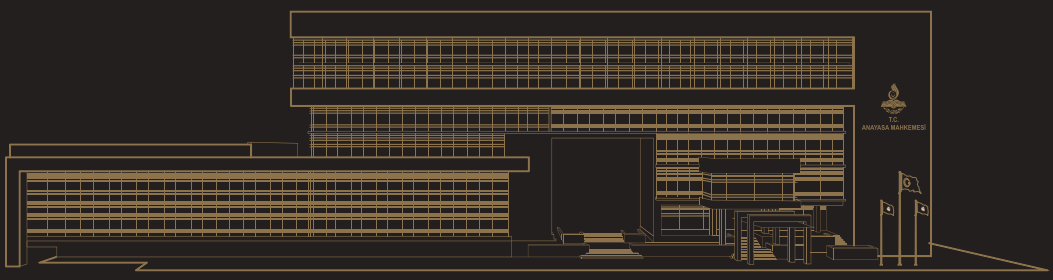
Constitutional Justice in Asia

"Migration and Refugee Law"



5th Summer School of the Association of
Asian Constitutional Courts and Equivalent Institutions

Constitutional Justice in Asia

"Migration and Refugee Law"

Editors:
Murat AZAKLI
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5th Summer School of the Association of
Asian Constitutional Courts and Equivalent Institutions
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Constitutional Justice in Asia

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MESSAGE FROM THE PRESIDENT

The Constitutional Court of the Republic of Turkey holds the 5th Summer School Program of Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of "Migration and Refugee Law" in Ankara/Istanbul between 17-24 September, 2017 within the scope of the AACC activities.

We are pleased to host the 5th Summer School of the AACC in Turkey. We believe that the presentations of the participants and lectures of distinguished guests throughout the Summer School reflect legal experiences and practices of the AACC members and make significant contribution to the field of comparative constitutional justice.

We are also delighted to inform you that working languages of the 5th Summer School included the official languages of the AACC, both English and Russian. This practice that has been provided in the 5th Summer School for the first time will be maintained in the future Summer School programs.

Summer School Programs of the AACC gather the participants in a sincere atmosphere to share their knowledge and experience that would contribute to the development of the constitutional justice and the rule of law in the Asian continent. This event also serves for the enhancing the relationship and strengthening the cooperation among our institutions.

I would like to express my contentment in presenting this publication, which collects the papers and presentations of the participants to the Summer School program for the benefit and use of all the members of the AACC.

Taking this opportunity, on behalf the Turkish Constitutional Court and my own behalf, I would like to extend my sincere thanks to all jurists and legal experts who contributed to this publication.

I wish that this book serves as a useful resource for all.

Prof. Dr. Zühtü ARSLAN

President of Constitutional Court of
the Republic of Turkey

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OPENING ADDRESS ON

"THE FIFTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE" ORGANIZED BY CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY[1]

Grand Tribunal Hall, Ankara, 17 September 2017

Distinguished participants, Justices and Rapporteurs,

I greet you all with my sincere feelings and regards.

I would like to express that I am very pleased to deliver the inaugural speech of the International 5th Summer School.

The summer school program has been organized by the Turkish Constitutional Court since 2013 as an activity of the Association of Asian Constitutional Courts and Equivalent Institutions ("the AACC"), and today, we are inaugurating the 5th Summer School Program.

In the 3rd Congress of the AACC held in Bali, Indonesia last year, a Permanent Secretariat was established upon an amendment to its Statute. In this scope, the Centre for Training and Human Resources Development was established in Ankara under the Turkish Constitutional Court. The last two summer schools have been organized under the capacity of this Centre.

I would like to state that summer schools held every year with different themes aim at exchanging information and experience among the constitutional jurisdictions and contribute to the improvement of relations among our institutions. I am pleased to note that we have received highly favorable feedbacks from the participants regarding the summer school programs held so far.

Distinguished participants,

I would like to also note with pleasure that the participation in this Summer School is wider compared to previous years. Representatives from the constitutional courts or equivalent

1 Translated by the Department of Foreign Relations, Turkish Constitutional Court.

institutions of 17 countries, including Turkey, are participating in the program. It is also a pleasing progress for us to be here with the representatives of all constitutional courts which are members of the AACC, with the exception of one or two countries. Today, almost forty representatives from Afghanistan, Azerbaijan, Bulgaria, Indonesia, Georgia, Montenegro, Kazakhstan, Kyrgyzstan, Korea, Kosovo, Malaysia, Mongolia, Russia, Uzbekistan, Tajikistan, Thailand, and Turkey are here with us for the Summer School Program.

Besides, representatives from the European Court of Human Rights, the Conference of Constitutional Jurisdictions of Africa, and the Office of the United Nations High Commissioner for Refugees ("the UNHCR") in Turkey are attending the program as lecturers. I take this opportunity to express my gratitude to all participants and lecturers.

Theme of this year's summer school, "Migration and Refugee Law", constitutes one of the most significant and complex issues of today that are of a global concern. According to the data provided by the UNHCR, the total refugee population all over the world is 21 million, and the number of those sheltered only in Turkey is over 3 million. It is noteworthy to mention that the number of refugees in Turkey exceeds the populations of 61 countries that are the members of the United Nations.

Legal dimension of this theme and especially foreigners' rights under national and international laws will be dealt with during the Summer School Program. Within this framework, judgments of the Turkish Constitutional Court, the ECtHR's approach on this matter and practices of the countries represented here will be discussed, and the participants will thereby share views, information and practices on the topic.

Reasons and outcomes of migration and asylum have been debated for so long. Migration emerges as people who are escaping from unfavorable conditions such as war, civil war, terror and poverty seek for a safe and prosperous place to live.

Whatever the consequences may be, it is evident that major

issues are present in the countries receiving migrants. The main problems resulting from migration are ostracization of migrants, their not being treated with human dignity, and their being subject to violence and even their killing.

In other words, migration uncovers social diseases, such as xenophobia and racism, which hamper the ideal of living all together in harmony and peace. Every single day, through international press agencies, we are reading news about the attacks against those regarded as "a stranger". In this respect, the devastating cruelty against Rohingya Muslims in Myanmar and deep silence of humanity point out the lack of conscience.

The underlying reason of all these problems is the failure to establish a sound relation with those who are regarded as "the other". Xenophobia and racism, which become much more evident with migration and asylum, are the attitudes and behaviour that should be paid a great attention in terms of diversity management and should be corrected. These are, in principal, the reflections of a pathological relation of "me and the other" and "we and the others" within an egocentric understanding at ontological level.

Xenophobia represents the negative feelings of a native person against another who has come after him or is different from himself. Stranger is the other. He is the one who do not consider or live in the way we do. In short, he is the one who is different.

Esteemed guests,

Distinguished participants,

It must be clearly stated that, in particular, today's Western world suffers from these social and political diseases. As these ill understandings which do not accord a right to life to "the other" gain grounds day by day, the greatest threat to the values such as human rights, democracy and rule of law, as well as, to the political systems shaped by these values emerges and grows. In brief, xenophobia, racism and Islamphobia are the dark faces of our age.

Fight against xenophobia and racism may be achieved by prioritizing a "human-oriented" understanding in social and

political spheres. Indeed, such understanding has deep- roots both in the East and the West.

Philosophers forming the spiritual roots of the Anatolia, such as Yunus Emre, Mevlana and Hacı Bektaş-ı Veli, have made unique contributions to co-existence through their human-centered messages promoting tolerance and affection among the society. Hacı Bektaş-ı Veli says "the second requirement of the eternal truth is not to condemn seventy two nations". Yunus Emre's expression "Love the created for the creator's sake" and Mevlana Celalettin Rumi's expression "the raison d'être of universe is human beings" and his call "Come, come again, whoever you are" reveal the same principle. According to this principle, human is a value by its very nature, not a means, and exactly for this reason, he/she deserves respect/tolerance.

Neither the East nor the West is homogeneous. Apart from thoughts generating/feeding xenophobia, racism, and Islamphobia, there also exist long-standing strong thoughts supporting pluralism and tolerance. The famous philosopher, Immanuel Kant, is one of the most leading representatives who defend these thoughts.

Kant mentions of "the right to hospitality" in his article titled "Perpetual Peace" and written in 1795. This right envisages that every foreigner going to another country is entitled not to be treated as an enemy. Therefore, not as a matter of favour or charity but as a requisite of respect for their rights, we are obliged not to show hostility towards foreigners crossing our borders. The "right to hospitality" introduced by Kant notably applies to refugees nowadays. Indeed, Turkey has been making historical contributions in terms of promoting the right to hospitality of "the other" by opening its heart and doors to over three million refugees.

As a matter of course, social values and institutions emerge in and transform to different concepts along with historical progresses in different lands. However, the values we embrace today, such as justice, freedom, human rights, state of law, pluralism and tolerance are common values of both the East and the West. It is our joint responsibility to develop and transfer to the next

generation a human-oriented culture and practice, by protecting these values –notably the other's "right to hospitality"– and paying due consideration to social and political pluralism rather than regarding differences as a threat. In this respect, there are two ways to fight against xenophobia, racism, and Islamphobia: the first one is to spread the human-oriented understanding. Humans are born innocent and they learn malignity and hostility afterwards. Indeed, attitudes such as xenophobia, racism and Islamphobia are deviations which we have learned or have been thought long after we were born.

Therefore, the step needed to be taken is to change this learning process. Samples of both malignity and goodness exist in history and nature. What all matters is our preference of these two options while building the present and the future.

The second step is to revise the legal means in this respect to ensure their effectiveness. In both the national and the international human rights laws, a firmer stand must be taken especially on the fight against hate speech and racism. It should be borne in mind that showing tolerance to hate speech would contribute to xenophobia and racism.

I would like to end my speech by commemorating the wise statesman, Alija Izetbegović. "It was 25 March 1994… Two hundred thousand (200.000) Bosniacs were killed, six hundred thousand (600,000) people were exiled and 800 mosques were bombed. Cities and villages of Bosnia-Herzegovina were devastated, and the military hospital in Sarajevo was bombed for 160 times…" After narrating all these, Izetbegović notes a remarkable statement: "being human and staying human are our responsibilities towards Allah and ourselves".

Aliya Izetbegović explains the meaning of the concept of "being human and staying human" —which he completely describes as a moral concept— in political discourse and in practice as follows: "In political discourse, it means that we will try to establish a legal State. This also means in practice that in this State no one will be persecuted for their religion or for their national or political belief."

We hope that our old world will learn from the bitter experiences of the past and follow the wise path of Izetbegović.

I would like to once again greet you all with respect before ending my speech. I wish that the 5th Summer School Program be successful and fruitful.

Prof. Dr. Zühtü ARSLAN
President of Constitutional Court of
the Republic of Turkey

OPENING SPEECH ON

THE FIFTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Distinguished Guests,

First of all, I would like to welcome you to our Court and greet you all with respect.

The Turkish Constitutional Court is a member of the Association of Asian Constitutional Courts and Equivalent Institutions founded in 2010. The Association aims to promote democracy, rule of law and fundamental rights in Asia through cooperation and establishing good relationships among constitutional jurisdictions by way of exchanging and sharing views and experiences.

In the second meeting of the Board of Members held in Istanbul in April 2014, it has been decided that the Summer School on Constitutional Justice be held in Turkey annually. In the third meeting of the Board of Members held in Indonesia in 2016, a decision has been made to establish a Permanent Secretariat of the Association that consists of three units and that the Secretariat of Education and Human Resources be launched in Turkey. Within the scope of the activities of the Secretariat, the 5th Summer School between 17-24 September has officially started this morning with the opening speech of the President of Turkish Constitutional Court Zühtü Arslan.

Under the 5th Summer School, an academic program has been planned in Ankara between 18-20 September 2017 and afterwards a social and cultural program has been planned in Istanbul between 21-23 September, 2017.

The theme of this year's academic event is "Migration and Refugee Law." During the event, guests from Migration Management General Directorate, the government agency for refugees in Turkey, and from United Nations High Commissioner for Refugees Turkey Office will make presentation on the topic.

Within this scope, scholars will make presentations regarding the constitutional, legal and administrative regulations on protection of refugees. The Rapporteurs of the Turkish Constitutional Court will explain the case-law in that regard. In addition, the international legal framework will be explained by the experts and lawyers from the European Court of Human Rights. Lastly, the participant delegations will be provided the opportunity to explain their laws and practices on the subject.

In the social-cultural program, the historical and natural beauties of Istanbul, one of the important cultural capitals of the world, will be visited. The presentations and discussions made during the academic program will be published in a book and then will be distributed to the participants.

Taking this opportunity I also would like to note that our country hosts without any hesitation and condition more than 3 million refugees who are fleeing from war and persecution in their own countries around the world.

I believe that this Summer School will contribute to the protection and promotion of the fundamental rights and freedoms of refugees in all over the world.

I would like to thank to the participants and everyone who contributed to the organisation of the Program and wish a successful event.

Selim ERDEM
Secretary General of the Constitutional
Court of the Republic of Turkey

INTERNATIONAL AND TEMPORARY PROTECTION OF FOREIGNERS FROM THE PERSPECTIVE OF TURKISH CONSTITUTIONAL COURT

Assoc. Prof. Dr. Faruk Kerem GİRAY

TURKEY

INTERNATIONAL AND TEMPORARY PROTECTION OF FOREIGNERS FROM THE PERSPECTIVE OF TURKISH CONSTITUTIONAL COURT

Assoc. Prof. Dr. Faruk Kerem GİRAY[*]

Legal Sources of Refugee Law in Turkey

A) International Conventions

B) Laws

C) Regulations

D) Circulars

E) Decisions of Administrative Court's (Especially decision on deportation)

F) Decisions of Criminal Court's of Peace (Decisions on administrative detention)

G) Decisions of Turkish Constitutional Court

H) Decisions of European Court of Human Rights

International Conventions

- 1951 Dated UN Convention on the Status of Refugees
- 1967 Dated UN Protocol on the Status of Refugees
- 1977 dated European Convention on Legal Status of Migrant Workers
- 1990 Dated International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

* Assoc. Prof. Dr., İstanbul University Law Faculty Private International Law.

UN Convention on the status of Refugees

Turkey has ratified the 1951 dated Convention with reservations!!!

1) Time restriction: Turkey applies the convention only to the facts occurred before January 1, 1951 in Europe. However by ratifying the 1967 dated New York Protocol, Turkey removes its reservation on time restriction and has been applying since 31.07.1968 without any time reservation.

2) Geographical restriction: Turkey applies convention only for the refugees coming from Europe continent and origin.

3) Not granting any privilege: None of the provisions of the Convention could be applied more beneficiary rather than to the nationalities of that state.

Nondiscrimination: States will apply the provisions of the Convention without discrimination as to race, religion or country of origin.

Laws on Migrants

• Law on Settlement No: 5543 • Law on Foreigners and International Protection No:6458

International Labor Law No:6735 (OJ: 13.8.2016)

DIRECTIVES

• Directive on Temporary Protection (OJ:22.10.2014)

• Directive to the Temporary Protected Foreigners for their right to work (OJ: 15.01. 2016)

Regulation on the Establishment, Management, Operation and Supervision of Admission and Accommodation Centers (OJ:22.4.2014)

Legal Terms for Refugee Law !!!

* Asylum Seeker or Immigrant can be used as a legal term instead of using Refugee term

* Refugee is a legal term in Turkish law!!!

Types of Migrants in Turkish Law

Migrants are divided into two main groups 1. Being subject to Law No: 5543 on Settlement

2. Being subject to Law No: 6458 on Foreigners and International Protection

The Criteria to Benefit from the Law on Settlement No.5543

1. If they are Turkish origin **and**

2. If they are having a close bound with Turkish Culture **and**

3. If they intend to live in Turkey

Classification of Migrants

Law on Habitation

1. Free Refugees

2. Resided Refugees

Law on Foreigners and International Protection

1. Refugees

2. Conditional Refugees

3. Subsidiary Protection

4. Temporary Protection

Kinds of International Protection

a) Refugee

b) Conditional Refugee

c) Subsidiary Protection

Temporary Protection is not a kind of International Protection!!!

Fundamental Principle of Refugee Law

Non-refoulement Principle (Art. 4)

No one within the scope of this of this Law shall be returned to a place where he or she may be subjected

• to torture,

• inhuman or degrading punishment or

• treatment or

• where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.

Definition of Refugee (Art.61)

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 citizenship and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country;

or who, not having a nationality and being outside the country of his former residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted refugee status upon completion of the refugee status determination process.

- Convention relating to the status of refugees

- Turkey puts geographical reservation to the convention

Definition of Conditional Refugee (Art.62)

A person who as a result of events occurring outside 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 nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country;

or who, not having a nationality and being outside the country of former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it, shall be granted conditional refugee status upon completion of the refugee status determination process.

Conditional refugees shall be allowed to reside in Turkey temporarily until they are resettled to a third country.

Definition of Subsidiary Protection (Art.63)

A foreigner or a stateless person,, who neither could be gualified as a refugee nor as a conditional refugee shall nevertheless be granted subsidiary protection upon the status determination because if returned to the country of origin or country of [former] habitual residence would:

a) be sentenced to death or face the execution of the death penalty;

b) face torture or inhuman or degrading treatment or punishment;

c) face serious threat to himself or herself by reason of indiscriminate violence in situations of international or nationwide armed conflict;

and therefore is unable or for the reason of such threat is unwilling, to avail himself or herself of the protection of his country of origin or country of [former] habitual residence.

Definition of Temporary Protection (Art.91)

Temporary protection may be provided for foreigners who have been forced to leave their country, cannot return to the country that they have left and have arrived at or crossed the borders of Turkey **in a mass influx** situation seeking immediate and temporary protection.

Legal Statutes of Syrians in Turkey

The legal statutes of the Syrians in Turkey are considered as "Temporary Protection".

They are not considered as refugees because they came to Turkish borders as a mass immigration Will there be any change in their statute even if they came from European Borders?

Exclusion from Internationa! Protection

1951 Geneva Convention

Convention shall not apply to any person who

A- has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

B- has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;

C- has been guilty of acts contrary to the purposes and principles of the United Nations.

Law on Foreigners and International Protection (article 64)

a) receiving protection or assistance from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees;

b) recognized by the authorities of the country of [former] residence as having the rights and obligations which are attached to the nationals of that country;

c) there is strong evidence to believe that they are guilty of offences

d) In cases where there is evidence to believe that the applicant, prior to international protection claim, have committed inhuman acts for any reason whatsoever outside of Turkey,

e) Applicants that instigate or otherwise participate in committing the crimes or acts

f) If a foreigner or a stateless persons in respect of whom there are serious indications of posing a public order or public security threat, as well as a foreigner or a stateless person committed a serious crime for which imprisonment would have been ordered if committed in Turkey, and have left his/her country of origin solely to avoid punishment for that crime, shall be excluded from subsidiary protection.

*** Exclusion of the applicant from international protection shall not require the exclusion of their family members provided that none of the reasons for exclusion applies to other family members.

1) Turkish Constitution (Art 16)

2) Law on Foreigners and International Protection (Art 4)

3) Having right to appeal against administrative detention decisions *****

1. Turkish Constitution art 16

The fundamental rights and freedoms in respect to aliens may be restricted by law compatible with international law.

2. Turkish Constitution art 10.

Everyone is equal before the law without distinction as to language, race, colour, sex, political opinion, philosophical belief, religion and sect, or any such grounds.

3. Law on Foreigners and International Protection (Non-refoulement Principle)

No one within the scope of this of this Law shall be returned to a place where he or she may be subjected to torture, inhuman or degrading punishment or treatment or, where his/her life or freedom would be threatened on account of his/her race, religion, nationality, membership of a particular social group or political opinion.

4. Having right to appeal against administrative detention decisions

There are two kinds of administrative decisions.

a. Administrative detention decisions regarding to international protection applicants or temporary protection applicants (Art.68)

b. Administrative detention decisions for Deportation (Art.57)

5. Having right to appeal against administrative detention decisions

Administrative detention decisions regarding to international protection applicants or temporary protection applicants (Art.68)

a. Subjecting applicants to administrative detention is an exceptional measure. The period of administrative detention for applicants shall not exceed thirty days.

b. The requirement for administrative detention shall be assessed on case by case basis. Decisions are taken by the Governor. (Director General of Migration Management or Governor of the state)

Art 68/7: The person placed under administrative detention **may appeal** against the detention decision to the Judge of the Criminal Court of Peace. Such an application shall not suspend the administrative detention. ??

Legal Remedies for Syrians in Turkey Violation of the Constitution (?)

Provision of article 68/7 is against to the Turkish Constitution article 19/6 and to the article 38/10 !!!!!!

The person arrested or detained shall be brought before a judge within at latest forty-eight hours and in case of offences committed collectively within at most four days, excluding the time required to send the individual to the court nearest to the place of arrest. No one can be deprived of his/her liberty without the decision of a judge after the expiry of the above specified periods. (Art.19/6)

The administration shall not impose any sanction resulting in restriction of personal liberty. Exceptions to this provision may be introduced by law regarding the internal order of the armed forces. (Art. 38/10)

This is the violation of article 10 which protects rights of equality.

B. Administrative detention decision for Deportation (Art.57)

This decision will be given by Director General of Migration Management or Governor of the state .

This decisions can be appealed in two ways.

1. Appeal against deportation decision

Appeal in 15 days to the administrative court Court must give its order in 15 days.

Foreigner shall not be deported during this period. (EXCEPTION implementation with KHK / Decree Law)

2. Appeal against administrative detention order

Can appeal against the detention decision to the Judge of the Criminal Court of Peace Court must give its order within 5 days.

Temporary Protection

• Temporary protection decision will be taken by the Council of Minister upon the Ministry of Interior's proposal.

• For ending this status, offer is made by Ministry of Interior and the decision will be taken by Council of Ministers.

• Governor of the state will draw up this document.

a) Persons who will be covered under temporary protection;

b) Effective date of temporary protection and its duration if considered necessary;

c) Conditions for extending and ending of temporary protection;

d) Whether or not temporary protection will be implemented country-wide or in a specific region;

e) Other subjects considered necessary

Who will benefit from Temporary Protection ?

• Foreigners who were forced to leave their countries and are unable to return to the countries they left and arrived at or crossed our borders in masses

• to seek urgent and temporary protection and whose international protection requests cannot be taken under individual assessment.

• The Council of Ministers must decide and announce this protection.

People benefiting from temporary protection shall not be deemed as having been directly acquired one of the international protection statuses as defined in the Law.

