



Chapter 9

Migration, Asylum & Trafficking

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Introduction

By Rachel Wechsler

The Oxford Human Rights Hub Blog has consistently drawn attention to violations of irregular migrants' human rights and has called for better protections for this particularly vulnerable population. Many of the posts in this chapter also highlight the tension between migrants' human rights and issues of national security, immigration control, and xenophobia, which often plays a role in the policy responses of destination countries.

Not only are the journeys that irregular migrants make from their homelands often inherently treacherous, but migrants are also frequently faced with harsh treatment and human rights violations while en route to their destination countries. In his post ('Migrant "Push Backs" at Sea are Prohibited "Collective Expulsions"' p 177), Nikolaos Sitaropoulos discusses the tragic drowning of migrant women and children in the Aegean Sea following interception by the Greek coast guard, which the survivors allege was an unlawful 'push back' or 'collective expulsion' in violation of Article 4-4 ECHR. Furthermore, Denise Gonzalez draws attention to the systematic abuses perpetrated against migrants traveling through Mexico by highlighting the plight of an Afro-Honduran migrant who was tortured, imprisoned on baseless charges, and racially discriminated against while en route to the United States ('Angel: Afro-Honduran Migrant Tortured and Imprisoned in Mexico' p 182).

Irregular migrants who manage to reach their destination countries are often detained based on their 'illegal' status. Several posts in this chapter question and criticise immigration detention policies and the conditions faced by detained migrants on the basis of their compatibility with human rights standards. Located a mere six miles north of the Oxford Human Rights Hub's headquarters, Campsfield House is a prison-like immigration removal centre that has been the subject of serious human rights critique, often within the context of broader criticism of UK immigration policy. Jo Hynes ('Campsfield Immigration Removal Centre: 20 Years Too Long' p 168) and Melanie Griffiths ('Government Lodges Plans to More than Double Oxfordshire Immigration Removal Centre' p 168) highlight unfair treatment of detained migrants at Campsfield and elsewhere in the UK, including indefinite periods of detention, racial discrimination, and overcrowding. They also describe the strong community and academic response to the human rights abuses at Campsfield, in the form of an active campaign to close the facility and prevent its proposed expansion, which has achieved some degree of success.

Violations of migrants' human rights in the context of immigration detention are certainly not limited to the UK. The European Court of Human Rights has heard several such cases (e.g. *Suso Musa v. Malta* [2013] ECHR 721, *Rehbock v. Slovenia* [2000] ECHR 645), and in *M.A. v. Cyprus* [2013] ECHR 717, it set out general principles for the judicial review of migrant detention, with which states must comply in order to comport with Article 5(4) ECHR ('Judicial Review of Migrant Detention in Europe: In Search of Effectiveness and Speediness' p 174). These principles, which Nikolaos Sitaropoulos argues are particularly significant in light of the trivial approach many states take to depriving migrants of their liberty, include making judicial review sufficiently accessible to detained migrants, ensuring that the process is expedient, and ensuring that it leads to termination of the detention if it is determined to be unlawful.

In Israel, the Supreme Court has twice quashed legislation authorising the detention of irregular migrants for lengthy periods based on violations of the constitutional rights to liberty and human dignity (*R Ziegler, 'Second Strike and You Are (Finally) Out? The Israeli Supreme Court Quashes (Again) the Prevention of Infiltration Law'* p 186). In his follow-up post, Ruvi Ziegler predicts that the third edition of the legislation, which is premised on the same tenets as the first two versions, will be challenged on constitutionality grounds in the near future ('Detention of African Asylum Seekers in Israel: Welcome to Round Three' p 187).

A common 'push' factor underlying migration decisions is internal conflict, as is the case for the millions of refugees fleeing civil war in Syria. There have been reports of widespread torture, rape, kidnapping, and the targeting of civilians, making the conflict in Syria 'one of the most egregious human rights atrocities the world has ever witnessed', in the words of Annie Sovcik ('Providing Syrian Survivors of Torture Access to Rehabilitation Services' p 183). Sovcik emphasises the great need for mental health and other rehabilitation services for survivors of torture in Syria, and encourages states to donate funds for this purpose. In addition, Cynthia Orchard and Dawn Chatty call upon the European Council to utilise its Temporary Protection Directive (2001/55/EC) to implement a coordinated temporary protection programme for Syrian refugees, granting them residence in EU Member States until circumstances in Syria become safe enough for them to return ('High Time for Europe to Offer Temporary Protection to Refugees from Syria' p 176). Doing so could alleviate some of the burden borne by Turkey, Syria's neighbour to the north, to where approximately one million Syrian refugees have fled in search of temporary protection status and/or assistance with resettling in a third country (*S Topouzova, 'Navigating the Turkish Legal Regime: Syrian Refugees in Istanbul'* p 179).

Notably, it is not only Syrians who have been impacted by the armed conflict in Syria; the nearly half a million Palestinian refugees who had sought protection in the country prior to the war, many of whom reside in the besieged Yarmouk refugee camp, have suffered greatly. Armed forces have blocked humanitarian aid to the camp, and thousands of refugees have been trapped without adequate food, water, medical care, and other basic necessities for long periods. Nanjala Nyabola asserts that denying humanitarian aid agencies access to Yarmouk violates Common Article 3 of the Geneva Conventions, which concerns the treatment of civilians and non-combatants in internal conflicts ('Palestinian Refugees in Syria: A Primer for Advocacy' p 180).

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Several blog posts over the past year have focused on responses to the major worldwide problem of human trafficking, which is an affront to human rights and often intersects with migration, security, poverty, and gender issues. In the UK, the Modern Slavery Act 2015 was first introduced in the House of Commons in June 2014, and became law on 26 March 2015. While applauding the awareness-raising effect of the legislation, Peter Carter criticises its lack of vision ('Modern Slavery Bill – A Brief Review' p 166). Mei-Ling McNamara further notes that it has been criticised for its 'conspicuous lack of victim support', in contrast with Scotland's Human Trafficking and Exploitation bill (introduced in the Scottish parliament on 11 December 2014), which takes a 'trauma-informed approach' to helping victims ('Scotland's Answer to Modern-Day Slavery' p 167).

The UK Court of Appeal has also been criticised for failing to adequately protect trafficking victims' rights. In the cases of Reyes and Suryadi v Al-Malki [2015] EWCA Civ 32 and Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya [2015] EWCA Civ 33, the Court held that diplomatic immunity prevented the victims from pursuing racial discrimination, harassment, and inadequate compensation claims against their traffickers ('What Traffickers Know that the Court of Appeal Does Not' p 171). Catherine Briddick calls this judgment 'frankly breath-taking' and concludes that it will 'facilitate and compound . . . [the] exploitation and abuse' of domestic workers, which are disproportionately women. The Court of Appeal also blocked the racial discrimination claim of a trafficked migrant worker on the basis of the illegality doctrine in Houna v Allen [2012] EWCA Civ 609, but fortunately the Supreme Court later reversed this decision ('Houna v Allen: Trojan Horse Comes to the Rescue of "Illegal" Migrants' p 170). Alan Bogg asserts that this 'result . . . is to be applauded', despite the fact that 'it has regrettable exclusionary effects on non-trafficked but nevertheless vulnerable migrants'.

A valuable tool in the fight against human trafficking is Europol, which coordinates and facilitates information-sharing among the EU Member States' national police forces, as trafficking is often a cross-border crime (O Johnstone, 'Europol and the Fight Against Human Trafficking' p 174). Another useful tool is the concept of corporate social responsibility with respect to upholding human rights, as reflected in the United Nations Guiding Principles on Business and Human Rights. However, as Marija Jovanovic points out ('The Business of Traffic in Humans' p 172), most anti-trafficking policies aimed at businesses are merely voluntary and lack any enforcement mechanism, which limits their effectiveness.

The posts included in this chapter effectively call attention to significant developments in human rights law and shocking human rights violations impacting migrants, asylum-seekers, and trafficking victims over the course of the past year. They remind us of the importance of continued advocacy on behalf of vulnerable segments of our society, whose human rights remain far from guaranteed.

Rachel J. Wechsler, Esq. is a DPhil Candidate in Criminology at the University of Oxford and a former Editor of the Oxford Human Rights Hub Blog.

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Modern Slavery Bill – A Brief Review

By Peter Carter QC | 2nd December 2014

How does it happen? The fire brigade is called to a fire in a terraced house. When the firemen arrive the doors and windows are locked and bolted. They break in to discover that the mains electricity cable had been dangerously diverted to provide power for a cannabis farm. Hidden in the remains are frightened young Asian men of indeterminate age. They have no documents to establish who they are or where they come from. They speak little or no English. The police are on the scene. They arrest the men. What happens to them? Too often and for far too long now they – like other people found at brothels or committing street crime, or running away with forged or stolen identity documents – have been treated as criminals and sent to prison. That is now beginning to change, but too slowly.



It is 250 years since Lord Mansfield ruled in *Somerset v Stewart* (1772) 98 ER 499 that English law will not tolerate slavery within England. Blackstone in his *Commentaries* boasted "...this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the law and so far becomes a freeman ...". In 1794 the US Congress prohibited the slave trade by the Abolition of Slave Trade Act 1794. Britain took until 1807. The Slave Trade Abolition Act was the culmination of a campaign begun in Parliament in 1788. Then slavery itself was abolished in the Colonies and temporary apprenticeship substituted by the Slavery Abolition Act 1833.

Modern slavery and associated human trafficking has become an international phenomenon, producing global profits for the perpetrators similar to that produced by drug trafficking. But it is still largely hidden. The Palermo Protocol (2000), the Council of Europe Trafficking Convention (2005) and the EU Directive 2011 (in force from last year) have established a process for identifying victims of trafficking and treating them as victims rather than criminals or as illegal immigrants. These instruments recognise the extent of the problem. With one or two notable exceptions (*R v O* [2008] EWCA Crim. 2835, *R v L* [2013] EWCA Crim 991) the courts have been slow to respond. There remains incredulity that it can happen here (and "here" can be wherever in the world you happen to ask).

We now have the Modern Slavery Bill. The purpose of the Bill is twofold – (1) to enhance the prospects of eradicating trafficking and exploitation by means of the successful prosecution of the perpetrators; (2) to rescue and protect victims of modern slavery. There is a causative link between these two aims. In order to achieve the first of these aims, the second is critical. Successful prosecution will deter perpetrators.

