Rosales Garcia* (2001) found a violation of the US Constitution by the INS in the case of a Cuban national with prior criminal records who completed his prison sentence, but who could not be deported due to a refusal of the Cuban Government to re-admit him: “We conclude that Rosales’ confinement can only be considered excessive in relation to the purpose of protecting the community from danger and enforcing an immigration order that is, at present, unenforceable...Rosales’ detention has crossed the line from permissive regulatory confinement to impermissible punishment without trial”... (Full text of the decision is found in the *Int’l Journal of Refugee Law* 13, #3 - 2001)

¹² Convention Against Transnational Organized Crime. Protocol against the smuggling of Migrants by land, sea and air. Art. 19 - UN G.A. resolution 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001). The same provision is contained in Art. 14 of the Anti-trafficking Protocol.

V. CONCLUSION

Immigration control and the fight against syndicates involved in people smuggling must be pursued strongly but avoiding violations of human rights of refugees and asylum-seekers. Countries that are not parties to the Refugee Convention are also obliged to avoid sending people back to situations of torture or persecution. Human Rights Conventions which have been ratified by virtually all the countries present are also applicable to refugees. Most of the countries present are also parties to the Convention Against Torture which prohibits sending anyone back to a situation of torture. It is provisions like this one that are as much national law as the immigration rules, that must also inform the daily decisions of immigration officers to deport individuals who may have entered or stayed in violation of immigration rules. These are basic rules of humanity in what is becoming an inter-dependent world.