Related Decisions of the Constitutional Court

1. Mahira Karaja (App. No: 2015/18203)

2. F.A. ve M. A. (App. 2013/655)

3. Rıda Boudraa (App. 2013/9673)

4. H.S. (App. No: 2016/22512)

5. Y.T. (App No: 2016/22418) (KHK sonrası)

6. Nizami Kurbanov (App. No: 2015/17968)

7. Mahira Karaja (App. No:2015/18203)

8. Azizjon Hikmatov (App. No: 2015/18582)

9. R.M. (App. No: 2015/19133)

10. M.A (App. No: 2016/220)

11. K.I. (App. No: 2016/4754)

12. Eiza Kashkoeva (App. No: 2016/9483)

13. Oyatullo Kurbanov and Others (App. No: 2016/10071)

14. Related with the 76. ve 80. articles of YUKK which regulates short period for appeal AYM Dec. (E. 2016/29 K. 2016/134) (14.7.2016)

15. Related with the 53/3 article of YUKK which regulates short period for appeal (E. 2016/37 K. 2016/135) (14.7.2016)

Personal inviolability, corporeal and spiritual existence of the individual

ARTICLE 17- Everyone has the right to life and the right to protect and improve his/her corporeal and spiritual existence.

• The corporeal integrity of the individual shall not be violated except under medical necessity and in cases prescribed by law; and shall not be subjected to scientific or medical experiments without his/her consent.

• No one shall be subjected to torture or mal-treatment; no one shall be subjected to penalties or treatment incompatible with human dignity.

Personal liberty and security

• ARTICLE 19- Everyone has the right to personal liberty and security.

The person arrested or detained shall be brought before a judge within at latest forty-eight hours and in case of offences committed collectively within at most four days, excluding the time required to send the individual to the court nearest to the place of arrest. No one can be deprived of his/her liberty without the decision of a judge after the expiry of the above specified periods....

Protection of fundamental rights and freedoms

• ARTICLE 40- Everyone whose constitutional rights and freedoms have been violated has the right to request prompt access to the competent authorities.

• The State is obliged to indicate in its proceedings, the legal remedies and authorities the persons concerned should apply and time limits of the applications.

Damages incurred to any person through unlawful treatment by public officials shall be compensated for by the State as per the law. The state reserves the right of recourse to the official responsible.

***Oyatullo Kurbanov and Others* (App. No: 2016/10071)**

• In this case, İstanbul Police Department found out that, five Tajik people build a Mescid in Pendik to collect supporters for DAES terrorist group. So that deportation decision was given against them due to the risk of breach of public policy and security. They appeal to the Istanbul administrative court. The court dismissed the case.

• Individual application made to the Court of Constitution.

• Regarding with this application decision, Constitutional Court determines that, while examine the application for appeal against deportation orders, the court also examines by ex officio the reports on human right violence published by the national and international organizations even if this kind of reports is not submitted to the case file by the applicant who is ordered to be sent back to the State in which there is violence against human rights.

Court ordered that there is no human right violence in Tajikistan so that their request for interim measure is rejected.

***R.M.* (App. No: 2015/19133) 16.12.2015**

He is an Iranian Citizen, accused of engaging activities to overthrow Iran Republic which is punishable with Capital punishment

The court unanimously

A) accepts the applicants' request for an interim measure,

B) suspends the procedures for deportation of R.M. back to his country until a new judgment is issued by the Court.

***H.S.* (App. No: 2016/22512) 2.11.2016 !!!!**

• The Court concluded that execution of the deportation order may lead to irreversible consequences since the applicant is a national of Syria, he presented the claims related to his individual condition, the action for annulment lodged at the administrative court is still pending and the internal conflict and instability in Syria are ongoing.

The Court granted stay of execution of the deportation order.

***AZIZJOV HIKMATOV* (App. No: 2015/18252) 15.12.2015**

• Constitutional Court ordered that there are torture and ill treatment against opponents and activists in Uzbekistan and this was confirmed by the AMNESTY reports. So if he was deported, his material and non- material integrity will be violated. So his request on interim measure is accepted.

Decision of M.A. **(App. No: 2016/220) 20.1.2016**

• The court observed that there are findings which are in support of the applicant's allegations in the reports drawn up in respect of Russia by the international human rights organizations. Regard being had to the applicant's allegations and the reports of these human rights organizations, it was concluded that the applicant's allegations were not unfounded.

• The Constitutional Court accordingly decided, as a measure, to stay the execution of the order for deportation of the applicant to her country.

MAHIRA KARAJA **(App. No: 2015/18203)**

• Court ordered that, there wasn't any report indicating that there was a systemically human rights violence in Azerbaijan so the applicant's allegations are unfounded.

NIZAMI KURBANOV **(App. No: 2015/17968) 2.12.2015**

• The court ordered that, Removal centre authorities, submit the written documents that gives permission to talk and phone with his lawyer when he was at the centre. So the court refused the request of the interim measure.

RIDA BOUDRA **(App. No. 2013/9673)**

• The court ordered that the situation to which the applicant was exposed for being held in administrative custody did not attain a minimum level of severity for being qualified as inhuman or degrading treatment. It has been therefore held that such allegations of the applicant are found to be manifestly ill-founded.

Y.T. **(App. 2016/22418) 1.11.2016 (Given decision after KHK)**

• Court ordered that, the reports on human right violence published by the national and international organizations must be considered ex officio even if this kind of reports is not submitted to the case file by the applicant who is ordered to be sent back to the State in which there is violence against human rights.

***K.I.* (App. No: 2016/4754) 16.3.2016**

• The applicant (she) is a Russian having entered to Turkey legally, having two years old son.

• İstanbul Governor Migration Directorate ordered to deport due to public security.

• She claimed that the physical conditions of the Bursa Removal Center is not sufficient for her and her baby. The room wasn't clean and doesn't have fresh air. But the authorities of the center, informed the Court that, enough food for her and her baby is given daily. She had granted to be health controlled by the doctor during her stay.

• So the court refused her application on interim measure.

***Eliza Kashkoeva* (App.No: 2016/9483) 25.5.2016**

• In this case, the applicant couldn't put the evidences that she makes her living lawfully. Besides the Court determines by ex officio the reports on human right violence published by the national and intemational organizations regarding with Kırgızia.

• In this context Court considers the Reports drafted by United Nations High Commissioner for Refugees , Human Rights Watch, AMNESTY International. But there isn't any finding that, there are human right violence in Kırgizia so that interim measure claim is rejected.

***A.A. and A.A* (App. No: 2015/3941)**

• In order to conclude that the prohibition of ill-treatment may be breached in case of the enforcement of the deportation order, it must be proven that existence of a risk in the country where the person would be sent is beyond a probability and attains a level of "real risk". The burden of proof in this respect may be on the public authorities and/or the applicant, by the very nature of the allegation.

• In the event that the risk in the country where the person would be sent is alleged to arise from persons or groups that are not public officers, the applicant must prove both the existence of this risk and

the fact that the public authorities of the relevant country would remain insufficient to afford sufficient protection for the elimination of this risk.

• The Court reached the conclusion that, the applicant's allegations that they may be subject to ill-treatment in their own country in case of being deported are not of defendable nature.

• The Court held that there had been no breach of the prohibition of ill-treatment guaranteed in Article 17 of the Constitution.Article 80/d reads that "Applications before the court under Articles 72 and 79 shall be decided within fifteen days. The decision of the court shall be final.

• The Court ordered that, by considering article 141/last paragraph of the Constitution, It is the duty of the judiciary to conclude trials as quickly as possible and at minimum cost. So judgements must not last in a long term and also its parties benefit on concluding trials rapidly and with a minimum cost.

• The Court find out that, there isn't any violation of the Constitution.Article 53/3 reads that: Foreigner, legal representative or lawyer may appeal against the removal decision to the administrative court within fifteen days as of the date of notification. The person who has appealed against the decision to the court sha l also inform the authority that has ordered the removal regarding the appeal. Such appeals shall be decided upon within fifteen days. The decision of the court on the appeal shall be final. Without prejudice to the foreigner's consent, the foreigner shall not be removed during the judicial appeal period or until after the finalization of the appeal proceedings.

• The Court ordered that, by considering article 141/last paragraph of the Constitution, there isn't any violation of the Constitution.

Abdulselam TUTAL and Others **(App. 2013/2319)**

• Although Article 148/3 of the Code no. 5271 on Criminal Procedural Law, which entered into force in the course of the

proceedings, was capable of ensuring effectiveness of the defense at the prosecution stage, the case was concluded within the framework of the statements taken, and this situation was not examined at the appellate stage.

• The applicants' inability to avail themselves of legal assistance of a lawyer and therefore the infringement of their right to defense precluded the fairness of the proceedings as a whole. It was not therefore found necessary to examine whether the other guarantees of the right to a fair trial had been fulfilled at the subsequent stages of the proceedings.

• For these reasons, the Court held that there was a breach of the applicants' right to a fair trial guaranteed under Article 36/1 of the Constitution.

***K.A.* (App. 2014/13044) 11.11.2015**

The applicant has put in Kumkapı Removal Centre due to administrative detention order. The court ordered that,

• conditions of the Kumkapı Removal Center is not suitable for a long stay and human dignity so that article 17 and 40 has been violated.

• Besides, administrative detention was not served lawfully to the applicant

• and not for having legal sufficient way to appeal has violated right to freedom and security.

***F.A and M.A* (App. 2013/ 2016) 20.1.2016**

• One of the important issue of this decision is granting to benefit from judicial assistance in applying to Turkish courts. They couldn't able to pay the litigation expenses because of not having enough salary, source for living. **Court ordered that, migrants can benefit from judicial assistance.**

• The court also ordered that, this kind of too much duration under administration detention has violated article 19/5 paragraph of the constitution.

• The court also ordered that, before entering into force of the Law No 6458, there isn't any sufficient regulation that informs the applicant where will he appeal this decision and when or having the right to give power of attorney and ask for a translator during the hearings. So this fact has violated article 19/2 of the Constitution.

• There isn't any appeal process against administrative detention order so that this is a violation of article 19/8 of the Constitution

MIGRATION AND REFUGEES LAW

Nikolai Stoliov PASHKUNOV

BULGARIA

MIGRATION AND REFUGEES LAW

Nikolai Stoliov PASHKUNOV[*]

INTRODUCTION

Good morning, distinguished delegates! Viki and I will provide you with a brief presentation on the topic of refugee law and immigration, as anyone else within the framework of that forum for that matter. I will briefly talk about the international and European aspect of the question, whereas Viki will elaborate on the internal Bulgarian web of laws, regulating refugees and migrants. Both of us will add some case law to complement our presentations.

Now I will start out with the international and regional nuance of refugee law and immigration, largely plagiarizing from a Professor for whom I hold a great dose of respect, namely Prof. Peter van Krieken, who recently passed away, but who I've nevertheless, had the privilege to be lectured by back in my student years. He's had about 19 years of experience within the UNHCR framework, and it is with pride that I will be transferring his ideas at this forum.

Out of a total global population of more than 6 billion, 250 million are believed to live outside their country of origin. Moreover, as the busy regional airports show, many people travel for business, tourism or family visits to foreign countries.

The very fact that travelers need to show a passport and sometimes have to buy a visa to be allowed to enter a foreign country is proof of the fact that **there is as such no right to migration**.

The UDHR has three articles that deal with this topic in one way or another. It concerns the articles 13, 14 and 15, **The Triptych, as he calls it**. They read:

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Article 13

(1) Everyone has the right to freedom of movement and residence within the borders of each state.

(2) Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution.

(2) This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15, which deals with nationality, which we don't have the time to touch upon.

(1) Everyone has the right to a nationality.

(2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

These three articles are related, as they refer to the places people are allowed to live, to reside and to travel to and from.

Indeed, the three subjects (or: objects) of this triptych are closely related:

- is the asylum-seeker a refugee or a would-be labour migrant

- is the daughter of the migrant born in the country where he works entitled to the nationality of that country?

- Is the refugee who obtained the nationality of the country of asylum entitled to return to his/her country of origin? Etcetera.

Herein under we shall strive to answer these interrelated questions, closely linked to the function of Articles 13-14.

Refugees –a non-exhaustive list of all of the instruments that touch upon the status of refugees:

- Constitution of the International Refugee Organization, New York, 15 December 1946;

- Statute of the UNHCR, New York, December 1950;

- Convention relating to the Status of Refugees. Geneva, 28 July 1951;

- Protocol, New York, 31 January 1967;

- Convention relating to the Status of Stateless Persons, New York, 28 September 1954;

- Convention on the Reduction of Statelessness, New York, 30 August 1961;

- International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, New York, 18 December 1990;

As shown earlier, the UDHR refers in art. 14 to the right to seek and enjoy asylum from persecution. Persecution can be defined **as a threat to life or freedom for reasons of race, political opinion, religion, nationality or membership of a social group, as per Article 1 of the Refugee Convention**.[1] This segment of the presentation will strive to provide a very in-depth interpretation of this very article.

The original draft contained the phrase the right to seek and be granted. That part had been amended to read *to seek and to enjoy*. That, in fact means that countries should decide whether the asylum seeker should indeed be granted asylum. **The grant of asylum is no automatism.** What the international community has agreed, however, is that someone with a **well-founded fear of being persecuted** shall not be returned or sent to a country where he would face persecution. This agreement has by now become customary law, meaning that all countries irrespective of whether they are a party to the 1951 Refugee Convention (Convention Relating to the Status of Refugees), **are bound by this *non-refoulement* principle**.

1 Ref 1951 Refugee Convention, art 1.

The question remains where the refugee would be entitled to enjoy asylum. That does not necessarily need to be the country where he sought asylum in the first place. For instance, many of the late 1970s refugees were resettled from their country of first asylum, or the country where they sought help, to the USA, Australia or one of the many European countries willing and/or eager to help.

It is quite remarkable that unlike virtually all other rights enlisted in the 1948 UDHR, the asylum aspect did not find its way into one of the 1966 Covenants. The reason for this omission may well be that the international community had already agreed on a fairly detailed refugee convention in 1951. This *Convention relating to the Status of Refugees* defines who is a refugee, is silent on the aspect of asylum, vocal about the *non-refoulement* principle, and then continues to list the rights the refugee is entitled to (work, education, social welfare, etcetera).

In short, the 1951 Refugee Convention too contains a triptych:

- 1A2: inclusion clause (definition of a refugee)

- 1C: cessation clause (refugee status is temporary in nature)

- 1F: exclusion clause (not everyone is entitled to the honorary title of refugee)

1A2:A definition of a refugee has been contained in article 1A2: in short a refugee is someone with *a well-founded fear of being persecuted* would he/she return home. This will be cut into 4 pieces: **fear, well-foundedness, being, and persecution.**

- The first element of this definition of interest is the term *fear*. For everyone with a legal background *fear* is perfectly useless as a concept. Who decides what fear and to which extent? Yet the inclusion of this mental, subjective aspect is of paramount importance: it forces us (and the decision makers) to realize each and every day that we do not deal with cars or washing powder, but with human beings. They stand central. With their fears.

- The second aspect, the adjective comes handy: *well-founded*. By having to look into the well-foundedness of the fear, we have the

tool to make a subjective feeling more objective. As observers we have the tool in understanding and appreciating the relevance of the fear. We link the fear to the situation on the ground, to what happened, to various developments in the country of origin, and so on.

- But a third little word is probably even of greater relevance: *being*. The inclusion of this word means that we should not just look to what has happened, to the situation and the personal story before the asylum seeker reached our shores, but in particular to what *might* happen if the asylum seeker were to be returned to the country of origin: what would happen upon return is the central, difficult question. No one has a crystal ball, no one can know for sure. So it is all about guesstimates, about calculated (serious) risks. Of course, one should look into the general situation and into the way the asylum seeker has been treated, his/her background, position in society, in order to better appreciate what might happen upon return. But then again – like financial products – results from the past are no guarantee for future developments.

- Persecution for reasons of (5x) race, religion, political opinion, membership of a social group and/or nationality. These five elements stand central and are to some extent self-explanatory. But what about the term persecution. It differs from prosecution that must be clear.[2] But could prosecution amount to persecution?

Persecution has not been defined in the Refugee Convention. But art. 33 (probably the most important article of this convention) gives a clue: it lays down the principle that no one shall be returned to a country/situation in which he/she would be exposed to a threat to life of freedom because of (5x) race, religion, political opinion, membership of a social group, or nationality. As the very same five characteristics have been named as in 1A2, one is tempted to draw the conclusion that persecution must equate a threat to life or freedom. And in my opinion, this conclusion is correct.

2 The anglo-saxon languages are at an advantage here; Germanic languages often use the same word for persecvution and prosecution: *Verfolgung, vervolging, förföljelse,* etc.

MIGRATION

That is, as far as refugees are concerned. Now let us delve into the migration phenomenon. It is agreed by all that everyone has the right to freedom of movement and residence within the borders of each state. Although the right to residence is not necessarily always easily granted (many cities have a lack of space or appropriate living quarters), the right to travel around one's own country stands out.

However, when it comes to *the right to leave any country, including his own, and to return to his country* there is some misunderstanding as to whether this would amount to a right to enter other countries. *This is definitely not (yet) the case*. In other words, everyone is allowed to leave, meaning that the authorities are not empowered to prevent someone from leaving (unless of course it concerns a criminal or otherwise special case), but this right to leave is not *complemented* by a right to enter another country. Fact is, that once abroad one is always entitled to return home. This goes even one step further: also if the person concerned does not want to return home, the country of origin is obliged to receive him back, if, for instance, the country where the person concerned resides wants to expel him/her.

Whereas article 13 focuses on *migration*, the next article confirms that there is no simple right to migration. Art. 14.1 reads that *everyone has the right to seek and to enjoy in other countries asylum from persecution*, a text we already touché upon and that would have been superfluous if there would have been a right to migration.

Migration is a complicated phenomenon. Although many claim that migration creates a win/win situation, you know, boosting the GDP of a country and what not, this is far from always true.

Migration is more often than not to be considered a result of external pressures like **(a) economics/ecology, (b) war, (c) persecution/repression and (d) demography** – the pyramid. These four factors can all be causes for migratory movements. It is also of importance to emphasize that these four main causes are interrelated: war has an impact on the economy; demographic developments may have an impact on the ecological balance, and

so on. Moreover, there is no need to explain that a gloomy economic situation may result in tensions between the population at large and the authorities, resulting in repression, or that a fight on the control of certain natural resources may result in war. It is also clear that an increasing population may put pressure on economic developments (a 3% population increase would need to be off-set by a 7% increase in GDP). Fairly new is the confirmation of the correlation of the so-called youth bulge and the likelihood of armed conflict. It has been submitted by inter alia the NGO *Population Action International* that in the case of the 15-29 old representing more than 40% of the adult population (15 and above), this results in a significant likelihood of armed conflict: "*our analysis suggests that States where young adults comprised 40% or more of all adults experienced civil conflict sometime from 1990-2000, 2.3 times the likelihood of countries below that benchmark*."[3] Think *Lord of the Flies*. On the basis of these figures it could be submitted that a decreasing fertility, combined with a slimming 'youth bulge' may create a situation in which peace may become more likely.

Does Europe Need Migrants?[4]

Europe lacks a migration policy. Most actors seem to agree that migration should be considered as a given. Many submit that migration creates a win/win situation, not only benefiting the individuals concerned but also the countries of origin and destination. They refer to ageing, the need for labour and the usefulness of remittances. However, in this part I argue that non-migration may yield a far greater dividend than migratory movements.

Now, on the one hand, the commonly accepted view is that Western Europe should be eager to absorb workers from the new EU countries as Europe needs more, not fewer, immigrants. Experts are more often than not prone to find it difficult to explain why

3 This research *excluded* countries with persistent or recurring conflict. See: Cincotta, Engelman and Anastasion: *The Security Demography; population and civil conflict after the cold war*; Population Action International (Washington 2003), p. 48. See also the 2002 WHO World Report on Violence and Health, p. 222.

4 Based on the introductory chapters of Van Krieken's *Consolidated Acquis*, The Hague/Cambridge/Berlin, 2004.

one needs immigrants when one does not have enough jobs to go around. Now, we can focus on low fertility rates, the greying of the population at large, the baby-boomers on the eve of their retirement. Yet, it was acknowledged that the EU would need an average of 6.1 million immigrants a year and that by 2050 some 40% of the then EU population would be *recent immigrants or their offspring*. Craig Smith, a NYT journalist, submitted that *it would take concerted, discriminatory policies to prevent the natural demographic flow of the Arab world's excess labour to labour-hungry Europe.*

Indeed, the enlarged European Union woke up to a challenge. Is the question – as suggested - not so much whether Europe will be forced to accept more immigrants, but rather when, how many and from where? Are journalists, politicians and economists able to look beyond 2050, willing to face the consequences of reproductive health, social cohesion, globalization and freedom of movement? Has enough thought been given to the availability of alternatives?

Europe needs migrants to ensure a prosperous future and should stop using immigration as a scapegoat for its social problems, former UN Secretary Kofi Annan said a few years ago. "Migrants need Europe. But Europe also needs migrants. A closed Europe would be a meaner, poorer, weaker, older Europe. An open Europe will be a fairer, richer, stronger, younger Europe – provided you manage migration well," he said. He criticised the tone of the current debate on asylum and immigration in Europe, saying that migrants and asylum seekers were being vilified and dehumanized. Asylum systems were overburdened, said Mr Annan, because many people saw no other channel through which to migrate, sometimes resorting to human traffickers and falling into the hands of organised crime. Annan said that helping refugees was a legal and moral duty and urged the EU to set up a system of sharing responsibility and ensuring asylum seekers receive fair treatment. He also urged the EU to offer greater avenues for legal immigration to Europe for skilled and unskilled workers, for family reunification and economic improvement - on a temporary and permanent basis.

The Directives currently in place concern minimum norms, not harmonization as such. Neither do the Directives contain a clear-cut policy, not to mention a vision.

- Family reunification (FRD) Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification

- the status of third-country nationals who are long-term residents (Council Directive 2003/109/EC of 25 November 2003)

- study et al.: Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

- Return (RD) DIRECTIVE 2008/115/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

- the highly qualified: Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment.

- sanctions against employers Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

Lack of vision ("Immigration has always been easier to start than to stop"[5])

Asylum has changed over the last 50 years changed from a goal into a means, from badly needed protection into a safe haven from where the 'struggle' could be continued, organized, pursued and/or financed. Similarly, asylum also became the channel to be used in case legal migration was not an option, in other words not possible. Many of the asylum seekers were in fact migrants, looking for jobs

5 Coleman's Cairo+10 contribution: (Keynote address on Population and Development in Europe during the last decade: an academic's overview): Facing the 21st Century. New developments, continuing problems (the full text can be found on the unece.org website).

and a better future, in itself a legitimate goal albeit that no (human) right to migration in general has been agreed upon. Now that most procedures have been streamlined (the *economy of procedures* stands central) and information on countries of origin has improved, resulting in restricted numbers of recognitions, possible profits from using the asylum channel for migratory purposes have diminished. The number of would-be migrants entering Europe, however, has remained stable. **To put it bluntly, migrants no longer register as asylum seekers but join the growing army of illegals, irregulars, the numbers of which are now calculated at 5-8 million.** Europe needs to determine exactly what it wants. Is migration the answer to its needs?