How much does it improve the present law and practice? It has been described by Anthony Steen (*Guardian* 3.11.14) as "A lost opportunity". It is certainly flawed. A Joint Committee of Parliament produced a report on the first draft Bill. It recommended a thorough revision of the law – simplify the current offences of trafficking and slavery rather than consolidate them into a single

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Act introduce specific offences of exploitation, especially of children create a statutory structure to replace the National Referral Mechanism (which largely determines the fate of victims and is acknowledged to fail too many) in order to improve effective identification of victims provide a statutory scheme for protection of victims enhance the independence of the Anti-Trafficking Commissioner

In her response to this Report the Home Secretary said:

“Modern slavery is an appalling crime. Traffickers and slave masters use whatever means they have at their disposal to coerce, deceive and force individuals into a life of abuse, servitude and inhumane treatment. Organised crime groups systematically exploit large numbers of individuals by forcing and coercing them into a life of abuse and degradation. It has no place in this country today.”

Despite these words, uttered with undoubted sincerity, the Joint Committee’s proposals have been largely rejected by the Home Office. The current Bill indicates that a lot of thought has been expended by officials on detailed statutory language but there is not much vision.

Some will ask whether this Bill is better than nothing. I believe that it is. It is not yet a lost cause. At the very least the publicity afforded to the Bill have helped to increase awareness.

Peter Carter QC is a barrister practising from Red Lion Chambers in London.

Scotland’s Answer to Modern-Day Slavery

By Mei Ling McNamara | 21st March 2014

A new standalone human trafficking bill for Scotland has been quietly gaining momentum in the corridors of Holyrood.

On Monday it was announced that a formal proposal by Labour MP Jenny Marra for a dedicated Human Trafficking (Scotland) Bill has been adopted by Justice Secretary Kenny MacAskill, which hopes to tighten up criminal justice measures and provide comprehensive support to victims of human trafficking. This bill, which has received cross-party support at a time when the referendum for independence is dividing opinion, has promised to be introduced before the end of the parliamentary session.

This bill could not have come at a more significant time in Scotland’s history. As independence looms on the 2014 agenda, and debates to abolish the centuries-old corroboration in Scots law rage in parliament, the country has seen an alarming rise in the amount of people found to be trafficked for both sexual and labour exploitation. While the UK Human Trafficking Centre reported 99 people in 2013 were referred to agencies in Scotland as being potential victims of trafficking – a 3 per cent rise since 2012 – the government, law enforcement and social services know this is a mere fraction of the total victims who are able to come forward.

One of the hallmarks of human trafficking is not only the shadowy nature of its networks, but the ruthless criminalisation of its victims. Many do not come forward fearing recrimination and prosecution by authorities, and survivors have told me they often chose to remain in the trafficked situation, rather than face a host of terrifying unknowns outside. It may sound counter-intuitive, but a chaotic existence in a trafficked situation has known quantities – even if these stem from control, power and humiliation. It’s a travesty of justice that many face re-victimisation within the British courts. This new bill seeks to stymie that.

The acceptance by the Scottish government to introduce this bill is significant. While the Modern Slavery Bill introduced by Theresa May in Westminster has its merits, it has been notably criticised for its conspicuous lack of victim support, focusing instead on a prosecutorial approach against traffickers. Yet without safeguards to prevent re-trafficking, the bill risks isolating the very people it claims to protect. Crucially, the Human Trafficking (Scotland) Bill has been developed in response to what it sees is a trauma-informed approach to sexual and labour exploitation, while maintaining the ethics and jurisprudence of human rights law.

Scotland’s human trafficking bill has some way to go before it can be voted into law. Yet news of its introduction into the Scottish parliament shows progress and optimism – a country addressing the intractable challenge of human trafficking without steering off course into the murky waters of immigration policy.

Mei-Ling McNamara is a journalist and documentary filmmaker, working in both print and broadcast media. She is a doctoral candidate in Trans-Disciplinary Documentary Film at the University of Edinburgh where her work is focused on forced labour, trauma and the politics of slavery in Britain.

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Campsfield Immigration Removal Centre: 20 Years Too Long

Jo Hynes | 23rd June 2014

Campsfield House, an immigration removal centre in Kidlington run by Mitie for profit, is now in its 20th year of operation.

Twenty years of detention without trial, without time limit, without proper judicial oversight and with little chance of bail for the detainees- all just 6 miles north of Oxford.

Campsfield detention centre on first glance certainly looks like a prison; its category C prison security would certainly suggest so. Yet it is far from such. In theory, detainees are supposed to be held here for a short, temporary period before they are deported, if it is deemed a risk that they will abscond. Instead, a system of indefinite detention, largely for administrative reasons, has arisen, with the average detention lasting 4-5 months, and some for 2-3 years. This creates a dual uncertainty hanging over detainees, since some have been held here for several years, yet simultaneously deportations can occur with next to no warning, in some cases the next day.

The UK detains more migrants, for longer and with less judicial oversight, than any other country in Europe. We are also the country in which the role of private companies in running detention centres (7 out of 10 detention centres) is most prominent. The Council of Europe's Human Rights Commissioner, as well as organisations such as Amnesty International, have called on the UK to revise its immigration detention policy and reverse the trend to ever-more immigration detention- even the Lib Dems in their latest Immigration Policy Paper propose to end indefinite detention for administrative purposes. The facts are clear: immigration detention doesn't act as a supposed deterrent to immigration and contravenes basic human rights.

In the past month Campsfield has seen a 50 detainee strong hunger strike, after one detainee, Mauladad Kaukar, was forced to sign a voluntary deportation form, despite speaking no English and not having the form explained to him. Both him and Muswar Khan, another detainee who could speak English and who was advocating on his behalf, were both racially abused by staff and threatened with solitary confinement. In the case of Muswar Khan, he has also had his access to the internet and right to work in the centre taken away, after staff realised he was writing emails concerning Mauladad's treatment and for labelling the previously unlabelled Independent Monitoring Board complaints box. The hunger strike has since stopped, but Muswar has brought Mauladad's case to the Chair of the Independent Monitoring Board. Yet with 31 of the 45 complaints made by detainees being referred back to the centre to be dealt with internally, according to the IMB's most recent annual report, Muswar is sceptical about this achieving much.

Since the opening of the centre, an active Close Campsfield campaign has been in operation to work for its closure. This past month the group, alongside Oxford University Amnesty International, have been coordinating an open letter to David Cameron, condemning Campsfield detention centre and the principle of indefinite detention. So far the letter has the support of over 40 academics, including several Heads of Houses, Ken MacDonald QC and Professor Danny Dorling.

Not often do such blatant abuses of human rights happen so systematically, so openly and so close to home.

Jo Hynes is a second year geography undergraduate at Oxford University and President of Oxford University Amnesty International 2014-5.

Government Lodges Plans to More Than Double Oxfordshire Immigration Removal Centre

By Melanie Griffiths | 17th November 2014

The Home Office submitted plans for major expansion of Campsfield House, an Immigration Removal Centre situated just outside Oxford. Local political, religious and charitable organisations are coming together to fight the proposals on the basis that indefinitely detaining people for immigration purposes is inhumane, doesn't fulfil immigration objectives and is prohibitively expensive.

Immigration detention in the UK

Immigration detention is an administrative, rather than punitive system. People are detained not as the result of a conviction, but for the purpose of an immigration goal, such as deportation. Our detention system is one of the largest in Europe, but has been repeatedly criticised domestically and internationally, including for inappropriately detaining vulnerable people.

The Home Office argues that people are detained for minimal periods, usually just before removal from the country. However, many detainees aren't at the end of their immigration case but have asylum claims or immigration appeals pending. Others cannot be removed, often through no fault of their own. Indeed, my PhD focused on people with disputed identity, many of whom were detained for long periods as the authorities fought over their identity. Unlike the rest of Europe, there is no maximum period for detention in the UK, meaning that people can be detained indefinitely.

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Campsfield opened as an Immigration Removal Centre in Kidlington in 1993. Until recently, there were 216 bed spaces but now, as a result of extra beds being squeezed into increasingly overcrowded rooms, there are 276 spaces. If plans to build a new section of the centre go ahead, the figure will increase dramatically to over 560 spaces. This would make it one of the largest detention centres in the whole of Europe.



Like other centres, Campsfield resembles a prison. People are held against their will, surrounded by surveillance cameras, behind locked gates and razor wire topped fences. Campsfield has long experienced problems, with over half the detainees on hunger-strike just four months after the centre opened in 1993 and the first 'riot' occurring three months later. There have since been further hunger-strikes, escapes, disturbances and suicides. Just last year there was a major fire. Despite previous warnings, no sprinkler system had been fitted, significantly increasing the danger and destruction.

Expansion plans

The UK as a whole now has over 4,000 immigration bed spaces, double the number just six years ago. Already this year an extra 800 spaces were created as a result of the re-designation of a prison as an Immigration Removal Centre and the addition of beds at several existing centres. The plan to build a new, bigger centre at Campsfield, would create 290 additional beds.

The land for the proposed build is 'Green Belt land', meaning that there must be 'very special circumstances' for it to be used for construction. The Home Office is arguing that this stipulation is met by a need for more immigration detention space, so as to increase removals. However, as Home Office statistics demonstrate, although we detain more migrants than ever before, we remove ever fewer from our shores. Rather, people are routinely detained even when they are not at the end of the legal process and/or when they cannot be removed. This means that they are simply 'warehoused' in detention for long periods, or are needlessly detained only to be released again.

As such, detention not only damages individuals, but also fails to achieve the government's own objectives. These and other aspects of detention are currently being scrutinised by the first ever Parliamentary Inquiry on the topic.

Making your voice heard

The Campsfield plans are generating growing local opposition. In recent days the Prime Minister has received letters of concern from 21 concerned local organisations and another from over 70 senior Oxford University academics. The latter was launched by Baroness Helena Kennedy QC on 15 November outside the Radcliffe Camera.

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Individuals can also feed into the decision-making process by writing to their MPs and submitting planning objections to the Cherwell District Council. The Planning Committee's decision is likely to be made on 22nd January 2015 and submissions should be made in December 2014. The Campaign to Close Campsfield is running a workshop on 3rd December 2014 on making planning objections. Further details, including template letters to send MPs, are available on both the Campaign to Close Campsfield and Detention Forum websites. If you want to learn more about supporting people already in detention, contact Asylum Welcome.

Coming up to a general election, it is hardly surprising that immigration issues are high on the national agenda. Unlike previous elections, however, it appears as though this time, the controversial issue of immigration detention is very much at the heart of the debate.

Dr Melanie Griffiths completed a DPhil on the UK's asylum and detention system at the University of Oxford in 2014. She is currently an ESRC Future Research Leaders Fellow at the University of Bristol.

Hounga v Allen: Trojan Horse Comes to the Rescue of 'Illegal' Migrants

By Alan Bogg | 17th September 2014

In *Hounga v Allen* [2014] UKSC 47 the Supreme Court took the opportunity to overrule one of the most controversial Court of Appeal decisions on employment rights in recent times, where the Court of Appeal held that the doctrine of illegality barred the race discrimination claim of a trafficked migrant worker, Ms Hounga.