Smaller populations

Apart from the idea that bigger populations mean more power (presumably through larger armed forces or a stronger economy), there is in principle nothing wrong with decreasing populations. Of course, people want to become richer, and the fear is justified that with less 'producers' less products will be on the market. It is then forgotten that productivity has increased steadily over the last 500 years or so, and there is no reason to suspect that productivity would suddenly stop doing so. Yet, two important conditions then need to be met: (i) sufficient creative and innovative engineering capabilities are to be available to replace labour with capital, that is to introduce new machineries; and (ii) qualified managers must introduce better processing and must continuously streamline procedures. Innovation is the key word, and Europe should invest heavily in ensuring that the replacement of labour by capital will remain a major option. Subject to that condition decreasing populations might still enjoy growing productivity. If only 'space' were not such a scarce commodity.[6]

Alternatively, it should be appreciated that a yearly increase in a population by a mere 1% will result in doubling the population in 72 years. For Europe that would mean that by 2100 the EU-27 will

6 Remarkably, the Netherlands, in 2002-2003, combined increased unemployment with increased productivity.

have one billion inhabitants, and that the global population will reach the 25 billion mark by 2150. A prospect that deserves some thought?

Jobs available, jobs needed

Europe has during the last two centuries moved from mainly agriculture to manufacturing and to service industries. Today, thanks to effective communication and transportation, most production can take place on far-away shores. What is needed nearby are health, education, infrastructure and retail. Infrastructure entails construction (roads, offices, housing) but also communication (trains, aircraft, cars, telecom) and general upkeep (repairs, cleaning). Of the four mentioned here, health and education are least prone to productivity increases. So, Europe should welcome migrants who are able to ensure the progress of these sectors, where their expertise is appreciated and can be put to practical use. The implications in reality are quite obvious, though. Everyone has heard of the Syrian migrant, a Professor in Chemistry in Damascus University, who can find word only as a cab driver in Western Europe.

Back-office

It is probably even more surprising to learn that also moving so-called back-office activities (keeping files, administration, accounting, auditing) to low income countries can be a very profitable exercise, that is: profitable to all. The Economist calculated that the transfer of 1 dollar worth of back office work from the USA to India would give India 33 dollar cents and the USA no less than $1.12, making a total profit of 45%. This, it should be added, includes re-employment.[7]

The need for highly skilled labour

Europe has become lazy. Most people enjoy early retirement, 36-hour working weeks and 6 weeks annual leave. Moreover, the

7 India: labour: 0.10; profits retained in India: 0.10; suppliers 0.09; central government taxes 0.03; state government taxes: 0.01. Net benefit to India: 0.33. USA: savings accruing to US investors/ customers: 0.58; imports of US goods and services by providers in India: 0.05; transfer of profits by US-based providers in India back to US: 0.04; Net direct benefit retained in US 0.67; Value from US labour re-employed 0.45 – 0.47. Potential net benefit to US: 1.12-1.14. Source: The Economist, December 13th, 2003.

educational systems have become the victims of their own success. They produce grades, diplomas and degrees, but not necessarily the skills and experts Europe truly needs. Europe needs engineers, not administrators. R&D budgets need to be increased. Of course, a service industry has different needs and needs different people than economies based on agriculture or manufacturing. Yet, at a time when over 400,000 experts found work in the USA, Europe should rethink its educational and R&D policies. Meanwhile, Europe might indeed be in need of some highly skilled experts to bail the European countries out. That type of utilitarian approach should result in flexibility as to the granting of visas, labour and residence permits. The successful migrants move on or move back. The unsuccessful ones more often than not stay put. Policies reflecting the above deserve to be developed.

CONCLUSION

Therefore, it is this presentation's broad conclusion that in the case of migrants staying at home, all parties might be better off - the individuals as well as the countries of origin and destination. This is because the transfer of industries, agriculture and back-office jobs to low income or more productive countries would be much speedier, which ultimately substantially benefits the global economic development. It is about moving capital, rather than moving people.

As far as refugees are concerned, if they fit in within the 1951 Refugee Convention Art. 1 profile, then we have the legal and moral obligation to preserve those people, coming from war-torn countries.

According to official data, extracted from reports of UNHCR Bulgaria, for the past couple of years approximately 10, 000 individuals (along with some meager numbers that ought to be added from the beginning of the refugee crisis) have received their refugee status in Bulgaria and have presumably enjoyed in Western Europe, since a refugee status (not to be confused with a humanitarian such) gives one the right to travel freely within Europe. If you calculate the simple ratio of people with refugee

status (10, 000) over the total population of Bulgaria (approx. 7 mill) you'll get 0, 001 or a 0.001 refugees per Bulgarian citizen in Bulgaria. Now, disregarding all that media hype, it is quite easy to conclude that the refugee wave, as they call it in Bulgaria (unlike in Turkey) does not pose a serious threat to our country, not to speak of the fact that every single refugee's mission in Bulgaria is to actually get away from Bulgaria. This is hardly the apocalyptic scenario that Bulgarian media is all about.

I would like to conclude with another practical implication coming out from an ECHR case study – the El Hirsi case. No matter how much I am a proponent of the idea that we need to protect refugees, that we have a moral, legal and historical obligation to do so, this case essentially gave green light to all North Africa refugees to seek asylum in Italy. Now, think about a desperate refugee stuffing all his relatives in an unsafe boat in a desperate attempt to get to Lampedusa. Now, what is the most likely scenario? Drown in the Mediterranean? Just some food for thought.

IMMIGRATION AND REFUGEE LAW OF THE REPUBLIC OF BULGARIA

Victoria Viktorova MINGOVA

BULGARIA

IMMIGRATION AND REFUGEE LAW OF THE REPUBLIC OF BULGARIA

Victoria Viktorova MINGOVA[*]

INTRODUCTION

Good morning/afternoon! I'm Victoria Mingova. I'm a legal expert in the Constitutional Court of the Republic of Bulgaria. My report contains a brief overview of the general structure of the institutional and law-enforcement system in Bulgaria in the field of migration, asylum and integration and some decisions of the Constitutional Court of the Republic of Bulgaria.

1. INSTITUTIONAL FRAMEWORK

The structure of the main state institutions responsible for the implementation of migration and asylum policies consist of the following government ministries:

A. The National Council on Migration and Integration

The National Council was established in February 2015 and is a collective consultative body for formulating and coordinating the implementation of state policies in the field of migration and integration of foreigners seeking or having received protection in the Republic of Bulgaria.

- ***The Ministry of Interior***

The Ministry has two main structures with competencies on migration issues:

- The Migration Directorate is responsible for coordinating migration processes and developing migration policy as

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well as regulating and controlling the migration of third-country nationals residing in Bulgaria;

- General Directorate Border Police is responsible for border control, protection of state borders and for countering illegal migration and trafficking in human beings.

• ***The Ministry of Labour and Social Policy***

The Ministry is responsible for formulating and implementing policies for the admission of third-country nationals to the labour market in the country.

• ***The State Agency for Refugees***

The State Agency is a specialized state authority for providing protection and integration to refugees in Bulgaria. The Chairman of the Agency for refugees manages, coordinates and controls the implementation of state policy in relation to granting of refugee status or humanitarian status to foreigners in the Republic of Bulgaria. The State Agency for Refugees organizes activities for social, medical and psychological assistance to asylum-seekers and assistance for integration of foreigners with refugee or humanitarian status in the country.

• ***Commission for Protection against Discrimination***

The Commission is an independent specialized state body tasked with the prevention of discrimination, protection against discrimination and for ensuring equal opportunities.

• ***The Asylum Committee to the President of the Republic of Bulgaria***

The Asylum Committee is a unit to the Vice-President of the Republic of Bulgaria, to whom the President assigns the functions to grant asylum. The Asylum Committee shall make substantiated proposals regarding the decision on any asylum application sent to the President of the Republic of Bulgaria.

2. NATIONAL LEGISLATION RELATED TO ASYLUM AND MIGRATION

The national legislation of the Republic of Bulgaria includes all Community acts related to migration and asylum. They are reflected in a number of legal acts in primary and secondary internal legislation.

The main laws related to the implementation of the asylum and migration policy in Bulgaria are:

- The Constitution of the Republic of Bulgaria
- Law on Asylum and Refugees
- Law on Foreigners in the Republic of Bulgaria
- The Penal Code (regarding the penalties for illegal migration and trafficking in human beings)
- Civil Registration Act
- Bulgarian Citizenship Law
- Law on Combating Trafficking in Human Beings
- Law on the Entry, Residence and Departure of the Republic of Bulgaria the citizens of the European Union and members of their families
- Regulations, organizational regulations of the competent institutions and laws on health, education and other areas that have specific provisions to migrants.

A. National Policy on Migration, Asylum and Integration

The existing national policy on migration, asylum and integration in Bulgaria is based on National Strategy on Migration, Asylum and Integration for 2015 – 2020. The strategy sets a list of priorities for national policy in the field for the years from 2015 to 2020.

In the first place, it prioritizes the security of the external borders of the European Union. Bulgaria continues to aspire to join the

Schengen Area and the focus on the fight against illegal immigration remains a top priority in its policy.

The next group of priorities concerns the establishment of a functioning asylum system that involves a fair and transparent procedure for determining the need for international protection and effective integration support to individuals.

Thirdly, the strategy establishes priorities for the good management of the legal immigration of third country nationals, as well as the voluntary return of illegally residing migrants.

B. Types of Protection Provided by the Republic of Bulgaria to Foreigners

The protection provided by the Republic of Bulgaria to foreigners, shall include asylum, international protection and temporary protection:

- **Asylum** granted by the President of the Republic of Bulgaria to aliens who have been persecuted due to their beliefs or activities in support of internationally recognized rights and freedoms.
- **International protection**
  - **Refugee status** granted by the President of the State Agency for Refugees in line with the criteria set out in the 1951 Geneva Convention and the Law on Asylum and Refugees;
  - **Humanitarian status** granted by the President of the State Agency for Refugees to an alien whose life, security and freedom are threatened due to an armed conflict or danger of torture or other forms of inhuman and degrading treatment, as well as for other humanitarian reasons.
- **Temporary protection** shall be granted by the Council of Ministers for a certain period, in case of mass refugees' influx who are forced to leave their state of origin due to

armed conflict, civil war, foreign aggression, violation of human rights or heavy violence in the territory of the respective state or in an individual region thereof, and who because of this cannot return there.

C. Differences between Immigrants and Refugees According to the National Law

The public debate in Bulgaria in relation to the increased number of persons in need of international protection, at present does not differentiate between irregular migration and the right to seek asylum. Journalists and politicians use the terms 'migrants' and 'refugees' interchangeably. Thus, there is little awareness that refugees have no other choice, but to use the 'services' of human smugglers and to cross the border illegally in order to exercise their internationally recognized right to seek asylum. Asylum seekers often become the object of state measures to counter irregular migration.

- **Immigrants** voluntarily leave their country of origin in search of better employment and development opportunities. They can return to their homeland as they avail themselves of the protection of their national government and the rights laid down by law.
- **Refugees** avail themselves of protection under international law due to a well-founded fear of persecution in their country of origin. Granting protection to refugees amounts to saving their life.

Who Is An "Asylum Seeker" According To The National Law?

Unlike immigrants, asylum seekers do not leave their states voluntarily and on their own will for economic, family or educational reasons. The asylum seeker is an individual who is forced to flee his country of origin due to fear of persecution, violation of basic human rights or a threat to his life and security by reason of an armed conflict or a natural disaster.

For the above reasons, such an individual seeks protection in another state in order to ensure protection against harm for himself/herself or his/her family. In Europe this special type of residence is called **"international protection"**. For the purpose of international protection, the individuals who flee their country of origin for the above reasons may receive this special residence permit, even if they do not meet the usual requirements for legal migration – holding a regular passport, visa or crossing the border only via the designated points.

The states of the European Union apply a common system for granting this special type of residence permit, called CEAS (Common European Asylum System). The person seeking asylum and protection is called **an applicant for international protection in the EU states.**

D. Who Is "A Refugee" According to the National Law?

In accordance with the **Law on Asylum and Refugees of the Republic of Bulgaria:**

"A refugee is an alien who has a well-founded fear of being persecuted due to his: race; religion; nationality; membership of a specific social group; political opinion and/or belief, who is outside of the country whose national he is or, if stateless, outside the country of his permanent residence, and who, for those reasons, cannot or does not want to avail himself of the protection of that country or return thereto."

Pursuant to the law, the Bulgarian state grants refugee status to a foreigner who has a well-founded fear of persecution due to his/her race, religion, nationality, membership of a social group or political opinion and, for these reasons, is unable or unwilling to avail himself/herself of the protection of his/her country of origin or return to it.

Therefore, a foreigner must meet the requirements and grounds laid down in the law in order to be granted and receive refugee status in Bulgaria.

Upon receiving refugee status, a foreigner acquires the rights which the Bulgarian legislation guarantees to the beneficiaries of this status.

E. Procedures for Granting Asylum and International Protection

A foreigner who requests asylum shall file a written application to the President of the Republic of Bulgaria. If the application is filed with another state body he shall be obliged to send it immediately to the President.

Every foreigner has the right to apply for international protection, in person, in each of the territorial units of State Agency for Refugees with the Council of Ministers. The submission of an application for provision of international protection may be done either before the specialised administration, the State Agency for Refugees, or before any other government institution or state authority. Therefore, application for provision of international protection can be claimed on the territory, at borders before the Border Police staff, or in detention centres before the Migration Directorate staff, either of which are obligated to refer it immediately to the State Agency for Refugees[1].

Since 25 December 2015, the Agency is required to formally register the referred applications no later than 6 working days from their initial submission before another authority. The application should be made within a reasonable time after entering the country, except in the case of irregular entry/residence when it ought to be made immediately[2], otherwise it could be ruled out as manifestly unfounded[3]. If the application is made before a state authority other than the State Agency, status determination procedures cannot legally start until the foreigner is physically transferred from the border or detention centre to any of the Agency's reception centres for the so-called registration to lodge the claim "in person"[4].

1 Article 58 (4) Law on Asylum and Refugees (LAR).
2 Article 4 (5) LAR.
3 Article 13 (1) (11) - (12) LAR.
4 Article 61 (2) LAR.

The State Agency for Refugees is competent to grant or reject either of the two types of international protection; refugee status or subsidiary protection ("humanitarian status"). In case of mass influx where individual asylum applications cannot be processed, a temporary protection status is granted by the government following a collective decision made by the European Union Council[5]. These forms of individual or collective protection can be applied without prejudice to the authority of the Bulgarian President to grant asylum to any foreigner based on the national constitution, if he or she is persecuted for convictions or activities undertaken in order to protect internationally recognised rights or freedoms[6].

As of 16 October 2015, the international protection procedure stages are unified in one, single regular procedure[7]. Dublin and accelerated procedures are now considered as non-mandatory phases of the status determination, applied only by a decision of the respective caseworker, if and when information or indications are available to either engage the responsibility of another Member State to determine the international protection application in question[8], or to consider the international protection application as manifestly unfounded respectively[9].

Admissibility procedure: The 2015 amendments to the Law on Asylum and Refugees took the admissibility criteria out of the accelerated procedure's assessment thus introducing the admissibility assessment as a separate admissibility procedure that could be applied during the status determination[10]. An application can be deemed inadmissible if the applicant has been granted protection or a permanent residence permit in another European

5 Article 2 (2) LAR.

6 Article 27 (1) LAR in conjunction with Article 98 (10) Bulgarian Constitution.

7 Before the amendments of the law in the end of 2015 asylum applications in Bulgaria could be examined in 3 stages, respectively: 1) Dublin procedure (whether the asylum application will be examined by Bulgaria or another EU member state); 2) accelerated procedure (combined examination of both admissibility and manifestly unfounded grounds); and, 3) regular procedure (status determination on the merits of the application). If the asylum application was rejected at a former phase, the latter was inapplicable unless the rejection has been revoked by a court.

8 Article 67b (2) LAR.

9 Article 70(1) LAR

10 Article 13(2) LAR.

Union Member State or "safe third country". A new admissibility assessment has also been introduced with respect to subsequent applications which provides the opportunity to consider their admissibility based on a preliminary examination whether new elements or findings have arisen or been presented by the applicant relating to his personal situation or country of origin[11].

Accelerated procedure: The accelerated procedure presently is applied by a decision of the respective caseworker, if and when there is information or indications to consider the application as manifestly unfounded based on a number of different grounds[12]. A decision should be taken within 10 working days from lodging, otherwise the application has to be examined under the regular procedure. The accelerated procedure is not applicable to unaccompanied children.

Regular procedure: The regular procedure (titled under the law as a "general procedure") requires detailed examination of the application on its merits. A decision should be taken within 4 months from the lodging of the application but this deadline is indicative, not mandatory. After the 2015 reform, the deadline can be extended by 9 more months with an explicit decision in this respect by the Head of the State Agency[13], but in any case the Agency is obligated to conclude the examination procedure within a maximum time limit of 21 months from the lodging of the application[14].

Appeal: The appeal procedure mirrors the non-mandatory stages of administrative status determination:

- Dublin/Subsequent application: A non-suspensive appeal must be submitted within 7 days to the Administrative Court of Sofia, which has exclusive competence, in one instance[15];
- Accelerated procedure: A suspensive appeal must be submitted within 7 days to the territorially competent Regional Administrative Court, in one instance.

11 Articles 75a to 76c LAR; Article 76d in conjunction with Article 13(2)(4) LAR.
12 Article 70(1) LAR. The 14 applicable grounds are set out in Article 13(1) LAR.
13 The State Agency for Refugees is managed by a Chairperson: Article 46 et seq. LAR.
14 Article 75(4) and (5) LAR.
15 Article 84(4) LAR.

- Inadmissibility/Regular procedure: A suspensive appeal must be submitted within 14 days to the territorially competent Regional Administrative Court.

An onward **appeal to the Supreme Administrative Court is possible for inadmissibility decisions and negative decisions taken in the regular procedure**. In Dublin cases, subsequent applications and decisions taken under the accelerated procedure, only one appeal instance is applicable.

Legal aid can be granted by the court, if requested. All courts in all types of appeal procedures can revoke entirely the appealed administrative decisions and give mandatory instructions as to how the case must be decided at the first instance by the State Agency foe Refugees. However, the courts do not have powers to grant protection directly or to sanction the Agency, if their instructions are not observed while reverted asylum applications are re-considered. The courts can only proclaim the re-issued decision as null and void after a new appeal procedure, if it ignores the previous instructions of the court.

F. Who Is "An Immigrant" According to the National Law?

Any individual has the right to reside in, leave and return to the state of his citizenship. The immigrant is a person who has left his country in order to permanently settle in another state. Where people leave their state, they are called "emigrants", and where they enter a foreign state, they are called ''immigrants". The reasons for immigrating into another state may vary - employment, setting up a family or education. Irrespective of the reasons, however, immigrants leave their country to settle in another state on their own will and by their own decision without being forced to do so by other individuals or factors.

By way of law the states are not under the obligation to receive individuals who are not their citizens on their territory. Immigration is limited to the requirement for certain reasons to be available based on which the foreigner may be allowed to enter and stay for the purpose of permanent residence in a foreign state without being

its citizen. This change of residence from one's state into another one may take place only if the requirements, conditions and rules introduced by the laws of the latter are observed. These rules are referred to as an immigration regime.

Legal (regular) immigrants are foreigners from other states who have received permission by the Bulgarian authorities to enter (a visa) and to stay (residence) on the territory of Bulgaria.

In order to receive permission for legal residence, the immigrant must enter Bulgaria with a special visa (visa D). The tourist visa (visa C) entitles its holder only to a short-term stay of up to 3 months without the right to request a longer-term residence.

The longer-term residence can be prolonged (up to 1 year), long-term (up to 5 tears), and permanent (no fixed term). As each type of residence is conditional on specific requirements, the immigrant has to submit documents which prove that he meets these requirements. It is only legal immigrants with a long-term or permanent residence that are entitled to employment. Furthermore, legal immigrants have the right to travel to other European states, as long as they observe certain requirements and rules.

In Europe most states are united in the European Union. The states of the European Union apply common rules regarding the entry and stay of foreigners from states outside the European Union. Some European states do not exercise control over the national borders with other European states (Schengen area), which does not apply to the borders between the European Union and the states outside the Union (the so-called "external borders") where the passports and visas of all passengers are subject to control.

If an immigrant has entered Bulgaria or another European state without a passport, a visa or has not entered via the points designated for that purpose, and has thus crossed the border without the permission of the border authorities, he is treated as an illegal immigrant (irregular immigrant).

Illegal immigrants are not allowed to stay in Bulgaria. The Bulgarian authorities have the right to forcefully remove them

from the national territory without their consent - this procedure is called "deportation", if the authorities assess an illegal immigrant as posing a threat to the national security or public order, a removal procedure, called "expulsion", is applied.

In the event of both procedures with respect to illegal immigrants, an entry ban is imposed, the so-called "black stamp". The entry ban may cover a period of up to 5 years in cases of deportation or up to 10 years in cases of expulsion.

In addition, the authorities have the right to detain an illegal immigrant from 6 up to maximum 18 months, if time is needed to ensure the arrangements for the removal from the country – for example, due to the need for a laissez-passer to be issued in case the passport is missing.

The deportation, expulsion and detention orders can be appealed before a court; however, the court can overturn them only if such orders were issued by mistake or in violation of the law.

The deportation and entry ban orders issued in respect of an illegal immigrant are valid across all the states of the European Union. This is why the authorities always take fingerprints from illegal immigrants, which are recorded in a special internet database called EURODAC. All the EU states have access to this database. Even if an illegal immigrant flees into another European state and identifies himself with an assumed identity or uses forged documents, the authorities of that state will be able to immediately establish that a deportation order has been issued with respect to him. The entry ban imposed excludes the possibility to receive a visa for any EU state over the whole period of the ban. The only way for the illegal immigrant to avoid the entry ban is the consent to voluntary return to his country of origin.

3. INTEGRATION POLICY IN THE REPUBLIC OF BULGARIA

Integration policy for migrants in the country is conducted in accordance with the common basic principles on Integration of Immigrants into the European Union. The balance between rights

and obligations of migrants in the Republic of Bulgaria is guaranteed. Integration policy is an integral part of the state policy of our country. The Republic of Bulgaria has modern, well developed and effective legislation in the field of equal opportunities, social inclusion and non-discrimination, which is fully in line with European standards. The national legislation implements the provisions of the European Equality Directives by regulating the protection of all individuals on the territory of the Republic of Bulgaria against all forms of discrimination and at the same time assists in its prevention and establishes measures for equality of opportunity.

A. Decisions of the Constitutional Court

In the light of the above, I shall present to you certain decisions of the Constitutional Court of the Republic of Bulgaria on Equality and the Principle of Non-Discrimination.

According to Article 6 of the Constitution, all persons are born free and equal in dignity and rights. All citizens shall be equal before the law. There shall be no privileges or restriction of rights on the grounds of race, national or social origin, ethnic self-identity, sex, religion, education, opinion, political affiliation, personal or social status or property status. The term "citizens" refers to all individuals to whom this Constitution applies and according to Article 26, par. 2 of the Constitution foreigners residing in the Republic of Bulgaria shall be vested with all rights and obligations proceeding from the Constitution, except those rights and duties for which Bulgarian citizenship is required by this Constitution or by another law.

In Decision № 14 of 1992 on Constitutional Case № 14 of 1992, the Court interpreted the provision of Art. 6, par. 2 of Constitution — the equality of citizens before the law as a constitutional principle which is fundamental to the civil society and to the State. This principle is common to the entire legal system of the Republic of Bulgaria. It is the basis for the interpretation and application of the Constitution and the legislation. In order to ensure the general principle of the equality of all citizens before the law, Art. 6, par. 2 refers to certain signs may not give rise to unequal treatment – race, nationality, ethnic origin, gender, origin,

religion, education, beliefs, political affiliation, personal and social status, or property status. Constitution has explicitly bans on the aforementioned grounds. They are legally inadmissible as grounds for restriction of the rights or privileges.

Decision № 2 of 1998 on Constitutional Case № 15/97 in response to 50 Members of the 38th National Assembly ruled that the provisions of the Framework Convention on the Protection of National Minorities comply with the Constitution of the Republic of Bulgaria.

The rights and freedoms listed in the Convention are duly provided for and correspondingly protected in the Constitution. They are recognized to every individual regardless of his or her national identity.

The content of the rights and freedoms that are treated both in the Convention and the Constitution is determined by the modern standards of fundamental human rights.

The Constitutional Court recalled that respect for territorial integrity is a fundamental principle in international law and is also a fundamental principle enshrined in Art. 2 para 2 of the Constitution. The exercise of rights and freedoms under the Convention is possible and admissible only when this principle is strictly abided by both under the Convention and the Constitution.

The Constitutional Court concluded that the Convention provisions do not affect the principle of national unity that the Constitution proclaims. National unity does not exclude religious, language or ethnic differences among the citizens of the Republic of Bulgaria.

In Decision № 4 of 2001 on Constitutional Case № 15/2000 fifty-five Members of the 38th National Assembly challenged Art. 47 para 1 of the Law on Foreign Nationals in the Republic of Bulgaria on the basis of Art. 149 para 1 subpar. 2 and 4 of the Constitution, claiming that the provision is in contravention to the Constitution and is not compliant with the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

The challenge was turned down as it did not receive the majority of more than half of the votes of all justices required under Art. 151 para 1

of the Constitution. The Constitutional Court could not pass a ruling to cover both challenges and treated them separately.

The provision challenged reads that the coercive administrative measures in Arts. 40-47 of the Law on Foreign Nationals in the Republic of Bulgaria concern the national security and shall be non-appealable. Some of the Constitutional Court justices handed down the opinion that certain administrative acts shall not be subject to court supervision and the justification for that shall be the national security. Art. 120 para 2 of the Constitution provides for the non-supervision of legality. The exception has been codified to protect a Constitution-proclaimed value like national security to which both the Constitution and the Convention give primacy over citizens' fundamental rights. The exception does not divest the persons affected of the right to take the matter to a superior authority as per Arts. 45 and 56 so as to supervise the respective administrative act (out-of-court supervision). Therefore the provision is not discordant with the Constitution or the Convention.

The rest of the Constitutional Court justices handed down the opinion that Art. 47 para 1 of the Law on Foreign Nationals in the Republic of Bulgaria was in contravention to the Constitution. The provision reads that the acts listed shall not be contested judicially or administratively, which abridges the right to defence as per Art. 56 and Art. 120 para 2 of the Constitution. Moreover, the abridgement is not commensurate with the need of national security defence, which is guaranteed sufficiently by the possibility for immediate execution of administrative acts and an appeal will not eliminate this possibility.

Further, the latter opinion assumes that the coercive administrative measures in pursuance to Arts. 40-47 of the Law on Foreign Nationals in the Republic of Bulgaria may violate Convention-proclaimed rights and freedoms. The provision challenged though, in contravention to Art. 13 and Protocol 7 of the Convention, divests the persons affected of the right to defence in courts when facing national authorities. As regards the balance of rights and freedoms and the public interest, it is to be judged on a case-by-case basis and by a court or an agency independent of the Executive.

In Decision № 21 of 1996 on Constitutional Case № 19/1996 the Constitutional Court concluded that the Constitution guarantees the

right of everyone to express their opinions and to disseminate it by word - written or oral, by sound, image or otherwise. There is no constitutional limitation on the language in which this right may be exercised. Moreover, there is a constitutionally established right for citizens for whom Bulgarian is not native language - to use their own language. At the same time, the Constitution guarantees the right of everyone to "develop their culture in accordance with their ethnicity" - Art. 54, para. 1 of the Constitution. This right corresponds to the basic constitutional principle in Art. 6, para. 2 of the Constitution that "no restrictions on rights or privileges based on race, nationality, ethnicity ... are permitted".

In Decision № 4 of 2014 on Constitutional Case № 12/2013 the Constitutional Court exposes that Art. 6, para 2 of the Constitution reads that all citizens shall be equal before the law and that there shall be no privileges or restriction of rights on the grounds of race, national or social origin, ethnic self-identity, sex, religion, education, opinion, political affiliation, personal or social status or property status. The equality of citizens before the law is their fundamental right that recurs in other Constitution articles, Art. 19, para 2 and Art.121, para 1 that the Submission refers to.

The principle of equality stands for equality of citizens before the law and for the prohibition against discrimination on the grounds as enumerated in the Constitution. The law may provide for a differentiation with respect to the same right or responsibility, yet this is not tantamount to a breach of the principle of equality before the law if the differentiation is based on a definite criterion and if all subjects of law within the respective group meet the criterion.

4. CONCLUSION

Integration is an interactive process between immigrants and the host society. For immigrants, integration means the process of learning about a new culture, acquiring rights and obligations, gaining access to positions and social status, building personal relationships with members of the host society and establishing of a sense of belonging and identification with the host society. For the host society, integration means opening up institutions

and granting equal opportunities for immigrants. The better the relationship between institutions and immigrants, the more adequate policies are for their integration. The explicit goal of many empowerment measures is often to help immigrants to have their voice heard and to play an active role in the development of policies. Networking in different platforms is often an essential tool for migrant empowerment.

THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS REGARDING THE EXPULSION OF FOREIGN NATIONALS

Mehveş BİNGÖLLÜ KILCI

ECtHR

THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS REGARDING THE EXPULSION OF FOREIGN NATIONALS

Mehveş BİNGÖLLÜ KILCI[*]

I. ARTICLE 3 OF THE CONVENTION IN GENERAL

A. Absolute Nature of Prohibition of Torture

Article 3 reads:

> ***"Prohibition of Torture"***
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

This very short text has given rise to an enormous amount of judgments by the European Court of Human Rights ("the ECtHR"), including judgments concerning expulsion of foreign nationals. Article 3 is one of the most fundamental values of democratic societies, maybe the most fundamental. The ECtHR has held on many occasions that the European Convention on Human Rights ("the ECHR") prohibits torture and inhuman or degrading treatment or punishment in absolute terms. Hence, even in the most difficult circumstances, such as the fight against terrorism and organised crime, ill-treatment or torture cannot be tolerated. There is no exception to this prohibition and even in the event of a public emergency threatening the life of the nation it is not possible for the Contracting States to derogate from their obligations under Article 3. Besides, the prohibition is absolute irrespective of the victim's conduct (*Labita v. Italy* [GC], no. 26772/95, § 119, ECHR 2000-IV).

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B. "Torture and Inhuman or Degrading Treatment or Punishment"

For a treatment to be considered as ill-treatment by the ECtHR, it must attain a minimum level of severity. Brutality in police custody or in prison may constitute torture or inhuman treatment depending on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. Similarly, imposition of a death sentence following an unfair trial and detention in poor conditions of detention are also considered to be ill-treatment. Stoning to death and corporal punishment were considered to be inhuman punishment (see *Ireland v. the United Kingdom*, 18 January 1978, Series A no. 25; *Tyrer v. the United Kingdom*, 25 April 1978, Series A no. 26; *Jabari v. Turkey*, no. 40035/98, ECHR 2000-VIII; *Peers v. Greece*, no. 28524/95, ECHR 2001-III; *Öcalan v. Turkey* [GC], no. 46221/99, ECHR 2005-IV; *Bouyid v. Belgium* [GC], no. 23380/09, ECHR 2015).

II. APPLICATION OF ARTICLE 3 IN EXPULSION CASES

How does Article 3 come into play in the context of expulsion of foreign nationals from a Contracting State?

As we all know, according to the general principles of international law, States have the right to control the entry, residence and expulsion of foreign nationals. The ECtHR has reiterated this principle on many occasions (*Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, ECHR 2012). However, it has also stated that the expulsion of a foreign national by a contracting state may engage the responsibility of that State under Article 3 of the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment or punishment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country (see *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008).

Hence, when we look at what the ECtHR has stated as the

conditions for engaging a State's responsibility under Article 3 in expulsion cases, we will see the following:

• First, the element of "**risk**"; and

• Second, the existence of "**substantial grounds**" for believing that there is a real risk which is about the evidentiary standards in such cases.

III. THE ELEMENT OF "RISK OF ILL-TREATMENT" IN EXPULSION CASES

A. A "Real" Risk of Ill-Treatment

As regards the "real risk", it should be noted at the outset that the term "real" carries importance. When an applicant applies to the ECtHR, it is not enough for him or her to show that there is only a possibility of a risk. The risk must be real.

B. Source of the Risk

The risk does not have to emanate from State authorities. It may also emanate from persons or groups of persons who are not public officials. In such a case, the European Convention may apply on two conditions:

• It must be shown that the risk is real; and

• It must also be shown that the authorities of the receiving State do not or cannot remove the risk by providing appropriate protection.

An example is the case of *J.K. and Others v. Sweden* ([GC], no. 59166/12, ECHR 2016).

C. Personalised Risk / Group Membership / General Violence

In principle, an applicant applying to the ECtHR must show that he himself or she herself runs the risk of ill-treatment. (see, for example, *Jabari v. Turkey* above). The ECtHR examines the general situation in the destination country as well as the applicant's personal circumstances.

In cases where an applicant alleges that he or she is a member of a group systematically exposed to a practice of ill-treatment, the protection of Article 3 of the Convention enters into play when it is established:

• that there are serious reasons to believe in the existence of the practice in question;

• his or her membership of the group concerned.

In such circumstances, the ECtHR would not insist that the applicant show the existence of further special distinguishing features. For instance, in the case of *Salah Sheekh v. the Netherlands* (no. 1948/04, 11 January 2007) the applicant was a member of a minority ethnic group in Somalia which was systematically targeted by another group. The applicant himself had been ill-treated and his family members were raped and killed by militia in Somalia. The ECtHR, having noted that the applicant was a member of that ethnic group, considered that his removal to Somalia would be in violation of the Convention.

In another case against Russia, in the case of *Mamazhonov v. Russia* (no. 17239/13, 23 October 2014), the ECtHR noted that it had found a breach of the prohibition of torture in all the cases before it concerning extradition or expulsion of Uzbek nationals from Russia to Uzbekistan who were prosecuted for religious or political extremism because there were credible reports and information showing that those people were systematically ill-treated in Uzbekistan. The ECtHR observed that the applicant was also charged with extremism. It then concluded that his extradition would be in breach of Article 3 of the Convention.

Along with personalised risk and membership of a group there is a third scenario: Generalised violence. For the ECtHR, a real risk of ill-treatment may be established when there is a general violence in the destination country. However, the ECtHR made it clear that it would adopt such an approach only in extreme cases of violence. That is to say when there is a real risk of ill-treatment simply by virtue of an individual being exposed to such violence

on return. Very good examples of this scenario are the cases of *L.M. and Others v. Russia* (nos. 40081/14 and 2 others, 15 October 2015) and *S.K. v. Russia* (no. 52722/15, (14 February 2017). The applicants in those two cases were Syrian nationals and the cases concerned expulsion of those applicants to Syria following the armed conflict had started there. The ECtHR noted that the applicants were from Aleppo and Damascus, where particularly heavy fighting was raging. It also noted that there were reports of indiscriminate use of force, indiscriminate attacks against civilians and civilian objects. It therefore found that the applicants' removal to Syria would amount to a breach of article 3 of the Convention.

(for the assessment of the ECtHR regarding Mogadishu/Somalia see *Sufi and Elmi v. the United Kingdom* (nos. 8319/07 and 11449/07, 28 June 2011) when indiscriminate violence existed; and *K.A.B. v. Sweden* (no. 886/11, 5 September 2013) after the level of violence decreased in Mogadishu).

D. Indirect Removal

The indirect removal of a foreign national to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention. For instance in *Abdolkhani and Karimnia v. Turkey* (no. 30471/08, 22 September 2009), the applicants were Iranian nationals who fled their country. The ECtHR held that they should not be sent to Iran where they risked ill-treatment and also not to Iraq because the risk of them being sent to Iran from Iraq was also real.

E. Internal Flight Alternative

Similar considerations apply in the scenario of internal flight alternatives. The Expelling State may allege that an applicant is not deported to a "dangerous" area but a safe area in the destination country. In such circumstances, the expelling Contracting State still has the responsibility to ensure that the applicant is not, as a result of its decision to expel, exposed to treatment contrary to Article

3 of the Convention. Therefore, for relying on an internal flight alternative, certain guarantees have to be in place: The person to be expelled must be able to

- travel to the area concerned,
- gain admittance and,
- settle there.

For instance in the case of *N.M.B. v. Sweden* (no. 68335/10, 27 June 2013), the ECtHR considered that expelling an Iraqi Christian who was originally from Bagdad to the Kurdistan Region in Iraq was acceptable.

F. Diplomatic Assurance

Then there is the question of diplomatic assurances. In some cases, the expelling States argued before the ECtHR that they had obtained diplomatic assurances from the receiving State for good treatment of the applicants or for non-application of death penalty etc.

The ECtHR examines these diplomatic assurances in each case where the State makes the claim. Existence of such an assurance is not sufficient for the ECtHR. For instance in the case of *Baysakov and Others v. Ukraine* (no. 54131/08, 18 February 2010), the ECtHR did not accept the assurance provided by the Office of the General Prosecutor of Kazakhstan that the applicant would not be tortured. The ECtHR noted that there were credible reports that political opponents were tortured in Kazakhstan and there was no system of prevention of torture at the time. Besides, the General Prosecutor was not empowered to give such an assurance. The ECtHR also noted that because there was no effective system of torture prevention, it was difficult for it to see whether such assurances would be respected. On the other hand, in the same case the ECtHR accepted the General Prosecutor's assurance that he would not request death penalty in the applicant's trial (see also *Saadi v. Italy* (above) where the Italian Government asked the Tunisian Government to provide assurance that the applicant would not be ill-treated if returned

and where the Tunisians referred to national laws and international obligations only. The ECtHR did not accept that statement as an assurance; and *Othman (Abu Qatada) v. the United Kingdom* (no. 8139/09, ECHR 2012 (extracts)), in which where the ECtHR accepted the diplomatic assurance given by the Jordanian Government to the United Kingdom Government).

G. Procedural Duty on the State to Examine the Risks

The last point with regard to the element of risk, is **the obligation of the State authorities to examine the risk of their own motion**. In its judgment of *F.G. v. Sweden* ([GC], no. 43611/11, ECHR 2016) the ECtHR held:

"… in relation to asylum claims based on an individual risk, it must be for the person seeking asylum to rely on and to substantiate such a risk. Accordingly, if an applicant chooses not to rely on or disclose a specific individual ground for asylum by deliberately refraining from mentioning it, be it religious or political beliefs, sexual orientation or other grounds, the State concerned cannot be expected to discover this ground by itself. However, considering the absolute nature of the rights guaranteed under Articles 2 and 3 of the Convention, and having regard to the position of vulnerability that asylum seekers often find themselves in, if a Contracting State is made aware of facts, relating to a specific individual, that could expose him to a risk of ill-treatment in breach of the said provisions upon returning to the country in question, the obligations incumbent on the States under Articles 2 and 3 of the Convention entail that the authorities carry out an assessment of that risk of their own motion. This applies in particular to situations where the national authorities have been made aware of the fact that the asylum seeker may, plausibly, be a member of a group systematically exposed to a practice of ill-treatment and there are serious reasons to believe in the existence of the practice in question and in his or her membership of the group concerned…"

IV. ASSESSMENT OF THE RISK AND BURDEN OF PROOF

So at the beginning of my speech, I mentioned the following passage from the judgment of *Saadi v. Italy*:

"Expulsion of a foreign national by a contracting state may engage the responsibility of that State under Article 3 of the Convention where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment or punishment contrary to Article 3 in the destination country."

When a case comes before the ECtHR, how does the Court assess if there is a real risk of ill-treatment and what kind of elements does it use for its assessment? Who shows the substantial grounds for believing that there is a real risk?

The ECtHR has repeatedly stated that it is in principle for the applicant to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he or she would be exposed to a real risk of being subjected to treatment contrary to Article 3; and that where such evidence is adduced, it is for the Government to dispel any doubts about it (see, for example, *Saadi v. Italy* [GC], no. 37201/06, ECHR 2008 and *F.G. v. Sweden*, [GC], no. 43611/11, ECHR 2016).

In the case of asylum seekers in particular, owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions. Even if the applicant's account of some details may appear somewhat implausible, the ECtHR has considered that this does not necessarily detract from the overall general credibility of the applicant's claim (ibid.).

The ECtHR has also repeatedly stated that if it finds it necessary, it may obtain relevant materials *proprio motu*. Those materials may be domestic materials as well as materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations.

V. CONCLUSION

The ECtHR keeps receiving applications from foreign nationals whose expulsion from member States is planned or who have already been deported and the cases before it raise diverse issues. The applicants face the risk of deportation to countries from the four corners of the world and the nature and type of the proceedings in member States also vary. On the other hand, however diverse and complicated the issues are, the basic principles established by the ECtHR do not vary: The Court continues stressing that the prohibition of torture is absolute and that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. The ECtHR also stresses the obligation of the State authorities to subject the risk of ill-treatment in the destination country to an adequate examination.

GENERAL REVIEW OF INTERNATIONAL PROTECTION SYSTEM AND ASYLUM ISSUES IN GEORGIA

Giorgi SULKHANISHVILI
Nika AREVADZE

GEORGIA

GENERAL REVIEW OF INTERNATIONAL PROTECTION SYSTEM AND ASYLUM ISSUES IN GEORGIA

Nika AREVADZE[*]

Asylum as a fundamental right

Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arisingfrom non-political crimes or from acts contrary to the purposes and principles of the United Nations

Universal Declaration of human Rights Article 14.

Law of Georgian on International Protection

determines the conditions of entry, stay and standards of treatment on the territory of Georgia of aliens and stateless persons, who do not have stateless status in Georgia (hereinafter: stateless persons), who have requested international protection pursuant to this Law

Establishes the legal status, rights and obligations of asylum-seekers

Provides for the grounds and procedures for granting refugee and humanitarian statuses and temporary protection to aliens and stateless persons in Georgia

Sets the competencies of the state agencies and rules of coordination of their activities in establishment of fair and.

General Terms

Asylum-seeker - an alien or a stateless person who has made a

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request for international protection to any state agency in respect of which a final decision has not yet been taken by the Ministry or the court decision has not yet entered into force.

Request for International Protection - a direct or indirect, oral or written expression of intent/desire by an alien or a stateless person, to seek international protection in Georgia.

Application for International Protection - an official written application submitted by an alien or a stateless person to the Ministry seeking international protection in Georgia.

Pursuant to this Law, the following forms of international protection are granted in Georgia:

a) refugee status;

b) humanitarian status; and

c) status of a person under temporary protection.

Granting Refugee according to Georgian Legislation

State body authorized to review and decide on granting refugee status cases is the Ministry of Internally Displaced Persons from the Occupied Territories, Accommodation and Refugees of Georgia.

Asylum-seeker submits the request for international protection to the Ministry in a written form, which registers him/her and initiatesthe proceedings.

Asylum-seeker might submit the request to another state agency/ body, which immediately forwards the request to the Ministry.

Asylum procedure

- Implies a legal process, which includes undertaking of all the necessary activities for the implementation of this Law by the responsible state agencies, from the moment of requesting asylum until the final decision regarding international protection is made, including entry into force of the judgment of a court

• Whole asylum procedure is confidential

Non-refoulement Principle

Asylum-seeker or person under international protection shall not be returned or expelled in any manner whatsoever to the border of the country where

• their life or freedom would be threatened on account of their

• race,

• religion

• nationality,

• membership of a particular social group, or

• political opinion

Non-refoulment principle does not protect asylum-seeker or person under international protection, who:

Is regarded as a danger to the security of Georgia

having been convicted by a final judgment of a particularly serious crime on the territory of Georgia and constitutes a danger to the community of Georgia.

Exemption from criminal responsibility

Alien or stateless person is exempted from criminal responsibility for the illegal entry to the territory of Georgia, violating the rules of Law of Georgia on Occupied Territories, or for illegal crossing of the state border, or preparation, use or purchasing of forged identity card or other official documents, seal, stamp or blank, for keeping such documents for later use if he/she has fled to Georgia from the country where he/she was threatened illegally stays on the territory of Georgia and asks state authorities of Georgia for international protection, and.

• He/she has not sold forged official documents, seal, stamp or blank forms

• if there are no other offences in his/her actions.

Exemption from criminal responsibility

Alien or stateless person, who Is a victim of trafficking.

• before acquiring the status of a victim of trafficking, because of being a victim of trafficking committed a crime.

Exception

If alien or stateless person is refused to international protection by relevant final decision, he/she is not exempted from the criminal responsibility.