The Supreme Court reversed the Court of Appeal on the illegality point and upheld Ms Hounga's race discrimination claim. This means that 'illegal' migrants now enjoy (some) employment rights in (some) circumstances, rather than being outlaws deprived of their fundamental human rights in every circumstance. In so doing, it puts to an end a short but shameful episode in the life of the English common law. It is a result that is to be applauded. How enduring this judgment will prove to be is, however, an open question. While all of the Justices concurred in the result, Hounga offers two approaches to the illegality enquiry in race discrimination claims. Lord Wilson (with whom Lady Hale and Lord Kerr agreed) delivered a speech that was ripe with promise for a progressive development of the law on illegality in respect of employment claims. Lord Hughes (with whom Lord Carnwath agreed) delivered a speech that would have preferred a much narrower approach to the disposal of the case.

Essentially, Lord Wilson appears to suggest a three-stage approach to the determination of the illegality issue. First, was the claimant's illegality 'inextricably bound up' with the tort claim? While Lord Wilson emphasized that this enquiry could not be purged of subjective considerations, thereby deprecating approaches that purported to offer an objective causation-based analysis, he nevertheless concluded that the Court of Appeal had fallen into error in concluding that there was an inextricable link. The illegality was part of the context, the circumstances that went to constitute her vulnerability to racial abuse, rather than integral to her tort claim that she had been treated less favourably *because* of her race. Lord Hughes agreed that the 'inextricable' link between the illegality and the tort claim has not been satisfied.

Secondly, there is a need for an enquiry into the public policy basis of illegality to ascertain whether or not the reasons in favour of denying the claim are sufficiently strong. According to Lord Wilson, the overarching value in this area of the common law is the preservation of the 'integrity of the legal system', though this encompasses a range of more specific concerns: would allowing her claim permit her to profit from her own wrong? Would it permit the evasion of a criminal penalty? Would it appear to condone Ms Hounga's illegality and encourage others like her to break the law? Conversely, would denying the claim encourage other unscrupulous employers to employ and abuse migrants with irregular status through the promise of impunity? All of these reasons gave little or no support to the denial of her claim on the grounds of illegality. Ms Hounga was not profiting from her own wrong; she was not evading a criminal penalty; there was no evidence that others might be deterred by disallowing her claim (though it would seem a rather unpalatable prospect for counsel in subsequent cases to argue that since unremedied racial harassment would deter illegal migrants the claim should be barred); and it was not implausible that other employers might be attracted to employing 'illegal' migrants if it meant that they could be employed cheaply and without needing to worry about their employment rights.

Thus far, the speeches of Lord Wilson and Lord Hughes are substantially in alignment. The speeches diverge, however, on the third point. Lord Wilson suggested that public policy might sometimes *countervail* against the denial of tort claims on the basis of illegality. This is new and significant, for public policy has generally been regarded as a doctrine that *defeats* contract and tort claims. In *Hounga*, Lord Wilson drew upon international human rights norms, as developed by the ILO and the European Court of Human Rights, to conclude that Ms Hounga had been trafficked. Since it formed part of the public policy of the English common law to afford protection to the victims of trafficking, permitting illegality to operate would be an affront to that public policy. Putting it differently, we might say that the integrity of the English legal system would have been damaged if the trafficked victim in *Hounga* had forfeited her human right not to be subjected to racial discrimination. Indeed, this is precisely what had happened in the Court of Appeal decision itself.

It is tempting to react with frustration to *Hounga*. In tailoring its protection to trafficked migrants, it has regrettable exclusionary

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effects on non-trafficked but nevertheless vulnerable migrants. In countenancing the balancing of public policy reasons even in human rights claims, it may be regarded as a betrayal of the universality of human rights norms in allowing illegality to figure at all. The temptation should be resisted, however. The Supreme Court decision in *Hounga* is an example of the common law working as well as can be expected of it, within the institutional constraints of incremental adjudication. The challenge for human rights lawyers is to plot the next steps after *Hounga*. In particular, Lord Wilson's category of public policy operating *against* the defeasibility of human rights claims by illegality is a Trojan Horse. It brings international human rights law into the very breast of the English common law, and it is fraught with subversive potential. The next move is to consider which other aspects of international human rights law might impede the operation of the illegality doctrine, especially where its effects on vulnerable workers are most pernicious.

Alan Bogg, Professor of Labour Law at the University of Oxford. He is the co-author (with T Novitz) of 'Race discrimination and the doctrine of illegality' (2013) 129 LQR 12, cited at [35] of Lord Wilson's reasons in Hounga v Allen.



What Traffickers Know that the Court of Appeal Does Not

By Catherine Briddick | 11th February 2015

In *Reyes and Suryadi v Al-Malki* [2015] EWCA Civ 32 and *Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya* [2015] EWCA Civ 33 the Court of Appeal considered two cases involving domestic work and immunity, a consideration of which reveals the discriminatory and gendered premises on which the law continues to operate.

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Ms Benkharbouche, who was employed as a cook in the Sudanese embassy, brought claims in the Employment Tribunal for unfair dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998. Ms Janah, whose duties included cooking, cleaning and shopping, brought claims against the Libyan Embassy for unfair dismissal, arrears of pay, racial discrimination, harassment and breach of the Working Time Regulations 1998. In both cases the respondent sought to resist proceedings by asserting state immunity under the State Immunity Act 1978 (SIA). The issue for consideration was whether or not state immunity under the SIA was compatible with the applicant's rights under Article 6 of the European Convention Human Rights (ECHR) and Article 47 of the EU Charter. The immunity protected by the SIA is derived from the principle in international law that one state cannot sit in judgement on another. However, as paragraph 21 of the judgement states, the scope of immunities required by international law are the subject of 'great uncertainty' and the right is violated if a state adopts a rule restricting access to the courts which international law does not require. The Court of Appeal concluded that the SIA did go beyond what was required; it therefore issued a declaration of incompatibility under the Human Rights Act 1998 and disapplied sections of the SIA relevant to the claims based in EU law to enable those actions to proceed.

In contrast the Court, which heard both cases together, held that diplomatic immunity could successfully prevent Ms Reyes and Ms Suryadi from pursuing claims for racial discrimination, harassment and failure to pay the minimum wage following their trafficking by the Al-Malki's into the UK for domestic servitude. The Vienna Convention on Diplomatic Relations 1961 confers on diplomats complete immunity from civil actions except in cases that concern commercial activity carried out outside of the diplomat's official functions (Art 31(1)(c)). In a frankly breath-taking conclusion the Court of Appeal stated that although the denial of legal remedies to the trafficked women which resulted from their decision 'may appear' unfair, any 'apparent inequity' reflected a policy decision 'already made' which privileged diplomatic relations over individual rights (paragraph 77).

The debate in Reyes is constructed by the Master of Rolls, Lord Dyson (with whom Lady Justice Arden and Lord Justice Lloyd Jones agreed), to be primarily concerned with whether or not the positive obligations on states in relation to trafficking 'trump' the law on diplomatic immunity. After consideration he rightly concludes that they do not. The issue that is elided, and which is so significant, is the much narrower question of whether or not someone who traffics women to 'work' in his household is engaged in a commercial activity that is not protected by diplomatic immunity. Whilst accepting KALAYAAN's evidence that considerable sums of money are made in trafficking operations, Lord Dyson nevertheless concludes that the question is answered by looking at what that the 'employee' does, rather than at her 'remuneration' or the 'circumstances' which resulted in her 'employment' (paragraph 34).

The provision of services that are important for the proper running of an embassy cannot be judged 'incidental' when carried out in a home. The salient feature for Lord Dyson, what the employee actually does, is not changed by where she does it. The failure of the Court of Appeal to recognise what traffickers know to be the case, that women's domestic work has considerable value, commercial and otherwise, is a result of patriarchal attitudes which essentialise and devalue women's skills and experiences and which seek to keep issues that are the legitimate concern of human rights law outside its purview by relegating them to the private, domestic sphere. The effect of this judgement for domestic workers, who are subject to gendered immigration rules which prevent them from changing employers, is to facilitate and compound their exploitation and abuse.

Catherine Briddick is a DPhil Candidate in Law at St Peters', University of Oxford, a teaching assistant at the Refugee Studies Centre and Chair of Asylum Aid.

The Business of Traffic in Humans

By Marija Jovanovic | 4th May 2014

Human trafficking is a complex phenomenon touching upon different legal and policy frameworks. Being first and foremost a very serious crime, its relationship with human rights law is not as straightforward as many are quick to imply. Bringing it within the ambit of traditional human rights law, and invoking the responsibility of a State for the harm inflicted upon victims, requires engaging with the concept of positive duties. It creates a triangular relationship between a trafficker, his victim, and a State: the extent of States' positive obligations is far from clear-cut.

Importantly, human trafficking is also a business venture. By treating human beings as commodities, it generates enormous profit, with limited or no risks. Its estimated turnover is said to be more than US\$32 billion a year. However, unlike other profit-driven criminal enterprises that operate exclusively within illegal markets, human exploitation usually takes place in legitimate markets – such as agriculture, construction, or domestic service. Therefore, it is not easy to determine what role, if any, businesses have in the fight against this global scourge, and whether human rights law bears any relevance in that context. Do business enterprises have self-standing obligations arising out of human rights law? This inevitably raises a question of human rights obligations of non-State actors (the "horizontal" application of human rights law). Does a growing shift in power from the once dominant State to corporations justify a fundamental shift in responsibility for protecting human rights – effectively privatizing the enforcement of human rights laws?

The 2011 UNGDP deals with this business-human rights nexus. The Principles are structured around three pillars: the State duty

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to protect human rights; the corporate responsibility to respect human rights; and access to remedy. The second pillar appears to establish a self-standing responsibility of business enterprises to respect human rights, including their duty to act with due diligence to avoid infringing the rights of others, and to address adverse impacts of their activities. This seems a welcome, if controversial, hypothesis, given the nature and the status of the Principles. It is clear that they should not be read as creating new international law obligations. The responsibility of business enterprises to respect human rights is said to be ‘distinct from issues of legal liability and enforcement...’ Therefore, it seems premature to claim that human rights law is going through a major conceptual transformation, treating businesses as duty-bearers in their own right. In that context the following statement from the recent UK national action plan for the implementation of the UNGDP sounds overly ambitious: ‘At a time when some companies have bigger turnover than some countries’ GDP (...) we need all companies – from the biggest to the smallest – to embrace their responsibilities towards society, including respecting human rights’.