Rights and Obligations of Asylum Seekers pursuant to Georgian legislation

Asylum-seekers rights in Georgia are:

• Right to translation service

• Right to receive comprehensive information about asylum procedure

• Right to stay in the reception centre during procedures for examination of an application for international protection, except the cases when he/she is detained in the penitentiary establishment of the Ministry of Corrections

• Right to education

• Right to receive health-care and social aid

• Right to free legal service

• Right to work

• Right to a fair trial

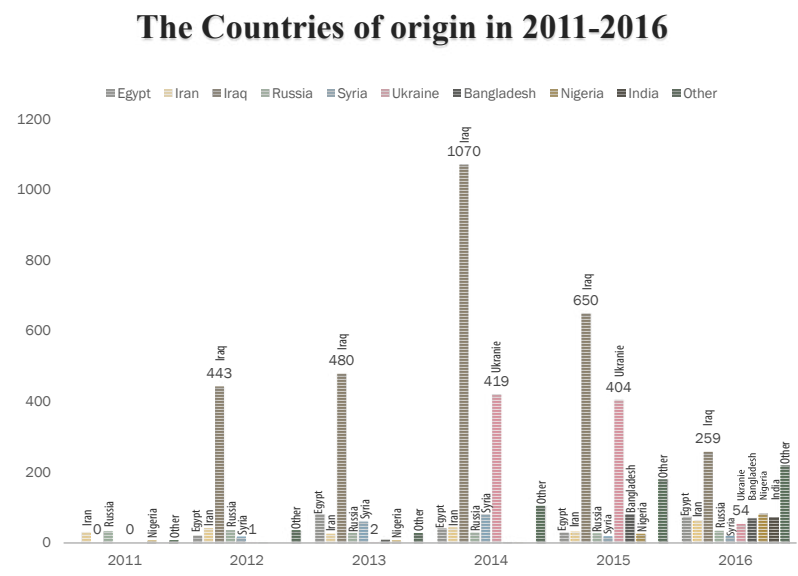
Constitutional complaint N1249:

• Disputed norm – Subparagraphs "b" and "g" of Article 57 of the law of Georgia "on International Protection"

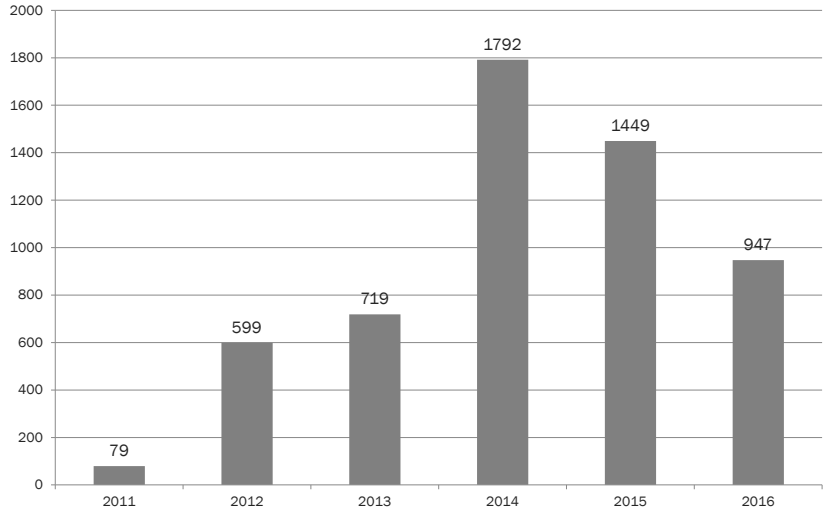
• Asylum seeker`s obligation to remain on the territory of Georgia and surrender his/her travel documents to the officials;

- Constitutional norm – Paragraph 2 of the Article 22 of the Constitution of Georgia "Everyone legally within the territory of Georgia shall be free to to leave Georgia."

Statistics



Asylum-seeker Statistics in 2011-2016



CONSTITUTIONAL RIGHTS OF FOROIGNERS IN THE LIGHT OF THE LIGHT OF THE CASE LAW OF THE CONSTITUTIONAL COURT OF GEORGIA

*Giorgi SULKHANISVILI**

Sources

- General clause:
  - Article 47 of the Georgian Constitution: Aliens and stateless persons living in Georgia shall have the rights and obligations equal to those of the citizens of Georgia except as provided for by the Constitution and law.
- Particular provisions:
  - e.g. article 42 of Georgian Constitution - Everyone shall have the right to apply to the court for protection of his/her rights and freedoms.

Public defender of Georgia v. Parliament of Georgia

- **Facts:**
  - Ombudsman of Georgia challenged the provision of the statute on the Constitutional Court of Georgia.
  - Disputed norm: "The application on constitutionality of the normative acts can be submitted by the citizens of Georgia, physical persons who reside in Georgia and Georgian entities."
  - Issue: Can foreigners who DO NOT RESIDE in Georgia submit constitutional complaint in the Constitutional Court of Georgia?
- **Arguments by the respondent:**
  - Foreigners are not allowed to apply to the Constitutional Court out of the latters constitutional mandate.

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- The constitution itself excludes the foreigners from applying to the Constitutional Court. Article 89 of the Constitution:

- …the Public Defender or A CITIZEN , under the procedure determined by an organic law, the Constitutional Court of Georgia shall: consider the constitutionality of normative acts in terms of fundamental human rights and freedoms enshrined in Chapter Two of the Constitution on the basis of an individual's lawsuit.

• **Extracts from the judgment of the Const. Court:**

- The only reason of the application to the constitutional Court is protection of violated rights or prevention of potential violation.

- The function of the constitutional court radically differs from lawmaking, where the rights of foreigners are restricted just because their opinions do not substitute the the opinions of citizens.

- The Constitutional Court defends the existing order stipulated by the Constitution itself.

• **Argument about the Constitutional provision:**

- Article 89 of the Constitution cannot reduce the content of the article 42 of the Constitution, that stipulates Everyone shall have the right to apply to the court for protection of his/her rights and freedoms.

- the State shall be bound by these rights and freedoms as directly applicable law.

• **Issues:**

- Is there some hierarchy of constitutional norms?

- Maybe some grounds for checking constitutionality of Constitutional norms???

• **Extracts from the judgment of the Const. Court:**

- Each constitutional right defines its subjects.

- **article 42 of Georgian Constitution - Everyone shall have the right to apply to the court for protection of his/her rights and freedoms.**

- It is true that right to fair trial may be restricted, but it should not be done on the basis of the citizenship.

- The person cannot remained without the protection of his constitutional rights.

- The law was held as unconstitutional.

Citizens of Russia – Oganes Darbinian, Rudolf Darbinian, Sussanna Jam- kotsian and Citizens of Armenia – Milena Barseghian and Lena Barseghian v. the Parliament of Georgia.

- Facts: the applicant were nationals of the Russian federation and the republic Armenia who resided in Georgia.

- Disputed norm defined the circle of groups of the people who can get free education. Applicant's group were not in this circle.

- Pursuant to the Claimants the disputed provisions are discriminatory; they prescribe differentiated treatment based on national identity, origin, language and status.

• **Article 35 of the Constitution:**

- Pursuant to paragraph 1 of Article 35 of the Constitution of Georgia "Everyone shall have the right to education. Freedom of choice in education shall be guaranteed"

- General education shall be fully funded by the State according to law.

- Main purpose of general education is full fledged development of individual's skills and capabilities, formation of critical analysis skills and views of a person, strengthening respect towards basic human rights, effective integration of a person into the society and promotion of tolerance among all national, racial, ethnic, religious or other groups.

- Presence of common sense in the society is an essential foundation for formation of a democratic and fair State.
- the State must equally care for the citizens of Georgia as well as for the aliens residing in Georgia.
- In case of limitation of the right to education the adolescent is discredited and the illiterate label will accompany him/her throughout the life. Such policy of state would create a risk of formation of the so-called "society in the dark" which will be domiciled in the State.
- The law was struck down.

Thank you!

IMMIGRATION AND REFUGE LAWS IN INDONESIA

Dr. Mardian WIBOWO
Jefri Porkonanta TARIGAN

INDONESIA

IMMIGRATION AND REFUGEE LAWS IN INDONESIA

Dr. Mardian WIBOWO[*]
Jefri Porkonanta TARIGAN[**]

I. INTRODUCTION

The strategic position of Indonesia poses advantages and challenges. One of advantage is the transit point for global economic activities. Such advantage has the side consequence, i.e. the passing of global population traffic. The multitude of illegal immigrants from other countries entering Indonesia surely brings consequences about residents and/or nationalities in the territory entered by immigrants. To respond issues on immigrants and potential problems that may arise, Indonesia governs them into various regulations of laws. Indonesia codifies various regulations on such matter on many levels, from abstract-philosophical to technical norm.

In Indonesia, protection, respect, and fulfillment of human rights are integral parts of the purpose of Indonesian Independence Proclamation and 1945 Constitution. Notwithstanding the non-ratification to 1951 Convention, Indonesia has a set of regulation of laws permitting the provision of asylum to foreigners, including the provision/fulfillment of basic needs of refugees. It indicates that without ratification to 1951 Convention does not hamper Indonesia to respect, protect and fulfill basic needs of refugees and/or asylum seekers.

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II. GEOGRAPHICAL POSITION OF INDONESIA

The Unitary State of the Republic of Indonesia is the largest archipelagic state in the world with 17,508 small and big islands.[1] The clusters of Indonesian islands have direct access to Indian Ocean on western and southern part, and Pacific Ocean on northern and eastern part. Islands of Indonesia located between two continents, Australia on southern part and Asia on northern part. The territory of Indonesian islands touch Malaysia, Singapore, the Philippines, Papua New Guinea, Australia, and Timor Leste.

Such cluster of 17,508 islands distinguishes Indonesia with any other country, i.e. the 54,716 km of coastline or second largest in the world behind Canada.[2] The land border is "as little as" 3,000 km, while the sea territory borders with India, Malaysia, Singapore, Thailand, Vietnam, the Philippines, Republic of Palau, Australia, Timor Leste, and Papua New Guinea.[3]

The strategic position of Indonesia, stapled between two oceans and two continents, poses advantages and challenges. One of advantage is the transit point for global economic activities, from northern part of the world to the south and vice versa, and from the western part of the world to the east and vice versa. Such advantage has the side consequence, i.e. the passing of global population traffic. Islands of Indonesia are the shortcut for the people migrating from north to south, west to east, and vice versa.

The crossing of economic and population traffic within territory of Indonesia is not recent issue, rather far before pre-historical era. Researches on various topics indicate that Indonesia was built by the blending of Nusantara[4] indigenous and exogenous people, among others, Northern Asian, Middle Easterner, Indian, European, etc forming Indonesia that is united in diversity. It is a proof that since

1 http://indonesia.go.id/?page_id=479&lang=id , Internet Access Date: 30.08.2017.

2 http://www.dw.com/id/10-negara-dengan-garis-pantai-terpanjang-di-dunia/g-18951508, Ministry of Defense calculated Indonesia's coastline as 81.900 km. See https://www.kemhan.go.id/2012/06/08/panjang-garis-perbatasan-indonesia-timor-leste-2688-kilometer.html, Internet Access Date: 30.08.2017.

3 http://wanadri.or.id/home/2015/11/pulau-terdepan-indonesia/ Internet Access Date: 30.08.2017

4 Before called Indonesia, such islands were called Nusantara.

pre-historical era, Indonesia has been migration destination from different parts of the world.

The development of population in Indonesia also brings economical growth accelerating commercial activities within Nusantara and surroundings. Study by Anthony Reid discovers various historical notes indicating that during 1340s, Chinese boats came to Nusantara for transporting clove,[5] and followed immediately by traders from other states. Such foreign traders increasingly enrich diversity of ethnic and culture for the territory later known as the Unitary State of the Republic of Indonesia.

III. IMMIGRANTS, REFUGEES, AND ASYLUM SEEKERS

The increasing of global population density as well as economical, social, political, cultural and other conflicts resulting in the territory of Indonesia as destination or transit, to say the least, for the movement of population from other countries, regardless legality. From here, the terms of immigrants, refugees and asylum seekers are widely known.

The terms of immigrants, refugees, and asylum seekers are often considered the same. They actually have different meaning with different legal consequences, although strictly related. Those three terms, even, are likely interchangeably attributed to the same person.

Great Dictionary of Indonesian Language defines **immigrant** as "*one who comes from other country and permanently resides in any country: ...*"[6] So far, there is no regulation of laws formulating the term 'immigrant,' that is why such term is derived from dictionary.

Legal system of Indonesia acknowledges the term 'immigrant' even put it as law title, being Immigration Act. This act, however, does not define 'immigrant', but rather uses 'Foreigner' who is "*... one who is non-Indonesian nationality*".[7]

5 Anthony Reid, *Southeast Asia during Commercial Period 1450-1680 Volumed 2: Global Trade Network*, third edition, (Jakarta: YOI, 2015), pg. 5.

6 *The Great Dictionary of Indonesian Language* version 1.1.2.20.

7 See Article 1 paragraph 9 of Law 6/2011 on Immigration.

Actually, the term 'immigrant' has been long known in Indonesian vocabulary but officially used in Indonesian law through Presidential Decree Number 125 of 2016 on Foreign Refugees Treatment (Perpres 125/2016).

Great Dictionary of Indonesian Language defines 'refugee' (*pengungsi*) as, "*one who evacuates*". The same dictionary defines the words "*evacuation*" (*ungsi*) or "*to evacuate*" (*mengungsi*) as "*evacuating (dismissing) oneself from danger or saving oneself (to a secured area)*".[8]

Whereas pursuant to President Regulation (*Perpres)* 125/2016 **Foreign refugee** is defined as, "*a foreigner who is inside the territory of the Unitary State of the Republic of Indonesia due to reasonable fear of persecution on the grounds of different race, ethnicity, religion, nationality, certain social group membership, and political view and is unwilling to obtain protection from one's native country and/or has obtained asylum seeker status or refugee status from the United Nations High Commissioner for Refugees in Indonesia*".

The term **asylum** defined by the Great Dictionary of Indonesian Language as, "*place for evacuation (take shelter), staying (on), freeloading (on)*".[9] Meanwhile, Indonesian laws and regulations do not specifically formulate the term 'asylum seeker'. Generally, 'asylum seeker' is equalized as 'refugee'. The exception is that asylum seeker is the one originally has the intention to obtain asylum/protection from destination country, while refugee does not necessarily have motive to obtain asylum.

The other noteworthy difference is that the status of immigrant or Foreigner is directly attached to the non-Indonesian nationalities that illegally entered the territory of Indonesia. On the other hand, in order to obtain the status of refugee and asylum seeker, the non-Indonesian nationalities must hold statement/certificate from the United Nations High Commissioner for Refugees (UNHCR) in Indonesia.

8 *The Great Dictionary of Indonesian Language* version 1.1.2.20.
9 *Ibid*.

A. Cases on Refugee and Asylum Seeker

The territory of Indonesia that is the crossing path of transportation between two continents and two oceans has passed through by people who migrate or relocate. Many cases where non-Indonesian nationalities in their effort to save themselves from their original residence (state), deliberately entered territory of Indonesia to stay; or at least stranded or transited in their effort to reach destination country.

Several cases on the illegal flowing of refugees or immigrants into Indonesia are as follows.

- 250,000 refugees from Vietnam gradually entered Riau, Indonesia, on May 1976, by boat.[10]
- Iranian and Afghan refugees entered Makassar, Indonesia, on 2014.
- 44 refugees from Tamil, Sri Lanka, entered Aceh territory, on June 2016, when their boat had engine failure.[11]
- etc.

From various cases of refugees entered the territory of Indonesia, data provided by UNHCR-Indonesia states that per 31 January 2017, there are 14,425 immigrants or refugees entered Indonesia, consisting of 8,039 refugees and 6,386 asylum seekers.[12]

Such significant amount of refugees entering and/or passing the territory of Indonesia cannot be separated from the fact that Indonesia is the neighbor, close to, even directly borders the countries providing asylum.[13] One destination of refugees is a small island named Christmas Island, Australia, that is geographically closer to the southern part of Indonesia, rather than Australian mainland.

10 http://internasional.kompas.com/read/2015/03/09/141453927/Kampung.Vietnam.Monumen.kemanusiaan.Indonesia , Internet Access Date: 30.08.2017.

11 http://www.bbc.com/indonesia/berita_indonesia/2016/06/160613_indonesia_pengungsi_srilanka, Internet Access Date: 30.08.2017.

12 https://news.detik.com/berita/d-3442963/14425-imigran-ilegal-penuhi-indonesia-ini-langkah-pemerintah, Internet Access Date: 30.08.2017.

13 http://www.unhcr.org/id/unhcr-di-indonesia , Internet Access Date: 30.08.2017.

The multitude of illegal immigrants from other countries entering Indonesia surely brings consequences from residents and/or nationalities in the territory entered by immigrants. Regardless the positive or negative consequence, the impacted dimensions are very vast, including social, political, economical, cultural, and other dimensions. To respond issues on immigrants and potential problems that may arise, Indonesia governs them into various regulations of laws.

B. Regulation of Laws

Indonesia is a law state, as expressed in 1945 Constitution Article 1 paragraph (3) that "*Indonesia is a law state*". As a result, all events or aspects of life in the state must be in legal corridor. No event or action beyond the law, including issues on immigration and refuge.

The system of Indonesian regulation of laws follows norm hierarchy as governed in Law Number 12 of 2011 on Establishment of Regulation of Laws (Law 12/2011). Such hierarchy is pursuant to the idea of Hans Kelsen and Hans Nawiasky regarding *stufenbau theori*.

Law 12/2011 puts 1945 Constitution as the highest regulation of law, followed respectively by Stipulation of People's Consultative Assembly, Law/Governmental Regulation in Lieu of Law, Governmental Regulation, President Regulation, Provincial Regional Regulation, Regency/City Regional Regulation, and other regulations. The higher hierarchy of regulation of laws, the more abstract its norm. Whereas, the lower its hierarchy, the more technical its nature.

In respect of immigration and refuge, Indonesia has not ratified the 1951 Convention Relating to the Status of Refugees. Nevertheless, Indonesia has full attention on the efforts in fulfilling basic rights of the refugees. In Indonesia, protection, respect, and fulfillment of human rights are integral parts of the purpose of Indonesian Independence Proclamation on 17 August 1945.

In order to manifest the respect and fulfillment of human rights,

primarily related to the issues on immigration and refuge, Indonesia codifies various regulations on such matter on many levels, from abstract-philosophical to technical norm. Below are regulations on immigration and refuge issues from constitutional level to technical/ executive level.

1. ***1945 Constitution***

   1945 Constitution contains many provisions related to immigration and refuge issues. This is primarily because 1945 Constitution specially regulates human rights, while immigration and refuge issues are the problem of persons – regardless their nationality – strictly related to human rights.

   In respect of human being, 1945 Constitution applies three different expressions; they are persons, residents, and citizens. The term "persons" refers to every human kind without exception; "residents" refers to those living within the territory of Indonesia, whether Indonesian citizen or not; while "citizens" refers to those officially acknowledged as Indonesian citizens (having different rights to those non-citizens), inside or outside the territory of Indonesia.

   Some provisions of 1945 Constitution mentioned below apply the expression "persons", which means that such provision is aimed to all people and not limited to people with Indonesian nationality. The term "persons" or "each person" in 1945 Constitution is the keyword that such provision may be applied as legal foundation in treating the issues on immigration and refuge.

   Here are several provisions in 1945 Constitution regarding immigration and refuge.

   - Article 28A states, "*Each person shall be entitled to live and maintain its life and livelihood*".
   - Article 28B paragraph (2) states, "*Each child shall be entitled to live, grow, and develop as well as entitled for protection on violence and discrimination*".

- Article 28D paragraph (4) states, "*Each person shall be entitled for nationality status*".
- Article 28G paragraph (2) states, "*Each person shall be entitled to be free from mistreatment or disparaging actions and entitled to obtain political asylum from other countries*".

Such provisions of 1945 Constitution are further regulated in hierarchically lower laws.

2. ***Laws***

2.1. Law Number 37 of 1999 on Foreign Relations (Law 37/1999)

- Article 25 paragraph (1) states, "*The authority to provide asylum for foreigners shall be on President's hands by paying attention to Minister's considerations*".
- Article 26 states, "*Asylum provided for foreigners shall be implemented pursuant to national regulation of laws and by paying attention to international law, customary, and practice*".

Several articles in Law 37/1999 as explained above indicate that Indonesia legally acknowledges and applies the concept of asylum. In other words, the asylum provided by the Government of Indonesia to the foreigners is legally permitted. Such authority to provide asylum for foreigners even delegated to the President by paying attention to Minister's considerations.

Provision of Article 26 confirms that the asylum is provided pursuant to national law and international law, customary and practice. It shows that notwithstanding Indonesia has not ratified yet to 1951 Convention, the content of such convention is not prohibited for consideration in providing asylum and generally in treating refugees.

2.2. Law Number 6 of 2011 on Immigration (Law 6/2011)

- Article 13 paragraph (1) states, "*Immigration Officer shall prevent Foreigner entering Indonesia if: ... b.not holding valid and effective Travel Documents; ...*".

- Article 13 paragraph (2) states, "*Foreigner prevented to enter as meant in paragraph (1) shall be put into temporary custody pending deportation process*".
- Article 83 paragraph (1) states, "*Immigration Officer shall be authorized to put Foreigner into Immigration Detention House or Immigration Detention Room if such Foreigner: a. Is in the territory of Indonesia without valid Residence Permit or with non-applicable Residence Permit; b. Is in the territory of Indonesia without valid Travel Documents; ... d. Is pending Deportation process; or e. Is pending departure to outside territory of Indonesia due to refusal of Admission Notice*".[14]
- Article 86 states, "*Provision on Immigration Administrative Actions shall not be applied to the victims of human trafficking and smuggling*".
- Article 87 paragraph (1) states, "*Victims of human trafficking and smuggling that are in the territory in Indonesia shall be put into Immigration Detention House or other designated place*".
- Article 87 paragraph (2) states, "*Victims of human trafficking and smuggling as meant in paragraph (1) shall be treated differently than Detention in general*".

From several provisions of Law 6/2011 above, it is clear that Indonesia expressly prevents the entry of foreigners without valid travel documents. It should be understood in the context that Indonesia is a sovereign country and should protect its territory and citizen. However, such prevention should not be performed by blocking borders,[15] rather quarantining the foreigners entering the territory of Indonesia by putting them in temporary shelter until the Government of Indonesia has clearly identified the problems faced by them. The placement of foreigners including refugees and asylum seekers in temporary shelter (detention house) effectuated until the Government of Indonesia has decided legal actions for such persons.

14 Immigration Detention House is a technical executive unit running Immigration Function as temporary shelter for Foreigners imposed with Immigration Administrative Actions.

15 Closing or fencing borders is technically difficult for Indonesia since majority of its border area is sea.

Regulation in law level is technically explained further in form of Presidential regulations or decrees. Regulations arranged by President on refugees as mandated in Law 37/1999 are as follows.

3. *Presidential Regulation of the Republic of Indonesia Number 125 of 2016 on Foreigner Refugees Treatment (Prepress 125/2016)*

Perpres 125/2016 is the implementing regulation to Article 27 paragraph (2) of Law 37/1999 on Foreign Relations.

Article 1 number 1 states, "*Foreign Refugee, hereinafter referred to as Refugee is a foreigner who is inside the territory of the Unitary State of the Republic of Indonesia due to reasonable fear of persecution on the grounds of different race, ethnicity, religion, nationality, certain social group membership, and political view and is unwilling to obtain protection from one's native country and/or has obtained asylum seeker status or refugee status from the United Nations High Commissioner for Refugees in Indonesia*".

Article 2 paragraph (1) states, "*Treatment for Refugee shall be based on cooperation between the central government and the United Nations High Commissioner for Refugees in Indonesia and/or international organization*".

Article 6 states, "*Institution organizing Search and Rescue affairs shall conduct Search and Rescue operation to the boat allegedly transporting Refugees calling for help*".

Article 9 states, "*Refugee found in emergency state shall be treated by: a. Relocating Refugee to the rescue boat if the boat is sinking; b. Bringing him/her to the closest port or land if it is the matter of life and death; c. Identifying Refugee who needs emergency medical aid; d. Referring such Refugee-alleged foreigner to Immigration Detention House in the closest port or land*".

Article 26 paragraph (1) states, "*Regency/City Regional Government shall determine the shelter for Refugee*".

Article 26 paragraph (5) states, "*Basic needs facilities as meant in paragraph (4) shall at least cover: a. Providing Fresh water; b. Fulfilling for*

foods, drinks, and cloths; c. Medical and cleaning service; and d. Religious facility".

Article 27 paragraph (1) states, "*Refugee with special needs shall be put outside the shelter as facilitated by international organization on immigration affairs upon approval by minister dealing with law and human rights affairs through working unit dealing with immigration affairs*".

Article 27 paragraph (3) states, "*Refugee with special needs as meant in paragraph (1) shall include Refugee who is: a. Sick; b. Pregnant; c. Disabled; d.Child; and e. Old*".

Article 29 paragraph (1) states, "*Asylum seeker whose application for refugee status is denied and finally denied by the United Nations High Commissioner for Refugees in Indonesia shall be put into Immigration Detention House for Voluntary Repatriation or deportation pursuant to the provision of regulation of laws*".

Article 29 paragraph (2) states, "*Other than the asylum seeker whose application for refugee status is denied and finally denied as meant in paragraph (1), Refugee pending the process to third country placement shall also be put into Immigration Detention House*".

Provisions in Perpres 125/2016 indicate that Indonesia respects and protects the human rights of refugees. Such respect is manifested, among others, in the following actions.

a. The Government of Indonesia welcomes international cooperation in order to treat refugees, especially with UNHCR.

b. The Government of Indonesia prepares a set of actions to help refugees having difficulties in sea route.

c. The central government through regional government provides shelter for refugees.

d. Shelter for refugees is equipped with basic facilities such as fresh water, foods, drinks, cloths, medical care, and religious facility.

e. Refugees with special needs, i.e. sick, pregnant, disabled,

child, and old refugees have special care in form of treatment outside the shelter.

f. Asylum seeker whose application for refugee status is denied by UNHCR is put into immigration detention house pending voluntary repatriation or deportation.

g. Transit refugees going to the third country are temporarily accommodated in immigration detention house.

This Keppres serves as a guideline for law enforcers on duty in treating refugees, stage by stage. Before the enactment of Keppres 125/2016, technical treatment of refugees was guided by Regulation of Director General of Immigration Number IMI-1489.UM.08.05 Tahun 2010.

IV. CONCLUSION

Notwithstanding the non-ratification to 1951 Convention, Indonesia has a set of regulation of laws permitting the provision of asylum to foreigners, including the provision/fulfillment of basic needs of refugees. It indicates that such non-ratification to 1951 Convention does not hamper and underlie Indonesia to respect, protect and fulfill basic needs of refugees and/or asylum seekers.

IMMIGRATION AND REFUGEE LAW

Yelena ARTEMYEVA
Mensulu AMANGALIYEVA

KAZAKHSTAN

IMMIGRATION AND REFUGEE LAW

Yelena ARTEMYEVA[*]
Mensulu AMANGALIYEVA[**]

Конституция Республики Казахстан

принята на республиканском референдуме 30 августа 1995 года.

Статья 12 Конституции Республики Казахстан

1. В Республике Казахстан признаются и гарантируются права и свободы человека в соответствии с Конституцией.

2. Права и свободы человека принадлежат каждому от рождения, признаются абсолютными и неотчуждаемыми, определяют содержание и применение законов и иных нормативных правовых актов.

3. Гражданин Республики в силу самого своего гражданства имеет права и несет обязанности.

4. Иностранцы и лица без гражданства пользуются в Республике правами и свободами, а также несут обязанности, установленные для граждан, если иное не предусмотрено Конституцией, законами и международными договорами.

5. Осуществление прав и свобод человека и гражданина не должно нарушать прав и свобод других лиц, посягать на конституционный строй и общественную нравственность.

Статья 21 Конституции Республики Казахстан

1. Каждому, кто законно находится на территории Республики Казахстан, принадлежит право свободного передвижения по

[*] Director, Constitutional Council of Kazakhstan.
[**] Advisor, Constitutional Council of Kazakhstan.

ее территории и свободного выбора местожительства, кроме случаев, оговоренных законом.

2. Каждый имеет право выезжать за пределы Республики. Граждане Республики имеют право беспрепятственного возвращения в Республику.

Всеобщая декларация прав человека, принятая Резолюцией 217 А (III) Генеральной Ассамблеи Организации Объединенных Наций от 10 декабря 1948 года

Статья 13

2. Каждый человек имеет право покидать любую страну, включая свою собственную, и возвращаться в свою страну.

Статья 29

2. При осуществлении своих прав и свобод каждый человек должен подвергаться только таким ограничениям, какие установлены законом исключительно с целью обеспечения должного признания и уважения прав и свобод других и удовлетворения справедливых требований морали, общественного порядка и общего благосостояния в демократическом обществе.

Международный пакт о гражданских и политических правах,

принятый Резолюцией 2200А (XXI) Генеральной Ассамблеи Организации Объединенных Наций от 16 декабря 1966 года, ратифицирован Законом Республики Казахстан от 28 ноября 2005 года № 91-III.

Статья 12

2. Каждый человек имеет право покидать любую страну, включая свою собственную.

3. Упомянутые выше права не могут быть объектом никаких ограничений, кроме тех, которые предусмотрены законом, необходимы для охраны государственной безопасности,

общественного порядка, здоровья или нравственности населения или прав и свобод других и совместимы с признаваемыми в настоящем Пакте другими правами.

Закон Республики Казахстан «О миграции населения»

принят 22 июля 2011 года, регулирует общественные отношения

в области миграции населения, определяет правовые, экономические

и социальные основы миграционных процессов.

Статья 3

Основные виды иммиграции в зависимости от цели въезда на территорию Республики Казахстан и пребывания на ее территории:

- целью возвращения на историческую родину;
- целью воссоединения семьи;
- целью получения образования;
- целью осуществления трудовой деятельности;
- по гуманитарным и политическим мотивам.

Статья 5

Права и обязанности иммигрантов

Иммигранты в Республике Казахстан имеют право:

пользоваться правами и свободами, установленными для граждан Республики Казахстан, если иное не предусмотрено Конституцией, законами и международными договорами;

на образование, медицинскую и социальную помощь, свободного выбора места жительства в порядке, установленном законодательством Республики Казахстан; на свободное передвижение по территории Республики Казахстан, открытой для посещения иммигрантами;

обращаться в суд и государственные органы для защиты принадлежащих им имущественных и личных неимущественных прав;

на получение платных адаптационных и интеграционных услуг в центрах адаптации и интеграции оралманов, за исключением оралманов и членов их семей, получающих данные услуги на бесплатной основе.

2. Иммигранты в Республике Казахстан:

1) несут обязанности, установленные для граждан Республики Казахстан, если иное не предусмотрено Конституцией, законами и международными договорами;

2) обязаны соблюдать Конституцию и законодательство Республики, в том числе установленный порядок въезда, выезда и пребывания на территории Республики Казахстан, который определяется законодательством Республики.

Закон Республики Казахстан «О беженцах»

принят 4 декабря 2009 года № 216-IV,

определяет правовое положение лиц, ищущих убежище, и беженцев

на территории Республики Казахстан.

Статья 1.

Беженец – это иностранец, который в силу обоснованных опасений стать жертвой преследований по признаку расы, национальности, вероисповедания, гражданства, принадлежности к определенной социальной группе или политическим убеждениям находится вне страны своей гражданской принадлежности и не может пользоваться защитой своей страны или не желает пользоваться такой защитой вследствие таких опасений, или лицо без гражданства, находящееся вне страны своего постоянного места жительства или гражданской принадлежности, которое не может или не желает вернуться в нее вследствие этих опасений.

Статья 78 Конституции Республики Казахстан

Суды не вправе применять законы и иные нормативные правовые акты, ущемляющие закрепленные Конституцией права и свободы человека и гражданина. Если суд усмотрит, что закон или иной нормативный правовой акт, подлежащий применению, ущемляет закрепленные Конституцией права и свободы человека и гражданина, он обязан приостановить производство по делу и обратиться в Конституционный Совет с представлением о признании этого акта неконституционным.

IMMIGRATION AND REFUGEE LAW

Anita ÇAVDARBASHA
KOSOVO

IMMIGRATION AND REFUGEE LAW

Anita ÇAVDARBASHA[*]

I. GENERAL OVERVIEW

Migration as a permanent process of movement of people and the constant increase of the number of migrants, has determined the migration to be the main focus in many countries of the world. This increase of migrants was noticed even in Western Balkans and in Republic of Kosovo.

Migration flows and policies are inter-related: migration flows create the need for policies to manage them, and policies, in return, shape ongoing and future migration flows. Based on all this, Republic of Kosovo has undertaken a series of measures by which it drafted and approved several laws and secondary legislation, strategic documents, action plans and other documents.

The Republic of Kosovo stays committed in preventing illegal migration and at the same time provides the legal framework and institutional set-up in dealing with refugees, in accordance with the best practices and human rights perspective.

The challenges that we face, and the legal obligation to be in line with the EU *acquis* made us comply with the standards and take responsibilities on our road towards respecting human rights.

Therefore, as further steps to strengthen this matter, the Republic of Kosovo has also foreseen its obligations in the National Programme for Implementation of the Stabilisation and Association Agreement (NPISAA) 2017 -2021, where it is clearly stated that:

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"Regarding asylum policy, Kosovo shall guarantee the international standards in accordance with the Geneva Convention relating to the Status of Refugees 1951 and Protocol relating to the Status of Refugees, 1967. Special attention shall be paid to the rights of asylum seekers, thereby to ensure that the principle of "non-refoulement" is respected. In the short term, Kosovo shall ensure the harmonization of national legislation with the EU acquis, especially regarding the acceptance of asylum seekers, the treatment of asylum requests and management of return process of asylum seekers to their country of origin".

II. THE LEGAL FRAMEWORK

The Republic of Kosovo has a hierarchy of norms in which the Constitution[1] is the highest legal act.

Our Constitution, reflects the highest standards of the contemporary democracy, protection of human rights and fundamental freedoms of the citizens, and the best practices in term of the separation of powers.

In our Constitution, human rights and fundamental freedoms guaranteed by the bellow mentioned international agreements and instruments, are directly applicable in the Republic of Kosovo and, in the case of conflict, have priority over provisions of laws and other acts of public institutions.

The international instruments, which are applicable directly in our system are:

(1) Universal Declaration of Human Rights;

(2) European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;

(3) International Covenant on Civil and Political Rights and its Protocols;

1 Constitution of the Republic of Kosovo available at: https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702.

(4) Council of Europe Framework Convention for the Protection of National Minorities;

(5) Convention on the Elimination of All Forms of Racial Discrimination;

(6) Convention on the Elimination of All Forms of Discrimination Against Women;

(7) Convention on the Rights of the Child;

(8) Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.

Accordingly, when the Kosovo Constitution was adopted, all human rights laid down in these international human rights instruments became constitutional rights within the Kosovo legal order, even without ratifying them.

Taking into account also the rights of the refugees, the Constitution under Article 156 foresees that:

"The Republic of Kosovo shall promote and facilitate the safe and dignified return of refugees and internally displaced persons and assist them in recovering their property and possession."

To further illustrate the importance of the Articles and the connection with the respect for human rights and fundamental freedoms I would like to mention a case that was decided before the Constitutional Court.

According to our Constitution, the proposed Constitutional Amendments may be approved by the Assembly only after the President of the Assembly has referred the proposed amendment to the Constitutional Court for prior assessment, to confirm that the proposed amendment does not diminish the rights and freedoms set forth in chapter II of the Constitution.

After the Governments proposal, the President of Assembly, on 12 April 2012, submitted to the Constitutional Court a referral

concerning the Proposal (See case KO38/12)[2]. Among different proposals for Constitutional Amendments there was proposed also the deletion of the abovementioned article 156 on refugees and displaced persons.

The Constitutional Court decided that the deletion of this Article could diminish some rights and freedoms set forth in the Chapter II of the Constitution which is the chapter containing provisions for the fundamental rights and freedoms.

The Constitutional Court held in this case that by having the Article 156 of the Constitution, the Republic of Kosovo has a positive obligation to enforce human rights as foreseen in the Articles 13 and 14 of the Universal Declaration on Human Rights and Article 2 of Protocol NO. 4 to the Convention for the Protection of Human Rights and Fundamental Freedom.

The Constitutional Court on this issue also mentioned the article 35 of the Constitution by which the freedom of movement is guaranteed and it goes as follows:

"Article *35 [Freedom of Movement]*

1. Citizens of the Republic of Kosovo and foreigners who are legal residents of Kosovo have the right to move freely throughout the Republic of Kosovo and choose their location of residence.

2. Each person has the right to leave the country. Limitations on this right may be regulated by law if they are necessary for legal proceedings, enforcement of a court decision or the performance of a national defence obligation."

As one can see, the mere fact that every proposal for amendment of the Constitution, has to go through the prior assessment by the Constitutional Court, to check if the proposal diminishes the

2 Case K038/12. Assessment of the Government's Proposals for Amendments of the Constitution submitted by the President of the Assembly of the Republic on 12 April 2012 (No. Ref.: K 234 /12 on 15 May 2012), paragraphs 80-93.

fundamental rights and freedoms foreseen in it, shows that the overall system takes care that the fundamental rights and freedoms are guarded with utmost care.

On the other hand, clear provisions on the matter of immigration and refuges, are regulated by the laws, and the most important ones are:

1. Law on Foreigners[3]

2. Law on Asylum[4]

These laws are drafted in accordance with the international standards and as such also in the Country Report[5] was stated that *"Legislation on migration, asylum and border/boundary management matters is largely in line with EU acquis, […]."*

A. Law on Foreigners

This law regulates the conditions of entry, movement, residence and employment of foreigners in the territory of the Republic of Kosovo.

The Law on Foreigners foresees three types of residences: short term, temporary and permanent. Foreigners have also the right to work, provided that they comply with the conditions set out in the law.

The rights of a foreigner holding a permanent residence permit are:

- employment and self-employment;
- vocational training;

3 LAW NO. 04/L-219 ON FOREIGNERS, published in the Official Gazette on 5th September 2013, available at: https://gzk.rks-gov.net/ActDetail.aspx?ActID=8876.

4 LAW NO. 04/L-217 ON ASYLUM, published in the Official Gazette on 30th August 2013, https://gzk.rks-gov.net/ActDetail.aspx?ActID=8869.

5 European Union: European Commission, COMMISSION STAFF WORKING DOCUMENT, Kosovo* 2016 Report: Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy, November 2016, COM(2016) 715 final, p.65 available at: https://ec.europa.eu/neighbourhoodenlargement/sites/near/files/pdf/key_documents/2016/20161109 report_kosovo.pdf [accessed 5 September 2017].

- education and student scholarship;
- social welfare, right to pension and medical insurance;
- access to goods and services and the supply of goods and services;
- freedom of association and affiliation and membership of an organization representing workers or employers or of any organization whose members are engaged in a specific occupation, including the benefits conferred by such organization.

When deciding on the return or removal of foreigner from the territory of the Republic of Kosovo, the law provides that there will be considered:

- the best interest of the child;
- family life;
- the state of health of the foreigner concerned;
- the principle of non-refoulement

B. Law on Asylum

The Law regulates the standards and procedures for granting the status of refugee, subsidiary protection, and temporary protection, as well as the rights and obligations of asylum seekers, the persons with the refugee status and persons who are granted Subsidiary Protection and Temporary Protection.

What is important in this law is that the definition of refuges is made in Article 2 paragraph 1.11 as follows:

"Refugee–a person who owing to the well-founded fear of persecution for reason of race, religion, nationality, political conviction or belonging to a particular social group, is outside their country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country, or a stateless person, who, being outside of the country of former habitual residence for the same reasons as mentioned above, is unable or, owing to such fear, unwilling to return to that country."

The law goes further stipulating every element what it means when applying the definitions:

- **the concept of race** includes considerations of colour, descent, or membership of a particular ethnic group;
- **the concept of religion** includes the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;
- **the concept of nationality** is not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;
- **a group** is considered to form a particular social group where in particular:
  - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
  - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society. Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Republic of Kosovo. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

- **the concept of political opinion** includes the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in subparagraph1.26 of this Article and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the asylum seeker;

The most important provisions of the law are:

- That no one can be forced, in any manner, to be returned in a country where his life, his bodily integrity or freedom will be posed in danger for one of the motives stipulated above.
- The right of the asylum seeker to stay during the asylum procedure so from the moment he/she submits asylum application in Kosovo shall have the right to stay in its territory until the termination of the asylum procedure.
- Anyone to who is granted the asylum in Kosovo may exercise profitable activities, change the type of work and occupation.
- The person with refugee status may not be removed from Kosovo, unless when it places in danger the internal and external security of Kosovo, or seriously violates the public order.
- Asylum seeker or a person with refugee status or additional or temporary protection shall have the right for health care, in accordance with Law that regulate health care.

The law also promotes and obliges for the cooperation with the Office of High Commissariat of United Nations for Refugees who shall help the competent state authorities in the field of asylum for performing their duties, in relation to the implementation of the Convention of year 1951 and the protocol of year 1967 on the status of refugees and other international instruments that deal with refugees as well as the Convention of year 1954 regarding the Status of Stateless persons.

C. Institutional Set up and Competences

The competences are first of all foreseen in the Regulation No. 02/2011 on the Areas of Administrative Responsibility of the Office of the Prime Minister and Ministries[6]. Under Appendix 3 the Ministry of internal Affairs is responsible for:

- controlling and overseeing the state border in accordance with the legislation in force
- issues related to migration, asylum, citizenship and repatriation;

Within the Ministry of Internal Affairs operated the Department for Citizenship, Asylum and Migration (DCAM) which among others is responsible for reviewing and deciding on applications for asylum and international protection; Supervision and management of the Asylum Centre for accommodation of asylum seekers; Assisting and facilitating the integration of refugees in the society of the Republic of Kosovo; Reviewing applications for entry and residence permit in the Republic of Kosovo.

Within DCAM there is a Centre for Asylum-seekers which was inaugurated in Magure, municipality of Lipjan, in March 2012. The Centre is responsible for admission and accommodation of asylum-seekers. The Centre was built with international standards, and it is divided into two premises a) administration; and b) accommodation of asylum -seekers with 50 person capacity.

III. THE CASE LAW OF THE CONSTITUTIONAL COURT

The Constitutional Court is an independent organ whose role under the Constitution is that it is the final authority for interpreting the Constitution and the compliance of the laws with the Constitution.

Regarding the issue on immigration and refugees, we did not have particular cases, because our Constitutional Court is a very

6 Regulation No. 02/2011 on the areas of administrative responsibility of the Office of the Prime Minister and Ministries, published in the Official Gazette on 22 March 2013 available at: https://gzk.rks-gov.net/ActDetail.aspx?ActID=10533.

young court. However, we have chosen the following cases to illustrate with examples issues that were referred to our Court and that ore somehow related to the topic we are discussing here:

- **Resolution on Inadmissibility** in Case No. KI96/13 Applicant B. R Constitutional Review of the Decision, PZ. no. 169/ 12, of the Court of Appeal in Pristina, dated 21 January 2013.

The applicant, filed a Referral pursuant to Article 113.7 of the Constitution of Kosovo challenging a decision of the Court of Appeal in Pristina. He claimed that this decision was taken in violation of the Constitution because:

"the actions of the courts in the Republic of Kosovo have violated [his] rights to enjoy [his] personal property and rights to safety because there is a duality in the administrative decisions of court."

In addition, the Applicant claimed that the:

"state has taken over responsibility to protect the property of all its citizens and at the same time it is the successor of international institutions in Kosovo and legally it is impossible that nobody is responsible for the damage that cause to [him] during the riots in 2004."

One of the main allegations of the Applicant was that he was discriminated because he is a national of another country and therefore he alleged that the constitutional right to *"equality before the law"* is violated.

On this regard the Applicant cited also the UN Human Rights Committee of the Ninetieth Session, General Comment N0.32[7]:

"The right of access to courts and tribunals and equality before them is not limited to citizens of States parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party. A situation in which an individual's attempts to access the competent courts or tribunals are

7 UN Human Rights Comittee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, CCPR/C/GC/32 p.4.

systematically frustrated de jure or de facto runs counter to the guarantee of article 14, paragraph 1, first sentence. This guarantee also prohibits any distinctions regarding access to courts and tribunals that are not based on law and cannot be justified on objective and reasonable grounds."

The Applicant also argued that since he has this guaranteed right to use and enjoyment of his property, the respondents have violated this right by preventing him from receiving just compensation and ultimately in violation of Article 8 of the European Convention.

On the issue of the admissibility of the Referral, the Court held, that the Referral was inadmissible because the Applicant failed to submit evidence that the relevant proceedings were in any way unfair or tainted by arbitrariness.

Hence, the Court held that the Referral was manifestly ill-founded.

- **Resolution on Inadmissibility** in Case No. KI122/12 Applicant E.R, Constitutional Review of the Resolution of Municipal Court for Minor Offences, Reg. No. 46854/2012 of 19 October 2012

On December 2012, the Applicant filed the Referral in the Constitutional Court of the Republic of Kosovo and sought from the court the constitutional review of the Resolution of the Court for Minor Offenses in Prishtina.

On August 2012, the Department of Border Police of the Republic of Kosovo delivered a request to the Applicant , a citizen of the Republic of Albania to leave the territory of the Republic of Kosovo.

However, since the Applicant didn't leave the country as asked, during an inspection by the Department of Foreigners and Illegal Migration of the Ministry of Internal Affairs, he was found working as a musician in a facility in Kosovo. The Department of Foreigners and Illegal Migration, against the Applicant filed a request on initiation of the minor offence proceedings to the

Municipal Court of Minor Offences in Pristina regarding violation of Article 33 and in conjunction with Article 32 paragraph 1.1.6 within the provisions of the Law for Foreigners no. 04/L-069.

The Municipal Court of Minor Offences in Pristina issued then a resolution by which it imposed a fine on the Applicant and also imposed to the Applicant a protection measure of immediate deportation with no right of entry into the territory of the Republic of Kosovo in a time period of two (2) years. After the appeal of the Applicant, the imposed measure of "*no right to entry into the territory of the Republic of Kosovo in a time period of two (2) years*" the time period was decreased to one (1) year by the High Court of Minor Offences in Pristina.