At national level, the UK Government sought to position Britain as ‘a world leader in the fight against modern slavery’ by introducing a Modern Slavery Bill. However, whilst the Report of the Modern Slavery Bill Evidence Review acknowledged a crucial role for business, the Draft Modern Slavery Bill published last December disappointingly commits only to ‘continue to work with business on a voluntary basis’. Following pre-legislative scrutiny of the Draft Bill, the Joint Committee published a Report offering an amended Bill seeking to correct perceived shortcomings of the Government’s draft. Nevertheless, it merely requires relevant companies to include modern slavery in their annual strategic reports. Arguably, the desire not to create unduly burdensome requirements for businesses seems to have prevented introducing legislation with more teeth.

Developments across the Atlantic seem more promising. The 2010 California Transparency in Supply Chains Act – the first of its kind – requires retailers and manufacturers doing business in California, with annual revenues of over US \$100 million, to disclose information about their efforts to eradicate slavery and human trafficking from their direct supply chains. Also, several recent initiatives at Federal level have tightened anti-trafficking laws directed at businesses, helping those that contract with the US government to enforce existing anti-trafficking policy and to clarify steps that federal contractors must take to fully comply with anti-trafficking measures. These initiatives, however, are far from comprehensive, and, it is debatable whether they stem from genuine human rights considerations, or rather concerns with maintaining a good image and business reputation.

Evidently, the nature and scope of obligations placed on business still depend solely on national legislation. These duties are mainly voluntary, lacking any structured enforcement mechanism or a clear idea of their conceptual and normative grounding.

Marija Jovanovic is a DPhil student at the Faculty of Law, University of Oxford.



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Judicial Review of Migrant Detention in Europe: In Search of Effectiveness and Speediness

By Nikolaos Sitaropoulos | 27th January 2014

Detention has been highlighted in recent years by a number of international and non-governmental organisations as an ineffective and inefficient tool of migration control employed by a large number of states. In 2013, the European Court of Human Rights continued to find violations of Article 5(4) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") by various state parties and even rendered a quasi-pilot judgment in the case of *Suso Musa v. Malta* [2013] ECHR 721.

The grounds of these violations related to the lack of an effective judicial review mechanism, and, in the majority of the cases, to national procedures that did not respect the speediness requirement of Article 5(4) ECHR. The possibility of detention for a maximum period of 18 months in EU member states, established by Article 15 of the 'Return Directive' in 2008, has rendered even more evident the need for an effective, speedy judicial review in immigration and asylum cases.

Article 5(4) ECHR entitles a detainee to institute proceedings challenging the procedural and substantive conditions upon which his deprivation of liberty is based. The general principles applied by the Court in this regard are set out in *M.A. v. Cyprus* [2013] ECHR 717, as follows:

- Article 5(4) does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for "lawful" detention.
- The remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of his detention capable of leading, where appropriate, to his release. The accessibility of a remedy implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.
- The existence of the remedy required by Article 5(4) must be sufficiently certain, not only in theory, but also in practice.
- The requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances.
- Under Article 5(4), all detainees also have a right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of their detention and to its termination if it proves unlawful. In this context, the Court has laid down strict standards. For example, in the cases of *Sarban v. Moldova* No. 3456/05, *Kadem v. Malta* [2003] ECHR 19 and *Rehbock v. Slovenia* [2000] ECHR 636, the Court concluded that time periods of twenty-one, seventeen and twenty-three days, respectively, were excessive.
- Although Article 5(4) does not require the existence of bi-level judicial review, in cases where it exists, both levels should meet the speediness requirement (*Djalti v. Bulgaria* No. 31206/05, para. 64).

Of importance in this context is legal aid. Although the ECHR does not require provision of free legal aid in the context of detention proceedings, if legal representation is required under domestic law, the non-existence of legal aid raises issues of compatibility with Article 5(4) (*Suso Musa v. Malta*, para. 61). In the case of *Suso Musa*, the Strasbourg Court took an exceptional step and adopted a quasi-pilot judgment, indicating to Malta (in the non-operative part of the judgment (para. 119 et seq.)) the necessity of general measures at the national level establishing, inter alia, a judicial- character mechanism providing for speedy and fair judicial review of migrant detention. What actually prompted the Court to act in this manner was its conclusion that the problems detected in the case could give rise to numerous other well-founded applications that would excessively burden the Court's docket. The Court had already found a similar violation by Malta in 2010, in another case concerning migrant detention, *Louled Massoud v Malta* No. 24340/08.

The above guidelines provided by the Strasbourg Court's case law are significant, especially in a period when deprivation of migrants', including asylum seekers', liberty upon arrival or in view of forced return from Europe has been trivialised.

Nikolaos Sitaropoulos is the Head of Division and Deputy to the Director at the Office of the Council of Europe Commissioner for Human Rights.

Europol and the Fight Against Human Trafficking

By Owain Johnstone | 29th July 2014

On Tuesday 24th June 2014 the Human Trafficking Discussion Group (under the umbrella of the Oxford Migration Studies Society) was delighted to host a talk by Sergio D'Orsi of Europol, speaking about that organisation's important work on human trafficking.

Sergio spoke engagingly about both Europol's general institutional role and capacities and its specific focus on human trafficking within the organisation's broader mandate.

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If you are not familiar with Europol's work, it can best be described as a coordination and liaison mechanism for European police forces – and also a mechanism for liaising with non-European forces when necessary. While Europol itself does not possess any executive powers, it can help to support and coordinate policing activity by Member States whenever this involves cross-border crime of some kind. As such, Europol is a key body when it comes to creating a coordinated and effective European policing response to cross-border threats. It offers a means of communication between different countries' operatives as well as a large intelligence database.



A large part of Europol's mandate focuses on organised crime, within which is situated its human trafficking team, of which Sergio is a part. That team has an important role to play given the increasingly prevalent problem of human trafficking in Europe. They are also a source of expertise on trafficking, able as they are to draw on and collate experience and intelligence from across Europe and elsewhere. Sergio noted a number of contemporary trends in trafficking drawn from this knowledge, including an increase in levels of intra-European human trafficking, the growing flexibility of organised criminal groups to react to novel laws and enforcement mechanisms, and an increased demand for illegal labour following the economic crisis. In other words, trafficking is a growing problem – in Europe as much as anywhere.

One of the aspects of Sergio's talk that particularly stood out was his emphasis on the variability of human trafficking. Criminal groups can be small or large, routes are rarely constant (in contrast to people smuggling) and business models can be sophisticated and rapidly changing – the internet has become a particularly significant influence on trafficking activity, permitting traffickers to advertise, communicate, transfer money and take 'bookings' for anything from escort services to prostitution, and all with relative anonymity.

Yet despite this flexibility and variability, Sergio also emphasised the need to remember that traffickers and their victims are often of the same nationality and even come from the same local communities. One implication of this is that victims might find themselves abroad (in the UK, for example), where the only people who speak their language are their traffickers. A related finding is that organised criminal groups engaged in trafficking often have close links with immigrant communities in destination countries.

The overall impression that Sergio left us with was of human trafficking as a business – and like many businesses it is made up of a wide variety of actors and often linked to local contexts. He also noted the consequent importance of the bottom line, meaning that from an enforcement perspective it becomes even more important to address the financial aspects of trafficking.

Human trafficking, then, is a complex, multifaceted and rapidly evolving phenomenon, which makes the role of a coordinating and intelligence sharing body like Europol particularly crucial. If we are to tackle trafficking we must get to grips with its complexity and recognise that no country is able to address the issue alone.

Owain Johnstone is a DPhil Candidate at the Centre for Socio-Legal Studies, Oxford University.

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High Time for Europe to Offer Temporary Protection to Refugees from Syria?

By Cynthia Orchard and Dawn Chatty | 27th October 2014

Approximately 3 million people have fled Syria due to the armed conflict. About 96% of the refugees remain in Lebanon, Turkey, Jordan, Iraq, and Egypt. By July 2014, the number of Syrian asylum applicants in Europe reached 123,600, about 4% of the total. With such high numbers of displaced persons so close to European borders, and with large numbers of Syrian refugees in Europe, the activation of a coordinated temporary protection regime in Europe is overdue. The recent deaths of hundreds of migrants in the Mediterranean Sea, some of them Syrian refugees, illustrate the urgency of expanding safe, legal routes into Europe for refugees.



Following the uncoordinated response to the refugee crisis generated by conflict in the former Yugoslavia in the 1990s, in 2001, the European Council issued a Temporary Protection Directive (2001/55/EC). It provides a framework and minimum standards for responses to the mass displacement of persons unable to return to their country of origin (for example, due to armed conflict). Under Article 2(d), the Directive can apply to a spontaneous movement or *an assisted evacuation* into Europe of a large number of people from a particular country or region; and under Article 8(3), States should facilitate the entry of eligible persons, including by the *issuance of visas*.

The Directive has never been activated but could be part of a reasonable response to the Syrian refugee crisis. It would work something like this: the European Council would designate the group for whom temporary protection is required (in this case, people who have fled Syria due to the armed conflict). Then participating states would facilitate the entry and temporary protection of people from the designated group; and the designation also would apply to members of the group who entered Europe independently. People who have committed serious crimes would be excluded from protection. Beneficiaries would be granted temporary protection for one year (renewable if the circumstances in Syria had not substantially improved). The group designation could be withdrawn when the circumstances in Syria permitted displaced persons to return home safely or on the European Council's decision.

This temporary protection regime would be similar in some ways to existing refugee resettlement and humanitarian admission programmes, but offers several advantages. Temporary protection does not require a status determination procedure (other than to establish membership in the designated group), as is normally necessary for refugee status, which would reduce the time and resources needed to process beneficiaries. In addition, the programme would be coordinated across Europe, promoting responsibility-sharing amongst European countries. Finally, the programme would offer protection to significantly more people.

Temporary protection should not take the place of asylum. As confirmed in the Directive (Paragraph (10) and Articles 4 and 19),

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persons granted temporary protection should be eligible for refugee status if they meet the criteria under applicable law (though States could oblige beneficiaries to wait until the end of their temporary protection before applying for asylum). Permanent asylum is necessary for some who would be persecuted in their country of origin even if a sustainable peace were achieved and many people who previously required international protection could return home in safety. Permanent asylum also is necessary for some victims of severe trauma who are receiving treatment in their new country. It is likely, however, that many Syrians will be able to return to their homeland once the conflict ends and the country stabilises.

Temporary protection should not be the only way for Syrians to enter Europe legally and safely. It should be implemented simultaneously with other measures, including permanent resettlement, humanitarian admission, family reunification, private sponsorships, student scholarships, academic fellowships, and employment and training programmes.

Although not a panacea, temporary protection could be a very important part of Europe's response to the Syrian refugee crisis. The situation in the countries neighbouring Syria is so dire that many refugees are willing to risk their lives to seek refuge in Europe. European leaders should not wait for more tragedies to occur before significantly expanding safe, legal ways for Syrian refugees to enter Europe.

Cynthia Orchard is a US-qualified attorney currently working as a consultant researcher and editor with BADIL (the Resource Center for Palestinian Residency and Refugee Rights). She done legal advocacy for refugees in the UK and US and recently completed a Masters in international human rights law at the University of Oxford.

Dawn Chatty is Professor of Anthropology and Forced Migration at the University of Oxford, and former Director of the Refugee Studies Centre in the Department of International Development.

Migrant 'Push Backs' at Sea are Prohibited 'Collective Expulsions'

By Nikolaos Sitaropoulos | 8th February 2014

In the early hours of 20 January 2014, a boat coming from Turkey carrying twenty-seven Afghan and Syrian migrants was intercepted by the Greek coast guard near the isle of Farmakonisi, in the southeast Aegean Sea, and later capsized. Eight migrant children and three migrant women drowned. While this operation was described by the Greek authorities as a rescue, the migrant survivors adamantly alleged that it was, in fact, a 'push back.' 'Push back' is a widely-used term that has overshadowed the legal term, 'collective expulsion,' the prohibition of which was expressly provided for in 1963 in the one-sentence, oft-forgotten, Article 4 of Protocol No. 4 ('Article 4-4') to the European Convention on Human Rights ('ECHR').

In the case of *Becker v. Denmark* [1962] ECHR 1, the former European Commission of Human Rights defined collective expulsion as any measure 'compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.' The purpose of Article 4-4 is to enable migrants to contest the expulsion measure, thereby guarding against state arbitrariness and safeguarding fairness in forced return procedures.

Under the Strasbourg Court's established case law, the fact that members of a group of migrants are subject to similar, individual expulsion decisions does not automatically mean that there has been a collective expulsion, insofar as each migrant is given the opportunity to argue against this measure to the competent authorities on an individual basis.

Moreover, there is no violation of Article 4-4 if the lack of an expulsion decision made on an individual basis is the consequence of applicants' own 'culpable conduct'. For example, in *Berisha and Haljiti v. "the former Yugoslav Republic of Macedonia,"* No. 18670/03 the applicants had pursued a joint asylum procedure and thus received a single common decision. Another example is the case of *Dritsas v. Italy* No. 2344/02, in which the applicants had refused to show their identity papers to the police and as a result, the latter had been unable to issue expulsion orders to the applicants on an individual basis.

The locus classicus case involving interception at sea is *Hirsi Jamaa and others v. Italy* No. 27765/09. This case concerned the 2009 interception and forced return to Libya of a large group of African migrants by Italian navy ships in the Mediterranean, based upon relevant bilateral agreements between Italy and Libya. The Court in this case noted that Article 4-4 is applicable not only to migrants lawfully within a state's territory but also to all foreign nationals and stateless individuals who pass through a country or reside in it. The Court found Italy to be in violation of the above provision on the grounds that the migrants' transfer to Libya was carried out without any examination of their individual situations, there was no identification procedure conducted by the Italian authorities, and the staff aboard the transporting ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.

State responsibility in this context also arises under Article 2 ECHR (right to life), as demonstrated in another, earlier Strasbourg Court case, *Xhavara and fifteen others v. Italy and Albania* No. 39473/98. This case concerned the interception in 1997 of a group

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of Albanian irregular migrants in the Mediterranean by an Italian navy ship. Fifty-eight migrants drowned as a result. The Court held that, given that the fatal accident was caused by an Italian navy ship, the Italian authorities were under an obligation, pursuant to Article 2 ECHR, to carry out an investigation that was 'official, effective, independent and public.' On this point, the Court concluded that the criminal investigation initiated by the Italian authorities had provided adequate safeguards with respect to the effectiveness and independence requirements.

The tragic migrant interception operation in the Aegean Sea last January is part of the long list of tragedies in the Mediterranean and a consequence of long-standing European migration policies and practices that make migrants' lawful entry into Europe overly difficult. Although European states have no legal obligation to change their policies, they are nonetheless under a clear legal obligation to provide adequate redress to migrants who have undergone such painful odysseys due to 'push back' or rescue attempts.

Nikolaos Sitaropoulos is the Head of Division and Deputy to the Director at the Office of the Council of Europe Commissioner for Human Rights.

United Nations Human Rights Council: Commission of Inquiry into Human Rights Abuses in the Democratic People's Republic of Korea

By James Lewis | 3rd April 2014

On 26 March 2014 the United Nations Human Rights Council ("HRC") passed a Resolution 'condemning in the strongest terms' the continuing violation of human rights and calling for the referral of a wide catalogue of human rights abuses by the Democratic Republic of Korea ("DPRK") to the International Criminal Court ("ICC") for investigation ("Resolution"). The Resolution follows an extraordinarily comprehensive report published by the Commission for Inquiry on Human Rights Abuses in the DPRK ("Commission") which included extensive witness testimony on the systematic abuse of women and children.



The Commission was established on 21 March 2013 by the HRC to investigate human rights violations in the DPRK and reach a recommendation on whether the situation in the DPRK should be submitted to the ICC for investigation on charges of crimes against humanity.

An unprecedented amount of evidence was compiled over a year-long investigation, involving over 80 witnesses providing testimony during public hearings held in London, Washington D.C., Seoul, and Tokyo. This led to the Commission's formal conclusion (delivered on 17 March 2014) that it had found "systematic, widespread and grave human rights violations occurring in the DPRK" on a scale that reveals "a totalitarian state that does not have any parallel in the contemporary world".

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Of particular importance is the Commission's Report of 7 February 2014 ("Report"), containing a comprehensive documentation of the DPRK's human rights abuses using an unparalleled volume of new witness testimony. This new testimony covers not only the DPRK's well-documented abuses including arbitrary detention and execution, forced labour, and political oppression, but also in particular, the DPRK's systematic abuse of women and children.

The Report details, using primary accounts from both victims and humanitarian workers, the widespread trafficking of women for prostitution, forced marriages, and forced concubinage in the People's Republic of China ("PRC"). Women are targeted by brokers, who offer them food or employment, then smuggle them across the PRC border for sale. Several women testified that victims are sometimes unaware that they will be leaving the DPRK. Brokers offer them false promises of employment elsewhere within the DPRK, but instead traffic them into the PRC. One victim stated that she was sold in 2003 by traffickers for 8,000 won (US\$ 7.50).

A woman is typically sold at least twice before she is finally sold into the sex industry or to a man for marriage. Trafficked women are not registered in the PRC and neither are the 'marriages' nor any children born. This is because registration and documentation would risk exposing the women to the PRC authorities who routinely forcibly repatriate them to the DPRK. Thus, although the children born to Chinese fathers could claim nationality and State education under PRC law, they are often unable to enjoy any benefits as their registration would risk exposing their mothers. As a result of being undocumented, trafficked women routinely face rape, violence, and death at the hands of their husbands, pimps, or others who exploit their status.

Pregnant women repatriated back to the DPRK face forced abortions as required by a DPRK eugenic policy of genetic purity. These brutal abortions are carried out in holding or detention and interrogation centres. Descriptions include repeated physical trauma to induce miscarriages, insertion of chemicals or drugs into the bloodstream, or forcible extraction of the foetus. No medical assistance is provided to any of the victims who almost inevitably experience permanent organ damage or death from blood loss or infection. It is also common practice for prison guards to drown or suffocate infants born inside prisons or force the mothers to kill their own infants.

These testimonies are only examples of the brutal abuses committed particularly against women and infants detailed in the Report. Given the compelling evidence of the widespread and categorical abuse of human rights in the DPRK, it is unsurprising that the HRC passed its recent Resolution on such strong terms. The Resolution was adopted by a vote of 30 to 6, with 11 abstentions. However, as the referral to the ICC will need to come from the Security Council, such a referral will likely be blocked by Russia and China who both voted against the Resolution.

James Lewis is a solicitor at Pinsent Masons and holds both a LLB and MSc from King's College London.

Navigating the Turkish Legal Regime: Syrian Refugees in Istanbul

By Stanislava Topouzova | 3rd May 2014

Between March 21st and March 28th, a group of Oxford MSc students from the Department of International Development travelled to Istanbul to conduct fieldwork for a variety of migration-related questions. They met with advisors, specialists, and representatives from the International Organization for Migration (IOM), the Helsinki Citizen's Assembly (HCA), the Ministry of Interior, and the Tarlabasi Community Centre among others. This article was informed by those meetings.

Since March 2011, according to the United Nations High Commissioner for Refugees (UNHCR), over one million Syrians have arrived in Turkey due to the ongoing conflict in Syria. The Turkish Prime Ministry Disaster and Emergency Management Presidency reported that over 900 000 Syrians have arrived in Turkey since the conflict began.

Many Syrians who enter Turkey at the southern border are housed, often temporarily, in one of 21 UNHCR camps that have been established at the border. From this point of entry, many Syrians embark on yet another journey: one through the Turkish legal system in search for official "temporary protection" status, modelled after the European Union Directive on Temporary Protection.

The primary law concerning refugees in Turkey, the Law on Foreigners and International Protection (No. 6458, 04/04/2013), defines a refugee as: "a person who as a result of events occurring in European countries and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality...". In effect, this law maintains the "geographical boundaries" outlined in the Geneva Convention on the Status of Refugees and indicates that the Turkish government grants refugee status and protections only to persons from Europe fleeing persecution.

According to this law, any other individual who enters Turkey due to a well-founded fear of persecution can be granted a "conditional refugee status" after a determination procedure and an evaluation of their application. Ordinarily, applications are evaluated by UNHCR staff at one of many evaluations centres across the country. After completing interviews and evaluations, UNHCR staff determine if a case for asylum is "genuine" and whether the applicant qualifies for resettlement in a third country,

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typically Canada, the United States, Australia, or countries in Europe.

The resettlement process is protracted and arduous, as the law permits the Directorate General to oblige conditional refugees to reside, and register, in a particular province or city anywhere in the country while waiting for third-country resettlement. Thus, many conditional refugees awaiting third-country resettlement are scattered in villages and towns across the country while waiting to be resettled.

When the application of a conditional refugee is accepted by a third-country government and has successfully cleared all security checks, the International Organization for Migration (IOM) in Turkey acts as one of the primary vehicles for facilitating the resettlement process. The organization is specifically charged with the task of assisting refugees with the transition into the country of settlement. Refugees have to complete “cultural adaptation” programs and basic language training as preparation for entry into the country of resettlement.

Yet, for the majority of Syrians in Turkey, third-country resettlement is not an option under the “temporary protections” policy. Most Syrians in Turkey continue to live outside of the formally-established UNHCR camps and to wait in local towns, villages, and cities.