The Applicant alleged that the proceedings before regular courts resulted in violation of the provisions of minor offense procedure, erroneous and incomplete determination of the situation and violation of Law.

The Court noted that the Applicant has not specified what constitutional rights he claims to have been violated by the Resolution of the Minor Offenses Court.

Pursuant to that the Applicant has not substantiated his allegations nor he did provide any evidence on violation of his rights and freedoms by the regular courts the Constitutional Court rejected the Referral as manifestly ill-founded.

- **Resolution on Inadmissibility** in Case no. KI 147/11 Applicant, M. S Constitutional Review of the Decision of the High Court for Minor Offence in Pristina, GJL. no. 1288/2011, dated 28 October 2011.

The Applicant filed a referral in the Constitution of Kosovo asserting that her rights under Articles 24 [Equality Before the Law], 32 [Right to Legal Remedies] were infringed by the decision of the High Court for Minor Offences, which upheld the decision of the Minor Offences Court in Prizren as to the fine but changed the decision as to the period where the Applicant did not have the right to enter to one year.

The Court held that the Referral was inadmissible because the Applicant failed to submit evidence that the relevant proceedings were in any way unfair or tainted by arbitrariness. Hence, the Court held that the Referral was manifestly ill-founded. Furthermore, as to the administrative proceedings the Court notes that the Applicant initiated an administrative conflict procedure with the Supreme Court against the Decision of the Appeals Committee dated 8 August 2011. It follows that the Referral is inadmissible for non-exhaustion.

- **Resolution on Inadmissibility** in Case no. KI 121/10 Applicants S.Ch, KB.Ch, ChK.Ch and HB.B Constitutional Review of the Decisions of the High Court for Minor Offence in Pristina, GJL.nos. 1258/2010, 1259/2010, 1260/2010, 1261/2010, dated 22 November 2010.

The Applicants filed a Referral pursuant to Article 113.7 of the Constitution, asserting that their rights under Articles 24 and 32 of the Constitution were infringed when the High Court for Minor Offences issued an unfavorable decision in a deportation matter despite objections from the Applicants that administrative appeals related to the issue were still pending. The Applicants also contended that the subsequent unfavorable dispositions of the administrative appeals infringed on their Article 32 rights since they were unable to appeal the rulings because copies were never served on them.

The Applicants requested postponement of the deportations on grounds that they would impose a financial hardship and risk the health of a pregnant Applicant and her fetus.

Regarding the administrative proceedings, the Court held that the Referral was inadmissible because the Applicants failed to exhaust all legal remedies, noting that they had not substantiated their claim that they were unaware of the disposition of the administrative appeal, citing *AAB-RIINVEST University L.L.C. vs. Government of Kosovo* for the proposition that exhaustion of remedies is necessary because there is an assumption that the Kosovo legal system will provide an effective remedy for Constitutional violations.

Concerning the criminal proceedings, the Court held that the Applicants merely disputed factual findings and applications of law by the lower courts, highlighting that the Court is limited to resolving allegations of Constitutional violations, such as whether a trial was fair. In that regard, the Court found that the proceedings were not unfair or arbitrary, citing *Shub v. Lithuania.* In view of the inadmissibility of the Referral, the Court denied the request for interim measures.

- **Resolution on Inadmissibility** Case KI 22/09 D.G vs. Decision No. PKL-KZZ 76/08 of the Supreme Court of Kosovo dated 6 April 2009

The applicant filed a referral, thereby claiming that his constitutional rights have been infringed by the decision of the Supreme Court of Kosovo, which found the agreement on extradition between the UN Mission in Kosovo and another state to be valid, therefore to extradite the applicant to that state. The applicant claimed that the judgment of the Supreme Court violated the principle *ne bis in idem*, as provided by Article 34 of the Constitution, *"no one can be tried more than once for the same criminal offence".*

This argument is grounded by the applicant upon the fact that the applicant was found guilty by the Supreme Court of Serbia for the same offence, although he did not serve sentence imposed on him by such decision. He alleged that such a decision violated the basic principles of the EHCR, the European Convention on Extradition, and principles of the Law on Criminal Procedure.

Before a merit-based review of this case, the Court had earlier decided to reject the request of the applicant for interim measures. The Court decided to reject applicant request as inadmissible, thereby reasoning that the extradition to this other state is not in contradiction with the agreement, and that the applicant has not submitted any evidence to demonstrate that such a transfer to the other state would violate fundamental principles of human rights, or that would subject him to inhuman treatment.

IV. CONCLUSION

The points above give a general idea on how the overall system in the Republic of Kosovo works in terms of legislation and institutional set up including the role of the Constitutional Court. Our Constitution as a modern one, with the provisions for direct applicability of some of the international instruments mentioned above and our laws which are drafted in compliance with EU *acquis* and international standards, have ensured that the area of immigration and refugee law has the protection and implementation it deserves.

IMMIGRATION AND REFUGEE LAW

Kubanychbek ALYBAEV
Nurmatov ULANBEK

KYRGYZ REPUBLIC

Иммиграция и закон о беженцах
Конституционная палата Верховного суда Кыргызской Республики

Kubanychbek ALYBAEV[*]
Nurmatov ULANBEK[**]

14 декабря 1990 - Конституционный суд Киргизской ССР
1993 год – Конституция Кыргызской Республики

В полномочия Конституционного суда Кыргызской Республики входили:

1. **признание неконституционными** законов и иных нормативных правовых актов в случае их расхождения с Конституцией;
2. **решение споров**, связанных с действием, применением и толкованием Конституции;
3. дача заключения **о правомерности выборов** Президента Кыргызской Республики;
4. дача заключения по вопросу **об отстранении от должности** Президента Кыргызской Республики, а также судей Конституционного суда, Верховного суда, Высшего Арбитражного суда Кыргызской Республики;
5. дача **согласия на привлечение** судей местных судов к уголовной ответственности;
6. дача заключения по вопросу **об изменениях и дополнениях Конституции** Кыргызской Республики;
7. **отмена решений** органов местного самоуправления, противоречащих Конституции Кыргызской Республики;

[*] Head of Department, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic.
[**] Senior Consultant, the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic.

8. принятие решения **о конституционности правоприменительной практики**, затрагивающей конституционные права граждан

2010 год – расформирован Конституционный суд Кыргызской Республики

27 июня 2010 года – Конституционная палата Верховного суда Кыргызской Республики

1 июля 2013 года – фактическое начало работы Конституционной палаты

Конституционная палата Кыргызской Республики:

- **признает неконституционными** законы и иные нормативные правовые акты в случае их противоречия Конституции;
- дает **заключение о конституционности** не вступивших в силу международных договоров, участницей которых является Кыргызская Республика;
- дает заключение к проекту закона **об изменениях в Конституцию.**

Стратегия развития Конституционной палаты

на 2015-2020 годы

Основные направления деятельности:

1) Обеспечение высокого качества отправления конституционного правосудия;

2) Обеспечение открытости и прозрачности деятельности КП;

3) Обеспечение эффективности и доступности конституционного правосудия.

Беженцы в Кыргызстане как историческое явление - это часть его прошлой истории и действительности 90-х годов, продукт конкретных социально-экономических, политических и иных условий в соседних странах.

Основную массу в общем потоке миграции в Кыргызской Республике составляют трудовые мигранты, как уезжающие из страны в поисках лучшего заработка, так и приезжающие на работу в Кыргызстан.

В Кыргызской Республике миграционная сфера на уровне законодательства регулируется рядом документов, гарантирующих всем лицам, находящимся в пределах территории Кыргызской Республики и под ее юрисдикцией, все основные права и свободы:

1) Конституция Кыргызской Республики;

2) Закон Кыргызской Республики «О гражданстве»;

3) Закон Кыргызской Республики «О внешней трудовой миграции»;

4) Закон Кыргызской Республики «О внешней миграции»;

5) Закон Кыргызской Республики «О внутренней миграции»;

6) Закон КР «О правовом положении иностранных граждан в Кыргызской Республике»;

7) Кодекс об административной ответственности.

В Кыргызской Республике иностранные граждане и лица без гражданства пользуются правами и исполняют обязанности наравне с гражданами Кыргызской Республики.

Иностранные граждане в Кыргызской Республике равны перед законом независимо от пола, расы, языка, инвалидности, этнической принадлежности, вероисповедания, возраста, политических или иных убеждений, образования, происхождения, имущественного или иного положения, а также других обстоятельств.

Кыргызской Республикой ратифицировано 53 конвенции Международной организации труда, которые, как известно, содержат наибольшее число нормативных положений, относящихся к труду и трудовой миграции.

Основные международные документы, регулирующие

отношения в сфере трудовой миграции в Кыргызской Республике:

1) Всеобщая декларация прав человека и гражданина;

2) Международный пакт о гражданских и политических правах

3) Международная Конвенция о защите прав всех трудящихся-мигрантов и членов их семей;

4) Конвенция о правовом статусе трудящихся-мигрантов и членов их семей государств – участников Содружества Независимых Государств.

Кыргызстан признает:

1) право свободно передвигаться и выбирать себе местожительство в пределах каждого государства;

2) право на труд, на свободный выбор работы, на справедливые и благоприятные условия труда и на защиту от безработицы;

3) право на равную оплату за равный труд без какой-либо дискриминации;

4) право на справедливое и удовлетворительное вознаграждение, обеспечивающее достойное человека существование для него самого и его семьи и дополняемое, при необходимости, другими средствами социального обеспечения.

Кыргызская Республика предоставляет всем беженцам равное правовое положение без какого-либо различия по признакам пола, расы, языка, этнической принадлежности, вероисповедания, возрастного ограничения, политических или иных убеждений, образования, страны происхождения, имущественного или иного положения, а также других обстоятельств.

БЛАГОДАРИМ ЗА ВНИМАНИЕ!

REFUGEE STATUS DETERMINATION PROCEDURE IN KOREA

Kim Jung WON
Park Hyun JUN

KOREA

REFUGEE STATUS DETERMINATION PROCEDURE IN KOREA

Kim Jung WON[*]
Park Hyun JUN[**]

I. INTRODUCTION

I am honored to be here to speak in front of young and promising constitutional experts from around the world. Today, I would like to briefly introduce how Korea's Refugee Act was enacted and what it entails, what it takes to be officially recognized as a refugee in Korea, what the resettlement program provides and finally a recent case with which the Constitutional Court of Korea dealt.

II. ENFORCEMENT OF THE REFUGEE ACT

The Republic of Korea signed the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees (the Refugee Protocol) on December 3, 1992, both of which entered into force (on March 3, 1993) in Korea.

Then, provisions regarding refugees were established by the implementation of Korea's Immigration Control Act and its Enforcement Decree (December 10, 1993).

Despite these efforts, the international community has criticized for not accepting more refugees to the level of other advanced countries, and for not providing eligible means by which refugee status applicants can maintain a basic livelihood.

For those reasons, the Korean Government established a refugee division under the Ministry of Justice (June 12, 2013) to pursue and implement policies on refugees that are more in line with Korea's

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[*] Rapporteur Judge, the Constitutional Court of Korea.
[**] Rapporteur Judge, the Constitutional Court of Korea.

growing role on the world stage. As a result, the Refugee Act of Korea was enacted (took effect on July 1, 2013).

A. The Refugee Act of Korea

The Refugee Act of Korea stipulates that aliens who wish to attain refugee status may apply for it. Among the applicants, those who fall within the definition of a refugee will be recognized as refugees after examinations by Refugee Status Determination (RSD) officers. Recognized refugees are entitled to the treatment specified in the Refugee Act and protection pursuant to the Refugee Convention.

The Refugee Act of Korea also guarantees the right to appeal in the case of a denial of the application, while allowing applicants to stay in Korea during the appeal procedures by acknowledging them as refugee status applicants.

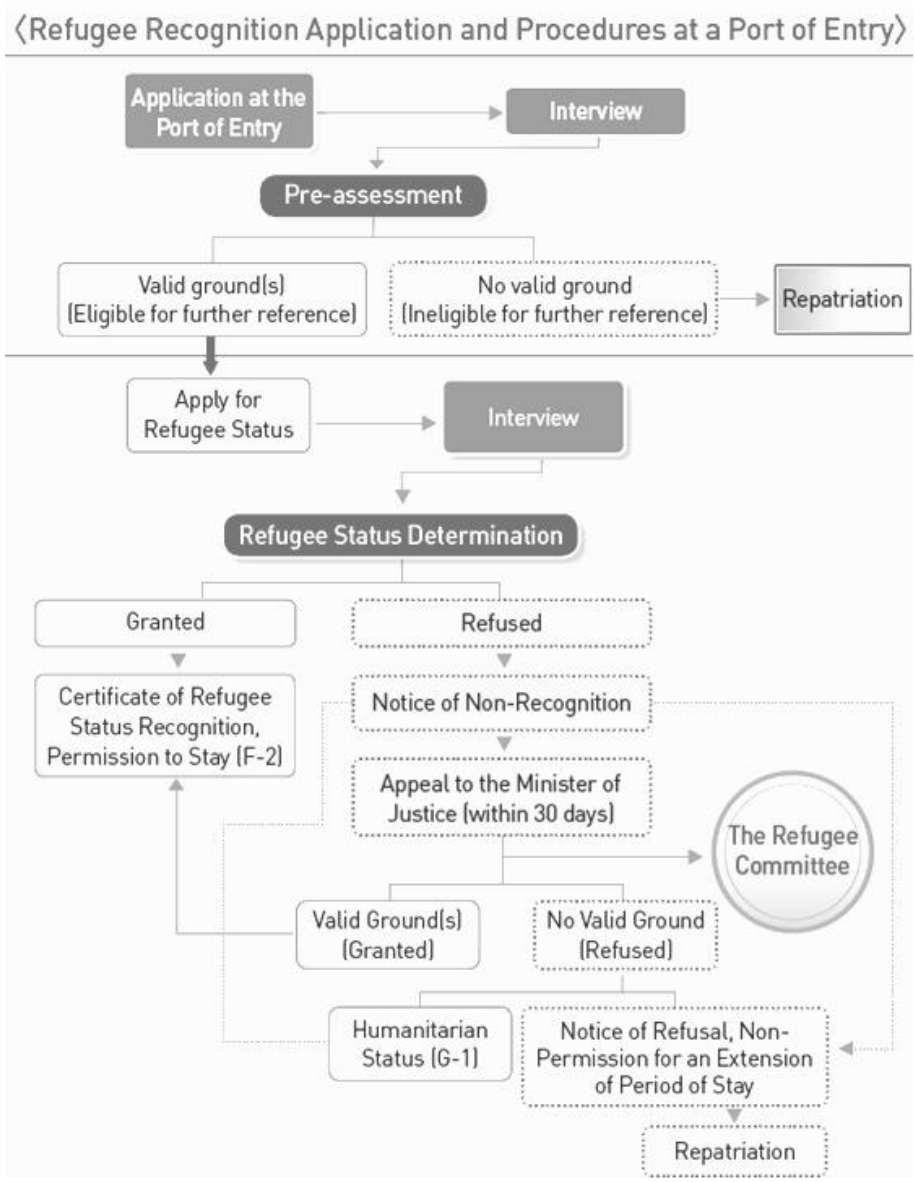
Under the Refugee Act, aliens must apply for refugee status at the port of entry or Immigration Offices. Applicants are entitled to legal assistance of an attorney during their RSD procedures.

Under the law, recognized refugees are entitled to social security and basic livelihood security. Their academic achievements and qualifications earned abroad may also be partially or fully recognized in Korea. In addition, the spouses and minor children of recognized refugees are entitled to receive permission to enter the country.

Humanitarian status holders are now eligible to receive permission to engage in employment activities while refugee status applicants may receive support such as living expenses, access to residential facilities and medical services as well as access to primary and secondary education for minor aliens.

B. The Refugee Recognition Procedure

The refugee recognition procedure is shown in the following figure. Please refer to the documents distributed for more information on the refugee status, humanitarian status, refugee status applicants' rights and treatment and other details.



C. Resettlement Program in Korea

Now, I will briefly introduce the Resettlement Program organized by the UNHCR. The Resettlement Program provides opportunities to thousands of the world's most vulnerable refugees who are referred by the UNHCR or other referral organizations so that the refugees can start a new life in the 3rd country (receiving country).

The United States, Australia, Canada, and 34 other countries including Korea are providing a sizeable number of resettlement places. Korea participates in this program as a member state of the UN and Chair of the Executive Board of the UNHCR.

So far, Korea has accepted 22 Myanmar refugees from refugee camps in Thailand in 2015, 34 in 2016, and 30 more in 2017.

Related Case

Last but not least, I would like to introduce a recent decision of the Constitutional Court of Korea in regard to the Refugee Act.

The summary of the case is as follows:

On November 20, 2013, a 22-year-old man from Sudan, arrived at the Incheon International Airport. At that time, the young man was holding a short-term commercial (C-3) visa issued by the Korean Embassy in Sudan.

He applied for refugee status at the Incheon International Airport Immigration Office, claiming that he was receiving death threats because he refused to participate in the compulsory conscription in his country.

After being denied in the pre-assessment, he requested to see an attorney in order to file an appeal against the Incheon Airport Immigration Office but that application was also denied.

Then he filed a constitutional complaint to our Court that the dismissal of his application for an attorney at the Immigration Office was unconstitutional. At the same time, he filed a motion for preliminary injunction to suspend the Immigration Office's refusal to attorney visits.

On a side note, there also was a practical issue of whether or not the attorney had to buy a flight ticket to enter the deportation room at the Incheon Airport where the Sudanese person was staying at that time.

The Constitutional Court of Korea held that there was a serious violation to the right to a fair trial because the Sudanese complainant

had no access to an attorney for more than five months after filing the lawsuit, when he had the right to an attorney as a refugee status applicant.

In this regard, the Justices of the Korean Constitutional Court made a unanimous decision and ordered the Immigration Office to immediately grant the refugee status applicant the permission to consult with an attorney.

Now the person from Sudan resides in Korea as a refugee, recognized by the Ministry of Justice of Korea.

I believe that the decision of the Constitutional Court well demonstrates Korea's effort to acknowledge human rights of aliens applying for refugee status in accordance with the international law.

Thank you for listening.

Turkey dispatched the third largest number of troops during the Korean War (1950-53), following the United States and the United Kingdom. Turkey suffered casualties of 721 deaths, 2,147 wounded in action, 175 missing persons and 346 captives during the war.

ROBUST DISCUSSION ON MALAYSIA'S IMMIGRATION AND REFUGEES LAW

Rozi Binti BAINON
Awang Kerisnada Bin Awang MAHMUD
MALAYSIA

ROBUST DISCUSSION ON MALAYSIA'S IMMIGRATION AND REFUGEES LAW

Rozi Binti BAINON[*]
Awang Kerisnada Bin Awang MAHMUD[**]

I. INTRODUCTION

Malaysia sits at the heart of Southeast Asia, consisting of a federation of 13 states and 3 federal territories. Generally, its two geographical regions is divided by the South China Sea:

West Malaysia or Peninsular Malaysia on the Malay Peninsula shares a land border on the north with Thailand and is connected by the Johor Causeway and the Tuas Second Link on the south with Singapore.

East Malaysia, consisting of the federal territory of Labuan and the states of Sabah and Sarawak, occupies the northern part of the island of Borneo, bordering Indonesia and the Sultanate of Brunei.

The multi-racial population of about 31 million are governed under a constitutional monarchy framework where the Federal Constitution is the supreme law of the land and the Yang di-Pertuan Agong is the Supreme Head of the Federation. The Malaysian governing bodies consist of three organs, namely the executive, legislature and judiciary. The Executive is headed by the Prime Minister with a tenure of five years under which there are in total twenty-six ministries. The Legislature on the other hand consists of the Yang di-Pertuan Agong and two Houses of Parliament which are the Senate and the House of Representatives. The Judiciary is headed by the Chief Justice where the hierarchy of courts begins

[*] Director of Policy and Legislation Division, Federal Court of Malaysia.
[**] Session's Court Judge, Federal Court of Malaysia.

from the Magistrates' Court, Sessions Court, High Court, Court of Appeal, and finally, the Federal Court.

Malaysia began its membership in the United Nations (UN) since 17 September 1957 and has been elected as a non-permanent member of the Security Council for four times in the year 1965, 1989 - 1990, 1999 - 2000 and 2015 - 2016. It has established strong international affiliations with other international agencies such as UN High Commission for Refugees (UNHCR), UN Educational, Scientific and Cultural Organization (UNESCO), World Bank, International Monetary Fund (IMF) and subsequently members of the Asia-Pacific Economic Cooperation (APEC), Asian Development Bank (ADB) and many others.

On 8 August 1967, Malaysia, together with Singapore, Indonesia, the Philippines and Thailand founded the Association of Southeast Asian Nations (ASEAN) and in 1969 became one of the pioneer member of the Organisation of Islamic Cooperation (OIC). As a former British colony, Malaysia is also a member of the Commonwealth of Nations.

II. MALAYSIA'S IMMIGRATION LAWS

Malaysia is known as a country with broad immigration policies due to its rapid economic growth. Hence, the immigration policies evolved significantly to cater the needs of the country. According to the Federal List in the Ninth Schedule of the Federal Constitution of Malaysia, immigration law falls under the purview of the federal government. In other words, only the federal government can make laws relating to immigration. In Malaysia, the main statute that control the inflows of immigrants is the Immigration Act 1959/63 [Act 155]. However, the Act 155 does not provide a clear definition of who are immigrants but they are generally classified as family class (closely related persons of Malaysian residents living in Malaysia), foreign workers, foreign domestic helpers, expatriates (highly skilled workers), foreign students, diplomats, travelers and refugees.

Malaysia is a sovereign state.[1] Being a sovereign State, Malaysia is independent, having autonomy (autonomous) and ability to control over itself and its decisions. The international law has developed and recognized the minimum international standard of human rights, which is categorized as soft law and does not create any legal obligations on a sovereign state including Malaysia. As sovereignty is associated with the independence of a state, Articles 2(1),(4) and (7) of the Charter of the United Nations have set forth the principle of domestic sovereignty of states over their internal affairs and the principle of non-interference in internal affairs of states by other states/international authorities.

Indeed, in exercising this sovereignty, Malaysia do undertake to do its best to oblige the principles enunciated in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) despite not ratifying all these three international bill of rights.

Freedom of movement is a fundamental right incorporated in Article 5 (Liberty of a person), Article 8 (Equality) and Article 9 (Prohibition of banishment and freedom of movement) of the Federal Constitution. The system of government in Malaysia is closely modelled on the Westminster Parliamentary system with a difference that the Constitution is supreme and not the Parliament. Article 4 of the Federal Constitution provides that "This Constitution is the supreme law of the Federation...".