As the Turkish government continues to amend its operational framework and approach to the evolving situation with its Syrian border, the Parliament has promulgated, in the 2013 Law on Foreigners and International Protection, a set of more robust support provisions for asylum-seekers in Turkey. Likewise, the Turkish Government has established a new civil society-based Directorate General for Migration Management to eventually take over most refugee coordination operations from the UNHCR.

Despite these developments in emergency planning and legislation, many challenges remain for Syrian refugees in Turkey. Ultimately, these challenges are not limited to legalities and logistics. Each new statistical figure and newly-elaborated legal measure serves as a signpost of the deeper challenges that Syrian refugees face in Turkey: challenges about being and belonging, finding a community and stability, and ultimately – rebuilding.

Stanislava (Stacy) Topouzova is presently completing her MSc at the Department of International Development at the University of Oxford, working on a legal ethnography of labour restrictions against Bulgarians and Romanians in the U.K. She will resume DPhil studies at the University of Oxford in 2014.



Palestinian Refugees in Syria: A Primer For Advocacy

By Nanjala Nyabola | 25th January 2014

In the face of crisis, it is very easy for those of us in neither government nor humanitarian work to switch off the news. Certainly, this seems to be the case with Syria, where the ongoing civil war has set off one of the largest humanitarian crises in recent history.

To date, over 2 million Syrian refugees have fled into neighbouring countries. Millions more internally displaced persons within the

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country remain unaccounted for. And the nearly half a million Palestinian refugees that had sought protection in Syria prior to the war exist in a violent and increasingly detrimental legal limbo.

The situation in the Yarmouk refugee camp, an informal camp in the outskirts of Damascus hosting the largest population of Palestinian refugees in Syria, is a painful example of what happens when specialised protections for protected groups are subsumed within a larger narrative. In 2012 there were over 148,000 Palestinian refugees registered with UNRWA residing in Yarmouk. These communities relied on humanitarian groups to supplement basic services provided by the government. Although thousands have fled, many remain owing to fighting between the government and combatant groups sheltering in the camp; itself a violation of humanitarian law.

Currently, Yarmouk camp is under siege, and food and medical aid is unable to get through. Last week, Al Jazeera broadcasted a distressing report of refugees eating animal feed and mothers dying in labour owing to malnutrition. The president of the International Committee of the Red Cross was also recently in Syria to urge the Syrian government to grant humanitarian actors access.

Humanitarian law provides strong protections for Palestinian refugees that must be enforced, and advocacy is needed to push for that, particularly as political leaders from both sides meet in Geneva later this month for peace talks. Syria is a party to the four main Geneva Conventions, and they are at the very minimum bound by Common Article 3 of the Conventions to protect the humanitarian rights of civilians and non-combatants in non-international conflicts. This article creates an active duty to treat those not directly involved in the conflict humanely and non-discriminatorily, and urges parties to the conflict to allow the ICRC or another impartial humanitarian body access to civilians to provide key medical and other services.

These requirements must also be read in light of a subsequent provision in Article 3 that urges parties to the conflict to give effect to other provisions of the Geneva Conventions, e.g. those that protect civilians from inhumane and degrading treatment. Permitting humanitarian agencies access to Palestinian refugees in Yarmouk is the only way parties to the Syrian conflict can faithfully satisfy their obligations under the Geneva Convention.

Further, the Yarmouk situation is in violation of fundamental guarantees of human rights law, and refugee law as *lex specialis* for refugees as protected persons. Significantly, the de facto embargo in Yarmouk is a violation of refugees' right to movement (ICCPR Article 12: Refugee Convention Article 28) and undermines Syria's commitment to cooperate with UNRWA to protect Palestinian refugees.

Recall that there is practically nowhere for Palestinian refugees to return to. Return to Israel or Palestine would be inconsistent with the refugee law requirement not to return individuals to places where they face a risk of persecution. Many Palestinian refugees are currently in Jordan, Lebanon, Iraq and Turkey, but the demographic and economic pressures on these countries are immense. Burden sharing by third countries is therefore necessary – by offering third-country resettlement for Palestinian refugees or by significantly increasing financial support to surrounding countries hosting refugees.

With this baseline knowledge, any individual should be able to advocate for the protection of Palestinian refugees in or from Syria. Various methods of doing so are possible, such as calling on national governments to urge continued financial support for the ICRC, UNRWA, UNICEF, the Syrian Red Crescent and other organisations on the ground in Syria. An increased awareness of the situation facing refugees in Syria, particularly Palestinian refugees whose situation grows more precarious, will ensure that their plight is not ignored.

Nanjala Nyabola is a political analyst and writer currently based at Harvard Law School.

Implementation of Tripartite Agreement on Hold

By Brid Ni Ghraíne | 1st June 2014

As host to the largest Somali refugee population in the world, it is little wonder that Kenya's shoulders have grown weary of carrying a burden which, in terms of numbers, falls just short of the half million mark.

Little wonder too is the desire of many Somali refugees to return to their country of origin. Many have spent over 20 years in Kenyan refugee camps after the collapse of the Somali government in 1991. Indeed, amidst reports circulating that between 30,000-80,000 refugees had returned voluntarily to Somalia in 2013, the time was ripe in November of last year to conclude an agreement to facilitate further returns. However, the implementation of this agreement reached a sudden halt in the last few days following the 27 May boycotting by the Somali Government of tripartite talks with Kenya and the United Nations High Commissioner for Refugees (UNHCR).

The Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia,

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and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 2013 was signed in 10 November 2013 and was welcomed by NGOs, UNHCR, and various stakeholders as representing an important step in the development of durable solutions for Somali refugees. The Tripartite Agreement has been carefully drafted so that the option of returning refugees to Somalia is not treated as an alternative to asylum. Return can only be carried out in specific circumstances, as it does not entail the cessation of refugee status and therefore there still exists insufficient protection from persecution in the country of origin.

Thus the principle of voluntary return and the right to return in safety and dignity form the backbone of the Tripartite Agreement. The Preamble of the Agreement also reaffirms the prohibition of *refoulement*, which protects refugees from being sent to places where their lives or freedoms are in danger. Kenya and Somalia are bound by this principle as States Parties to the 1951 Convention Relating to the Status of Refugees and Kenya is a State Party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which also prohibits *refoulement*.

Voluntary repatriation has not, however, been the practice of Kenya in the aftermath of the conclusion of the Tripartite Agreement. In April 2014, Kenya launched a massive security crackdown on Somali refugees following terrorist attacks in several areas, culminating in the forced deportation of 359 refugees. As various NGOs have informed us, the current situation in Somalia is not conducive to the mass return of refugees and only a few parts of Somalia are safe for return. Unsurprisingly, therefore, both

Amnesty International and the UNHCR have condemned these acts as a breach of international law. The Somali government has responded by refusing to attend a meeting concerning the Tripartite Agreement, which was due to take place on 27 May. According to the Somali government:

“As we are concerned about the plight of Somali refugees and the unlawful activities committed by the Kenyan security forces against the refugees of Somalia in Kenya, we cannot attend such meeting.”

The launch of a 12-member Tripartite Commission to oversee the gradual and voluntary repatriation process has now been suspended. It remains to be seen how the acts of the Kenyan and Somali authorities will impact the future of the Tripartite Agreement before its implementation has even begun. It is also worrying that the Tripartite Agreement can be terminated by either party at six months' notice, and that at the time of writing, the parties to the Agreement have not engaged in dialogue to overcome this first but highly significant obstacle to implementation.

Brid Ní Ghráinne is completing a DPhil at the Law Faculty, University of Oxford. She holds an LLM in Public International Law from Universiteit Leiden, the Netherlands, and a BCL (International) from the National University of Ireland, Galway.

Angel: Afro-Honduran Migrant Tortured and Imprisoned in Mexico

By Denise Gonzalez | 13th August 2014

Imagine that you are a father of two in Honduras and are in desperate need of a job allowing you to pay for medical treatment for your seven-year-old son, who has been diagnosed with cancer. In your home country, you are unable to find meaningful employment opportunities, so your only hope of saving your son's life entails risking your own by crossing Guatemala and then Mexico as an undocumented migrant with the hope of reaching the United States of America.

But instead of crossing the US border, you are betrayed by a human smuggler and arbitrarily detained by police, even though you have committed no crime. You end up in a high-security prison, falsely accused of organized crime and other drug-related crimes for which you could be sentenced to up to 60 years of prison time. Meanwhile, the son whose life you hoped to save dies while you are in prison. That is the story of Angel Amilcar, an Afro-Honduran migrant and highly-recognized human rights defender who, after a 2-month journey across Guatemala and Mexico in 2009, was arbitrarily detained in the northern Mexican border city of Tijuana, state of Baja California, and still awaits the end of his trial.

Mexico is a country of transit for thousands of undocumented migrants who travel to the United States in search of job opportunities and, ultimately, to increase the odds of survival for their families. However, each migrant's prospects of reaching Mexico's northern border are bleak, as Mexico constitutes a virtual graveyard for migrants and their dreams of a better life. In December 2010, Mexico City-based NGO "Miguel Agustín Pro Juárez Human Rights Centre" (Centre Prodh) and the Washington Office on Latin America (WOLA) published a report entitled "A Dangerous Journey through Mexico: Human Rights Violations against Migrants in Transit", which analysed how tens of thousands of migrants are systematically extorted, sexually abused, and/or kidnapped while they travel through Mexico. Amnesty International also documented this humanitarian tragedy through its 2010 report "Invisible Victims: Migrants on the Move in Mexico". The chapter on Mexico in Human Rights Watch's annual World Report has consistently included a section denouncing the grave abuses committed against migrants.

Angel's case shows that in Mexico, migrants are potential victims of all kinds of human rights violations, including false incrimination

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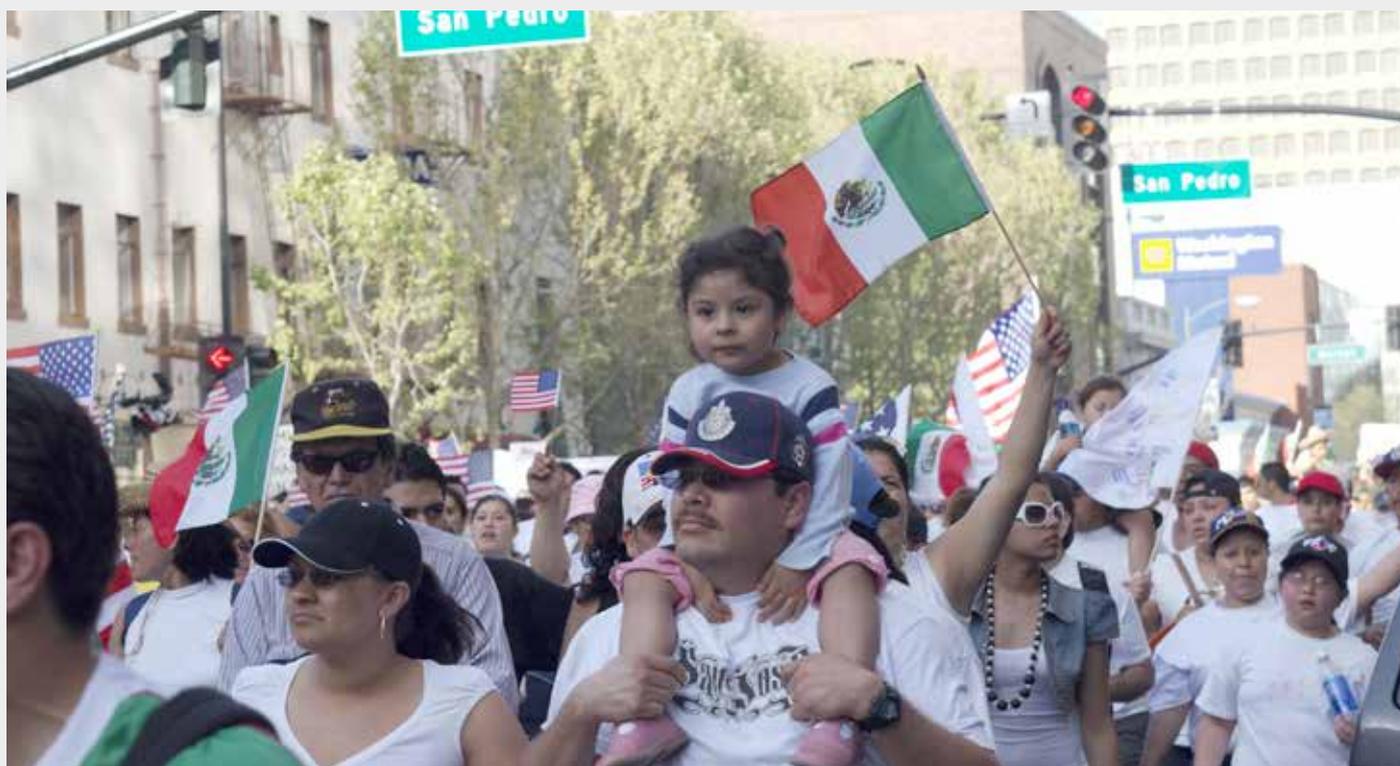
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and unfair imprisonment. According to a report to be published in the coming weeks by Centre Prodh, between May and October 2013 there were 1,219 Central Americans imprisoned in Mexican jails – who almost certainly remain in prison to date – accused of supposed crimes including homicide, theft, organized crime, illegal possession of weapons, and drug-related crimes. These cases raise serious concerns in light of both Angel's case and the systematic abuses against migrants in Mexico, coupled with the well-known structural deficiencies of the Mexican justice system, historically characterized by a presumption of guilt that leads to the imprisonment of countless innocent people.

Angel was detained during a police raid on a house to which he had been brought under threat by the human smuggler who falsely promised to help him cross the border. But instead of being treated as a victim, Angel was arrested, insulted and seriously discriminated against on the grounds of his ethnicity, tortured by the police and the military, forced to sign a false statement, exhibited before the media as a criminal, and prosecuted for crimes he did not commit. After documenting the case and concluding that Angel was accused and imprisoned as a result of discrimination due to his ethnicity, Amnesty International named him a Prisoner of Conscience on July 22, 2014.

In the coming weeks, a federal court will issue a judgment on Angel's case. However, before that happens, the federal prosecutor will have one last opportunity to drop the charges. Now, more than ever, Angel needs all the support he can get to regain his freedom.

Denise González Núñez is a human rights advocate at the Miguel Agustín Pro Human Rights Centre and graduated Master of Studies in International Human Rights Law from the University of Oxford.



Providing Syrian Survivors of Torture Access to Rehabilitation Services

By Annie Sovcik | 13th October 2014

Mental health and other rehabilitation services can be key to restoring basic functioning and facilitate resilience and positive coping strategies for refugee survivors of torture.

In the summer of 2012, "Ibrahim" was arrested at a security checkpoint in Damascus. For the next 20 days, he was repeatedly beaten unconscious, hung from the ceiling and kicked while being interrogated. When he was released, "Ibrahim" found he no longer had a home to return to – during his time away, his house and neighborhood had been completely destroyed. Although his wife and young children escaped, the life the family had known was over. The sound of explosives, sight of snipers, uncertainty of forced displacement, and hardship of extreme poverty became their new reality.

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As civil war continues to ravage Syria, this family's story is hardly unique. The numbers are staggering: over 3 million Syrians are registered as refugees and another 6.5 million are internally displaced. Over 50% of forcibly displaced Syrians are children.

Beyond the numbers are horrifying reports of torture, targeting of civilians, rape, kidnappings, starvation and massacres. In addition to being one of the worst humanitarian crises of our time, the events in Syria have unfolded into one of the most egregious human rights atrocities the world has ever witnessed. At our clinics in Jordan, staff at the Center for Victims of Torture (CVT) providing mental health counseling and physiotherapy services to Syrian survivors of torture and severe war atrocities have heard hundreds of stories of widespread and "industrial-style" torture that are consistent with documentation by the United Nations, other human rights organizations, and a collection of photographs smuggled out of Syria that provide evidence of the "systematic killing" and torture of about 11,000 detainees. CVT's torture survivor clients include a growing number of children and adolescents who have themselves been abducted for weeks or months and beaten, sexually assaulted, held in isolation, deprived of food, water and otherwise tortured.

Recognizing the destructive effects of torture, Article 14 of the U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT") prescribes that survivors should have access to redress, including rehabilitation services. CAT Committee General Comment 3 explains, "In order to fulfill its obligations to provide a victim of torture or ill-treatment with the means for as full rehabilitation as possible, each State party should adopt a long-term, integrated approach and ensure that specialist services for victims of torture or ill-treatment are available, appropriate and readily accessible."

As described in CVT's recent article on the mental health of Syrian refugees published in the *Forced Migration Review*, studies have found a strong association between exposure to instances of trauma and mental health symptoms. Daily stressors caused by conflict and displacement, such as inadequate housing, unemployment and changes in family structure may worsen symptoms. These problems affect adults and children directly, and indirectly, by affecting parent's relationships with their children. They impact social interactions, exacerbate feelings of isolation and separation from community supports. They have a direct impact on physical health, resulting in problems with functioning, including self-neglect, decreased participation in daily activities, and decreased capacity to care for children.

Mental health and other rehabilitation services can be key to restoring basic functioning and facilitate resilience and positive coping strategies for refugee survivors of torture and their families. Recognizing this, donor countries seeking to support survivors of torture should contribute – or increase their contributions – to the United Nations Voluntary Fund for Victims of Torture, which provides grants to organizations that offer psychological, medical and social assistance, legal aid and financial support to survivors

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of torture. Overall, donor and host states, as well as the United Nations High Commissioner for Refugees, should elevate the prioritization of mental health and psychosocial support services as an integral component of the overall strategy on responding to the Syrian refugee crises.

Annie Sovcik is the Director of the Washington Office at the Center for Victims of Torture (CVT). CVT provides healing services to survivors of torture and severe war atrocities at its clinics in the United States, Jordan, Kenya and Ethiopia and engages in training and capacity building initiatives worldwide.

The Unified Screening Mechanism: Hong Kong to Assess Refugee Claims Alongside Torture Claims

By Lillian Li | 20th November 2014

The UNHCR previously had the role of assessing and determining refugee claims (“persecution claims”) in Hong Kong in accordance with Art. 33 of the Convention Relating to the Status of Refugees (1951) (“Refugee Convention”). The UNHCR has now ceased its refugee screening mechanism and has implemented the ‘Unified Screening Mechanism’ (“USM”) in response to the Court of Final Appeal’s ruling in the case of *C v the Director of Immigration* FACV 18-20/2011.

The USM officially commenced on 3 March 2014 and the Immigration Department is now responsible for assessing and determining both torture and persecution claims under one integrated system. All potential claimants may now bring a claim either on the basis of torture, persecution, or both.

A USM claimant lodging a persecution claim must show the following:

- he/she has a well-founded fear of being persecuted on account of one or more grounds of race, religion, nationality, membership of a particular social group or political opinion,
- he/she is outside his/her country of nationality and is unable, or, owing to such a fear, unwilling to avail himself/herself of the protection of that country; and
- his/her life or freedom would be threatened on account of his/her race, religion, membership of a particular social group or political opinion should he/she be expelled from Hong Kong or returned to another country where the applicant has made a persecution claim.

These five grounds (*in bold*) are the same as those stated in Art.33 of the Refugee Convention. However, the Government has confirmed its position that it will not ratify the Refugee Convention or its 1967 Protocol and that the ruling in *C v the Director of Immigration* does not compel it to do so.

All USM claimants are entitled to receive publicly funded legal assistance from lawyers who are part of the Duty Lawyer Service (which has been providing legal assistance to former torture claimants since December 2009 after the Court of First Instance ruled in December 2008 in *FB & Others v the Director of Immigration* HCAL 51/2007 that the Government had an obligation to provide legal assistance to torture claimants who are unable to afford legal representation). Legal assistance will cover the entire USM screening process; including the completion of forms, submission of evidence, attendance at screening interviews, and any appeal process. All unsuccessful claimants are permitted to lodge an appeal.

USM Claimants who substantiate their persecution claims will be referred to the UNHCR who will over-see the re-settlement of the claimant to a third country. Despite the reforms brought about by the USM, the Government has maintained its policy of refusing to re-settle successful claimants in Hong Kong.

One of the most significant impacts of the USM is that all decisions of the immigration officers are now capable of being subject to judicial review and scrutinized by the local courts to ensure that their assessments meet a ‘high standard of fairness’ (as required under local law). Under the previous scheme, decisions made by the UNHCR were not subject to judicial review as the Government has no jurisdiction over the UNHCR. The Director of Immigration also formerly maintained a policy of repatriating all unsuccessful claimants as adjudged by the UNHCR without first making a separate and independent inquiry into the merits of their application. This repatriation policy came under heavy criticism as it was not possible to ensure that the UNHCR determination process reached a high standard of fairness.

The implementation of the USM has been seen by many non-governmental organizations and public lawyers as a milestone in the development of Hong Kong refugee law and policy. It also evidences the Government’s compliance with its international obligations under the Convention against Torture (1984) and customary international law.

However, some of the same criticisms made about the previous screening systems have also been made to the USM screening

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process. Local NGO staff workers and USM claimants contend that the screening process lacks accountability and transparency, local advocacy groups have not been consulted, and the questions asked to claimants have not changed from the previous systems. As of November 2014, there are 9,500 outstanding USM claims and only 504 claims have been dealt with since March. The recognition rate is 0.2%.

Lillian Li currently works with the Hong Kong Judiciary and is a qualified solicitor in Hong Kong. She was previously a casework volunteer at the Hong Kong Refugee Advice Centre (now known as the Justice Centre) for two years.

Second Strike and You are (Finally) Out? The Israeli Supreme Court quashes (again) the Prevention of Infiltration Law

By Reuven (Ruvi) Ziegler | 9th October 2014

On 22 September 2014, the Israeli Supreme Court sitting as a High Court of Justice quashed in a 217-page judgment (HCJ 8425/13 Anon v. Knesset et al) the Prevention of Infiltration Law (Amendment no. 4).



The amendment enacted two schemes: *first*, section 30A, authorising the detention for one year of any ‘infiltrator’ (the term was introduced by the above law, and shall be used in quotation marks in this discussion) entering Israel after the amendment’s coming into force. *Second*, Chapter D, authorising the holding in an ‘open’ residency centre of ‘infiltrators’ whose removal from Israel (according to the State’s official determination) proves to be ‘difficult’. ‘Infiltrators’ are to be held indefinitely unless they ‘voluntarily’ agree to return their state of origin, or to be transferred to a third state. Almost a year to the day, on 16 September 2013, the same panel quashed Amendment no. 3 that authorized the detention of “infiltrators” for three years. This is the *first time* that the Supreme Court has re-annulled primary legislation.

Justice Uzi Vogelman authored the main judgment, which holds both legislative schemes to be in violation of the constitutional rights to *liberty* (section 5 of Basic Law: Human Dignity and Liberty) and to *human dignity* (sections 2 and 4 thereof) by failing to satisfy the *proportionality* requirement in section 8 (the ‘limitation’ clause); the latter provision stipulates that ‘[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.’ Justice Vogelman emphatically stated that ‘infiltrators are people too. And if this merits explanation, let it be said explicitly: infiltrators do not shed any part of their dignity due to their method of arrival [or] by entering a detention or residency facility, and their right to human dignity remains intact even if they have arrived irregularly’ [123].

Six of the nine justices (Uzi Vogelman, Miriam Naor, Edna Arbel, Yoram Danziger, Salim Joubran, Esther Hayut) annulled section 30A (Chief Justice Asher Grunis and Justices Neal Hendel and Yitzhak Amit dissenting). A close reading of the previous judgment (HCJ 7146/12) reveals that Justice’s Hendel’s dissent should have been anticipated, as he dissented from the operative part of the otherwise unanimous judgment. Similarly, Chief Justice Grunis asserted in his concurrence that a re-enacted law authorising a significantly shorter detention period could pass constitutional muster. In contradistinction, Justice Amit’s dissent rests on distinguishing between section 30A and the quashed Amendment no. 3: while the former applies prospectively, and is hence directed towards a non-specific group of persons who have not yet transgressed the state’s borders, the latter applied

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retrospectively to 'infiltrators' who entered prior to its passage [7]. However, as Justice Arbel noted, newcomers subject to the state's jurisdiction enjoy constitutional rights to liberty and dignity [9]; moreover, a *nulla poena sine lege* principle seems out of context.

Seven justices (including Justice Amit) annulled Chapter D in its entirety. Chief Justice Grunis and Justice Hendel considered only the provision authorising three daily counts to be unconstitutional, and would have removed the second (midday) count requirement, leaving intact the morning and evening counts as well as the rest of Chapter D. The main judgment cautioned against letting 'the name "open facility" to lead us astray': it is "a facility similar in essence to a closed facility" which violates part of the minimum dignified life to which every person is entitled' [126]. Noting that 'the requirement to be present for the three daily counts, alongside the great distance from settlements in the region, negates nearly any possibility to leave the centre on a routine basis', justice Vogelmann rhetorically asks: 'is it, therefore, an 'open' centre'? [Id]. Indeed, even the dissenting justices observed that the scheme as it currently operates is akin to a closed facility: the significant difference between the majority and dissenting judgment pertains to the (in)ability to mitigate the harm caused by the scheme, and the consequent divergent remedies.

Reuven (Ruvi) Ziegler is a Lecturer in Law at the University of Reading.

Detention of African Asylum Seekers in Israel: Welcome to Round Three

By Reuven (Ruvi) Ziegler | 15th December 2014

On 8 December 2014, hours before dissolving itself in preparation for early elections arranged for 17 March 2015, the Israeli Parliament, the Knesset enacted (by a 47 to 23 majority, with 3 abstentions) the 'Law for Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel' Under the new legislation, 'infiltrators' who enter Israel *and cannot be deported* will be automatically detained for three months at the *Saharonim* prison in the Negev desert (reduced from one year under the quashed legislation). 'Infiltrators' already in Israel, as well as new arrivals (following their three months' detention) can be detained at the *Holot* detention centre for 20 months (as opposed to indefinite detention under the quashed legislation). Over 2,200 persons are currently held in *Holot* pursuant to the quashed legislation; they are expected to remain for what is now fixed-term detention.

The detainees will be required to report for a headcount between 8 and 10pm every night, and the detention centre will be locked shut at night. While the length of detention was shortened, its prison-like characteristics (managed by the Israel Prison Service, which conducts searches on persons entering and leaving the facility), the fact that detainees are barred from working, and the facility's remote location in the Negev desert are likely to render the possibility to leave the facility at daytime rather futile. Moreover, violation of the sign-in conditions can lead to up to four months' detention in the closed facility, at the discretion of the Population, Immigration and Borders Authority.

In the two previous 'rounds' of litigation, the HCJ unveiled the unsoundness of the overall state policy. On one hand, Israel recognises the fact that Eritrean and Sudanese nationals cannot be deported. On the other hand, it detains them in an effort, now explicitly manifested in the legislation's title, to entice them to leave. It is worth reiterating Justice Uzi Vogelmann's main opinion in the above HCJ judgment, stressing [193] that 'the question is not only quantitative – what is the maximum constitutional length of time for detention in custody – but also (and perhaps primarily) qualitative – whether it is permissible to detain a person not subject to effective deportation proceedings. To this question I respond...absolutely not.'

Since the legislation applies to 'infiltrators' who *according to the state's determination* cannot be deported, persons detained will be released after 20 months without any plan for regularisation of their precarious legal status. Indeed, the legislation also amends the 'migrant workers law 1991', imposing financial sanctions on the (majority of) non-detained 'infiltrators' who are in un-regularised employment: they will not receive severance pay or pensions to which other Israeli workers are entitled. Instead, their employers will have to deposit 16% of the salary in a separate account, and to deposit further 20% of their salary on behalf of their employees. This money will be 'released' only upon the employees' departure. Hefty fines are imposed for breaches. The legislative aim is two-fold: encourage asylum seekers to leave, and discourage employers from employing them. The immediate outcome will be further destitution, especially as 'infiltrators' do not receive benefits or state assistance.

A petition to the HCJ challenging the constitutionality of the legislation is imminent. The HCJ, faced with detention legislation premised on the same tenets found to be unconstitutional less than three months ago, will be forced into an making an unsavoury choice: quash the legislation for the third time, an unprecedented move in the state's history, and face real risk of legislative attempts in the next parliament to limit its judicial review power; or uphold it based on a proportionality analysis, permitting arbitrary detention of persons in need of international protection. Stay tuned-it will be a hot winter.

Dr. Reuven (Ruvi) Ziegler is a Lecturer at the University of Reading School of Law.

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Internally Displaced Persons in Ukraine

By Richard Verber | 19th August 2014

Well over 300,000 people have been displaced from their homes due to the ongoing violence in Ukraine. We have seen two waves: the first displacement from the south of Ukraine began before the March referendum in Crimea, and the second from the east due to ongoing fighting between the Ukrainian army and pro-Russian separatists.



The UN Office for the Coordination of Humanitarian Affairs (OCHR) estimates that some 3.9 million people live in areas directly affected by violence.

Back in June, the Ukrainian government recognised the issue of internally displaced persons (IDPs) and ordered the creation of an electronic database followed by a new law to determine their legal status. As of August 14, 2014, the database is yet to be created and no law has reached the statute books. This renders IDPs' legal status unclear. The lack of a database is hampering relief efforts as it is unclear how many people need support or where best to direct resources.

Although no law has been passed, the national government has given an informal order to regional ("*oblast* ") governments to assist IDPs. They have not stipulated what level of support should be offered though. *Oblasts*' budgets vary, meaning some are able to provide shelter, some can offer social services, some both and some neither. Efforts are supplemented by NGOs such as ours, private donations and the UNHCR. Were a humanitarian crisis to be declared, the UNHCR would be able to intervene more easily through the mobilisation of international donor organisations.

Defining IDPs' legal status is further hampered by the varying degrees to which the IDPs feel themselves to be displaced. Many consider their displacement to be only temporary: having fled the fighting, they hope to return to their homes when they can. We have seen this in Sloviansk and Kramatorsk. The widespread fighting there, however, has created a second wave of IDPs, who, having gone back, have found rebels living in their homes or their houses destroyed. Those who could afford it left their homes months ago when they realised how events might unfold.

Even more Ukrainians have fled to Russia (188,216) than are displaced in Ukraine (139,170), according to UNHCR figures. Some have Russian citizenship, some claim asylum as refugees. The UNHCR has said that most do not claim asylum, however, choosing to apply for some other legal status instead for fear of creating difficulties for themselves down the line.

What will make creating an electronic database challenging is that IDPs are often forced to flee with just a plastic bag containing a

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few clothes. As they have no documents, they are unable to claim their entitlements when they arrive at a different city. Those with documents can get help more easily. Legal assistance is urgently needed for those without documentation, many of whom fled for their lives as the fighting

approached. Adding further complexity is that some Ukrainians who feel close to Russia don't want to register: they don't trust the Ukrainian authorities or feel they're 'behind enemy lines'. Some are Russian citizens who don't want to register as they feel they might get in trouble.

Lastly, the term 'refugee' is not used to describe IDPs because as the law currently stands, only someone who finds themselves stateless, or in a country which is not their 'own', can apply for refugee status. Ukrainian citizens, still in Ukraine, cannot therefore apply for refugee status, and are not entitled to the rights refugee status affords. Others still feel that the government isn't going to support them anyway, or think it will only be a short amount of time before they go back home. The trauma begins when they realise this will not be the case.

As the new school year rapidly approaches, the need for a database becomes ever more urgent. Parents will want to register their children somewhere, so we expect the IDP figures to change in the coming weeks. How will they be accommodated in the education system? And how long will they have to remain there for?

It is likely to be a while before we know any answers.

Richard Verber is World Jewish Relief's Campaigns Manager. World Jewish Relief is a UK-based international development agency with a particular expertise in Ukraine and across the Former Soviet Union.