Individual rights and freedoms as enshrined in the Constitution are not without limitations as peace and security of the country must take centre concern.[2] Therefore, the Federal Constitution provides for the limitations to those fundamental rights and freedoms as a safeguard to maintain public order. These are contained in the relevant Articles itself and the written law made thereunder.

1 Malaysia is a member of the United Nations and according to United Nations List of States, Malaysia sovereignty is not challenged.

2 The Honourable Chief Justice Arifin Zakaria (2012), The Malaysian Perspective on Human Rights and Freedom In 21st Century and The Role of Court, 50th Turkish Constitutional Court and International Symposium, Turkey at page 3.

According to Mukherjee J. in A.K Gopalan v. State A.I.R 1950 S.C 27, "personal liberty" in ordinary language means "liberty relating to or concerning the person or body of the individual, and in this sense is the antithesis of physical restraint or coercion".

In the case of Government of Malaysia & Ors v Loh Wai Kong [1979] 2 MLJ 33, the respondent had applied for an order directing the appellants to issue a Malaysian passport to him. The respondent contended that he had a fundamental right under Articles 5, 8 and 9 of the Federal Constitution to travel abroad and the refusal of a passport violated his right. Suffian LP delivered the judgment of the Federal Court as follows:

"(1) Personal liberty in article 5 of the Federal Constitution means liberty relating to or concerning the body of the individual; that article does not confer on the citizen a fundamental right to leave the country. The government may stop a person from leaving the country if, for instance, there are criminal charges pending against him;

Article 5 does not confer on the citizen a fundamental right to travel overseas;

Article 5 does not confer on a citizen a right to a passport. The government has a discretion to issue or not to issue, delay the issue of or withdraw a passport for instance if, criminal charges are pending against the applicant. The exercise of this discretion is subject to review by a court of law, as in the case of other discretionary powers.". Suffian LP had further explained that- "Article 5(1) speaks of personal liberty, not of liberty simpliciter... the meaning of words used in any portion of a statute.. .depends on the context in which they are placed....and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it in construing "personal liberty" one must look at the other clauses of the article, and doing so we are convinced that the article only guarantees a person, citizen or otherwise, except an enemy alien, freedom from being "unlawfully detained"; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the

right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. İt will be observed that these are all rights relating to the person or body of the individual, and do not, in our judgment, include the right to travel overseas and to a passport/'

This case was followed by the Federal Court of Malaysia in Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Anorther Appeal [2002] 4 CLJ, which held that "the words 'personal liberty' should be given the meaning in the context of article 5 as a whole. We therefore disagree that the words 'personal liberty' should be generously interpreted to includes all other rights that are an integral part of life itself and those facets to form the quality of life...as it has been similarly enshrined in Part II of the Constitution under Fundamental Liberties' ".

By legislative history of Article 5, it was stated at paragraph 162 in Chapter IX of the Report of the Federation of Malaya Constitutional Commission 1957, that the constitutional objective/intention of personal liberty in Article 5 is to afford means of redress against unlawful infringement of personal liberty in the aspect of detention without legal authority.

A Malaysian passport by nature is a document issued in the name of His Majesty Yang DiPertuan Agong on the responsibility of the Minister of Home Affairs to a named individual, intended to be presented to the Governments of foreign nations and to be used for that individual's protection as a Malaysian Citizen in foreign countries. The Malaysian passport remains the property of the Government that may be withdrawn at any time, which is clearly stated at the last page of the passport. Any issuance of a Malaysian passport only carries with it a privilege and not a right, to travel overseas. It is a privilege given by the government subject to discretion whether or not under certain appropriate circumstances, to allow or bar a person from leaving the country, such as, if criminal investigation is pending against him.

Section 4(4) of the Human Rights Commission of Malaysia Act 1999 allows "regard to be had to the Universal Declaration of Human Rights 1948 (UDHR 1948) to the extent that it is not inconsistent with the Federal Constitution". In case of conflict between international instruments or norms and national rules, courts must adopt the rule that national law prevails. Hence, the court has played its part well in protecting, enhancing and advancing human rights and this is all the more important in the light of emphasizing the international standard of human rights in Malaysia.

As some of the migrants category stated above are particularly of a vulnerable population, issues of migration and human rights seems to be intertwined. The international community believes that there is a need to protect migrants as they are universal in scope. Therefore, human rights issues is pertinent in the development of national migration policy. As part of the Eleventh Malaysia Plan (2016-2020), a comprehensive immigration and employment policy for foreign workers is in the works, with Ministry of Home Affairs (MOHA) assuming the lead role in the policy- making. In the meantime, Malaysia has become a party to the Trans-Pacific Partnership Agreement (TTPA), which requires states to adopt and implement laws in accordance with the International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work in order to eliminate forced or compulsory labour, child labour and any form of discrimination towards the immigrant workers.

Other relevant Government bodies/departments/agencies are:

Malaysian National Security Council;

Ministry of Human Resource;

Immigration Department of Malaysia;

Royal Malaysian Police;

Royal Malaysian Customs Department;

Malaysian Maritime Enforcement Agency;

Labour Department; and

Human Rights Commission of Malaysia (SUHAKAM).

Non-Governmental Organisations which are active in human rights protection for the migrant workers or the victim of human trafficking are:

Voice of the Malaysian People (SUARAM);

Tenaganita;

Women's Aid Organization (WOA), etc.

Related national legislations on immigration in Malaysia are —

Federal Constitution [Ninth Schedule (Legislative List) - List I : Federal List];

Immigration Act 1959/63 (Revised) [Act 155];

Passports Act 1966 (Revised - 1974) [Act 150];

Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Amendment 2010) [Act 670];

Penal Code; and

National Security Council Act 2016 [Act 776].

To date, Malaysia has ratified 5 out of the 8 International Labour Organization Core Conventions which are currently in force, as follows:

Forced Labour Convention, 1930 (No. 29);

Right to Organise and Collective Bargaining Convention, 1949 (No. 98);

Equal Remuneration Convention, 1951 (No. 100);

Minimum Age Convention, 1973 (No. 138); and

Worst Forms of Child Labour Convention, 1999 (No. 182).

The Immigration Department of Malaysia (under the administration of MOHA) is the responsible agency in regulating

national immigration policies and control mechanism of movement of citizens/residents/immigrants in and out of Malaysia. Immigration policy in relation to migrant workers is always the focus of discussion as the population of migrant workers is larger than other categories of migrants and it also involves with more human rights issues.

Prominent features of the policy framework have included a detailed quota system for entry of immigrant workers and efforts to regularize migration through temporary amnesties. Although frequent changes have been made, the policies have been consistent in respect to admitting migrant workers only for the purpose of meeting the immediate labour needs of employers rather than allowing them for longer term settlement. For the purpose of this presentation, migrants workers are divided as follows —

Foreign Workers

Under the Malaysian Immigration Policy, only the sectors of manufacturing, construction, plantation, agriculture and services are allowed to hire foreign workers and yet it is subject to quota of foreign workers as obtained from MOHA, One Stop Centre (OSC). Foreign workers from Thailand, Cambodia, Nepal, Myanmar, Laos, Vietnam, Philippines (excluding females), Pakistan, Sri Lanka, Turkmenistan, Uzbekistan and Kazakhstan are generally eligible to work in all the sectors.

Foreign workers from India are eligible to work in all the sectors but for the sector of construction, it is only limited to works involving high tension cable only. Whereas for foreign workers from Indonesia, only male workers are excluded from working in the sector of manufacturing. Foreign workers from Bangladesh are eligible to work only in the sector of plantation via a Government to Government agreement (G2G). There is also an age limitation for applicants, must be not less than 18 years old and not more than 45 years old at the time of application.

A new mechanism known as Immigration Security Clearance (ISC) was implemented since 4-5-2015 which requires the employer

to ensure all foreign worker candidates have already undergone ISC verification as a mandatory requirement in application to work in Malaysia. The ISC registration can be done in all ISC centres in the source countries. The ISC verification document is then required to be attached with a Visa with Reference (VDR) approval letter during Visa application at Immigration Atase/ Embassy Malaysia. Starting from 15 June 2015, the employers have to apply VDR by online application via Module of eVDR (FWCMS) upon potential foreign workers being certified as fit and healthy by the approved medical center in the source countries.

Foreign workers will only be allowed to enter into Malaysia at the authorized entry point using the VDR issued by the Immigration Department and Entry Visa issued by the Malaysian Attaches Office in the country of origin. Employers must ensure that the clearance process of foreign workers at the entry points is done within 24 hours from the arrival time.

The foreign workers upon entry into Malaysia are required to obtain one Visit Pass (Temporary Employment) [VP(TE)] upon application made at the Immigration Office which issued the VDR approval letter. The [VP(TE)] will only be issued after they have passed the FOMEMA medical examination within 30 days which can be done at any medical centers registered with FOMEMA. In any event where the foreign workers fail to obtain [VP(TE)], they will not be allowed to stay and work in Malaysia and the employers are required to apply for Check Out Memo for the repatriation of the foreign worker. Foreign workers with valid VP(TE) will be issued i-Kad with different colour code indicating different sectors.

VP(TE) is only valid for a period of twelve (12) months. Employers are allowed to and must only apply for extension before the expiry date, otherwise the application will be referred to the Immigration Enforcement Division for consideration. Such application for extension is subject to fees or levy according to the working region and the working sector as provided by the Immigration Department.

Foreign workers who leave work place without notifying the employers with the intention to escape and who are not returning

to work place after coming back from origin country are considered as absconded. The relevant employers are then required to notify the Immigration Department for absconded cases. The absconded foreign workers will be blacklisted by the Immigration Department and their security bond will be confiscated as well.

Foreign Domestic Helper (FDH)

For Foreign Domestic Helper (FDH), it is governed under a slightly different policy. The approved source countries for FDH are Indonesia, Thailand, Cambodia, the Philippines, Sri Lanka, India, Vietnam and Laos. An eligible FDH must be a female, not less than 21 years old and not more than 45 years old, a confirmed fit person by an appointed Medical Centre, reside in the country of origin, enters Malaysia via VDR and has obtained certified PASS for ISC at the source country.

There are special requirements that an employer who intends to hire a FDH has to fulfill before the applications for FDH. The employer and his spouse should have children under 15 years of age or parents who are sick; must earn a minimum income RM3000-RM5000 depending on the country of origin of the FDH; must not be a bankruptcy; and employers who are Muslims are allowed to hire only Muslim FDH.

The employers have to make sure that the FDH is assigned to domestic chores (not including car wash) and the FDH is provided with room amenities/ accommodation which is equipped with basic facilities. FDH should be given nutritious food and proper rest, including sleeping time. The employers must also ensure that the FDH does not marry in this country while on the Pas Lawatan Kerja Sementara PL (KS). FDH cannot change employment or change employers without permission of the Immigration Department of Malaysia. Employers or employment agencies are not allowed to strike or inflict any act that causes injury to the FDH.

The FDH has to receive an approval letter for VDR to get a visa at the Malaysian Representative Office in the FDH's country of origin prior entry into Malaysia. After getting the visa, the FDH can enter

Malaysia through any permitted entrance. Immigration officers will provide a Special Pass for 30 days so that the employer can report the presence of the FDH at the immigration office that approved the VDR. The employer or employer agency should wait at the permitted entrance and is required to bring the FDH for a medical checkup at any clinic appointed by FOMEMA Sdn Bhd and obtain the PL (KS) sticker from the State Immigration Department which will be issued within one month from the date of arrival.

Once the FDH has received the PL (KS), she is allowed to work until the deadline stated on the sticker PL(KS) concerned. The employers then have to application for the Check Out Memo to facilitate the FDH to return to their country of origin, failing which the foreign workers are still considered to be under his employment and the employer is still responsible for the foreign workers.

III. GENERAL IMMIGRATION PROCEDURES

Under Act 155, the most effective way for the Government of Malaysia to control and regulate the inflow of immigrants and to reduce irregular immigration is by identifying the legal and illegal immigrants. Under Section 6 of Act 155, immigrants will be legal immigrants if only they fulfilled the requirements as spelt out, as follows —

"Control of entry into Malaysia

6. (1) No person other than a Citizen shall enter Malaysia unless—

he is in possession of a valid Entry Permit lawfully issued to him under

section 10; his name is endorsed upon a valid Entry Permit in accordance with section 12, and he is in the company of the holder of the Permit;

he is in possession of a valid Pass lawfully issued to him to enter Malaysia; or he is exempted from this section by an order made under section 55."

Section 6 provides that an immigrant is allowed to enter, stay or remain in Malaysia if he possesses a valid Entry Permit or his wife and children whose name has been endorsed upon a valid Entry Permit or receives an exemption by an order made under section 55. Therefore, any immigrant that falls under any of the subsections 6(1) (a) to (d) is a legal immigrant.

Generally, a person who enters into a foreign country of which he is not a citizen and fails to produce a valid travel document such as passport or visa upon the immigration authority, he will be considered as an illegal immigrant. However, Act 155 provided certain provisions such as sections 8, 9 and 15 that stipulate the situations where immigrants are prohibited to enter into Malaysia and identified as illegal immigrants.

Section 8 spells out who are prohibited immigrants which permission to enter into Malaysia will be refused by the Director General. Meaning that, the prohibited immigrants will be considered as illegal immigrants in Malaysia. The persons that are classified as prohibited immigrants under section 8 are as follows:

Any person who is unable to show that he has the means of supporting himself and his dependents (if any) or that he has definite employment awaiting him or who is likely to become a pauper or a burden to the public;

Any person who suffers from mental disorder or mental defect, or suffers from a contagious disease which makes his presence in Malaysia a danger to the community;

Any person who refuses to undergo a medical examination after being required to do so by an Immigration Officer;

Any person who has been convicted in any country or state of any offence and sentenced to imprisonment for any term, and has not received a free pardon and by reason of the circumstances connected with the conviction is deemed by the Director General to be an undesirable immigrant;

Any person who is a prostitute or who is living or receiving the proceeds of prostitution or has lived on or received the proceeds of prostitution prior to entering Malaysia;

Any person who procures or attempts to bring prostitutes or women or girls into Malaysia for the purpose of prostitution or other immoral purpose;

Any person who is a vagrant or habitual beggar;

Any person whose entry into Malaysia was unlawful under this or any written law enforced at that time;

Anyone who believes in or advocates the overthrow of any government, constituted law or authority in Malaysia by force or violence or who disbelieves in or is opposed to the established government, or who advocates the assassination of public officials, or who advocates or teaches the unlawful destruction of property;

Anyone who is a member of or is affiliated with any organisation that entertains or teaches disbelief in or opposition to the established government or advocates or teaches the need for unlawful assaulting or killing of any official, specific or general, or of any government in Malaysia or any established government or advocates or teaches the unlawful destruction of property;

Anyone who as a result of reliable unfavorable information received from any source, from any government, through official or diplomatic channels, is deemed by the Minister to be an undesirable immigrant;

Anyone who has been removed from any country or state by the government of that country or state on repatriation grounds, by reason of the circumstances connected therewith, is deemed by the Director General to be an undesirable immigrant;

Anyone who, being required by any written law to be in possession of valid travel documents, is not in possession of such documents or is in possession of forged documents;

The family and dependents of a prohibited immigrant; and

Any member of a class of persons, against whom an order to cancel any pass or permit has been made.

Other than that, section 9 confers the power to the Director General to prohibit entry or cancel any Permit or Pass. Section 15

also prohibits any immigrant whose Permit or Certificate that has been cancelled or Pass has been expired or any immigrant who made declaration under Section 14(4) (any material statement made in or in connection with the application for that Permit or Certificate was false or misleading; or the person is a prohibited immigrant).

The Immigration Department of Malaysia has the power to remove and deport illegal immigrants back to their country of origin in accordance to Act 155.There are 3 situations where immigrants shall be liable to be removed from Malaysia —

Firstly, during the examination when he arrives in Malaysia or after such enquiry (if necessary) and the immigration officers finds out that he is a prohibited immigrant. Under Section 31, the Director General shall prohibit him from entering Malaysia and he may be detained at an immigration depot or other place at the discretion of the Director General before he returns to his country of origin;

Secondly, under section 32 where he is convicted for an offence under sections 5, 6, 7, 8 and 9, he shall be liable to be removed by an order of the Director General; and

Thirdly, under section 33 where he is found to remain in Malaysia unlawfully by reason of Section 9, 15 and 50 even though without any proceeding being taken against him, he shall be removed from Malaysia by order of the Director General. However, he is allowed to appeal against the order of removal made by the Director General to Minister but not to appeal against any removal order made in respect of section 9(1)(a),(b) or, section 15(1)(c) or section 60 by reason of expiry Pass.

When immigrants are ordered to be removed from Malaysia, they may be detained in custody. Section 34 lays down the procedures that should be followed by the immigration officers when immigrants are supposed to be put in detention prior to their removal from Malaysia. The immigrants who are put under immigration detention and appeal under section 33(2) may be released at the discretion of the Director General, pending the appeal decision.

According to subsection (2), upon the determination of the appeal under section 33, the immigrants that are ordered to be removed from Malaysia should be placed on board of suitable vessel or aircraft by any police officer or immigration officer. While under subsection (3), those immigrants that did not apply for appeal maybe be detained in any prison, police station or immigration depot or any place appointed by the Director General.

Section 35 has given power to immigration officers or police senior officers to arrest any immigrant that is reasonably believed to be removed from Malaysia without warrant and detain him in any prison, police station or immigration depot for a period of not more than 30 days pending the decision whether an order should be made against him.

IV. MALAYSIA'S REFUGEE POLICY

International Instruments on the Protection of Refugees

A. The 1951 Convention

The 1951 Convention Relating to the Status of Refugees ("the 1951 Convention") protects refugees. It defines the term "refugee" by virtue of Art 1(A)(2) that states "a refugee is an individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group." People who fulfill this definition are entitled to the rights and bound by the duties contained in the 1951 Convention.

The 1951 Convention contains a number of rights and also highlights the obligations of refugees towards their host country. The rights contained in the 1951 Convention include[3]:

The right not to be expelled, except under certain, strictly defined conditions (Article 32);

3 UNHCR, September 2011,The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.

The right not to be punished for illegal entry into the territory of a contracting State (Article 31);

The right to work (Articles 17 to 19);

The right to housing (Article 21);

The right to education (Article 22);

The right to public relief and assistance (Article 23);

The right to freedom of religion (Article 4);

The right to access the courts (Article 16);

The right to freedom of movement within the territory (Article 26); and

The right to be issued identity and travel documents (Articles 27 and 28).

However, the 1951 Convention does not prescribe how States Parties are to determine whether or not an individual satisfies the definition of a "refugee". Instead, the Convention leaves it to the State Party to formulate the rules on asylum proceedings and the determination of refugee status. This has resulted in disparities among different States as each State will formulate the laws on asylum based on its own resources, national security concerns, and experiences with forced migration movements. Despite differences at the national and regional levels, the overriding objective of the modern legal regime on refugees is to provide protection to individuals forced to flee their homes because their countries are unwilling or unable to protect them.

B. The 1967 Protocol

Whenever a reference is made to the 1951 Convention, reference is also made to the 1967 Optional Protocol relating to the Status of Refugees. Originally, the 1951 Convention was of limited scope. Its scope was confined only to refugees in Europe and to events occurring before 1 January 1951. The 1967 Protocol, a supplementary treaty to the 1951 Convention, removes the geographical and time

limits that were part of the 1951 Convention. In other words, this supplementary treaty (the 1967 Protocol) turned the 1951 Convention into a truly universal instrument that could benefit refugees everywhere.

As of April 2015, there are 145 State Parties to the 1951 Convention and 142 to both the 1951 Convention and the 1967 Protocol.[4] The only Asean parties to the 1951 Convention and the 1967 Protocol are Cambodia and the Philippines. Malaysia is not a State Party to the 1951 Convention and its Protocol.

C. Customary International Law

The principle of non-refoulement, which prohibits the return of a refugee to a territory where his or her life or freedom is threatened, is considered as a rule of customary international law. As such it is binding on all States, regardless of whether they have acceded to the 1951 Convention or 1967 Protocol. The principle of non-refoulement is expressed as follows:

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

It prevents State from rejecting, returning or removing refugees from their jurisdiction and to expose them to a threat of persecution, or to a real risk of torture, cruel, inhuman or degrading treatment and punishment, or to a threat to life, physical integrity and freedom.

As this principle of non-refoulement is generally accepted as a principle of customary international law, this principle is binding on all nations regardless whether the State is a party or not to the 1951 Refugee Convention. This means that Malaysia, although not a party to the 1951 Refugee Convention, is, nevertheless, bound by this important principle of international law.

4 UNHCR, State Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967- protocol.html accessed 28 August 2017.

D. United Nations High Commissioner for Refugees

Apart from the two conventions held in 1954 and 1961, the most important actions of United Nations relating to refugees was the establishment of the United Nations High Commissioner for Refugees ('UNHCR'). The UNHCR is a United Nations agency that was established on 14 December 1951 with its headquarters in Geneva, Switzerland. Considered the guardian of the 1951 Convention, the agency is mandated to lead and coordinate international action to protect refugees and resolve refugee problems worldwide.

UNHCR in Malaysia

UNHCR in Malaysia commenced its operations in 1975 when Vietnamese refugees began to arrive by boat in Malaysia and other countries in the region. From 1975 until 1996, UNHCR assisted the Malaysian government in providing protection and assistance for the Vietnamese boat people. Over those two decades as part of an international burden sharing effort, UNHCR resettled more than 240,000 Vietnamese to countries including the United States, Canada, Australia, France, New Zealand, Sweden, Finland, Denmark and Norway.During that same period, more than 9,000 persons returned home to Vietnam with the support of UNHCR.[5]

During the 1970s and 1980s, UNHCR assisted the Malaysian Government in receiving and locally settling over 50,000 Filipino Muslims from Mindanao who fled to Sabah. UNHCR also supported the Malaysian Government in locally settling several thousand Muslim Chams from Cambodia in the 1980s and several hundred Bosnian refugees in the 1990s.[6]

According to the UNHCR Malaysia website, as of end June 2017, there are some 149,200 refugees and asylum-seekers registered with UNHCR in Malaysia. Some 132,500 are from Myanmar, comprising some 59,100 Rohingyas, 38,200 Chins, Myanmar Muslims, 4,200 Rakhines & Arakanese, and other ethnicities from Myanmar. There

5 UNHCR, UNHCR in Malaysia, http://www.unhcr.org/en-my/unhcr-in-malaysia.html accessed 24 August 2017.

6 *Ibid.*

are some 16,700 refugees and asylum-seekers from other countries, including some 3,800 Pakistanis, 2,200 Sri Lankans, 2,100 Yemenis, 2,100 Somalis,Syrians, 1,400 Iraqis, 1,100 Afghans, 700 Palestinians, and others from other countries. Some 67% of refugees and asylum-seekers are men, while 33% are women. There are some 37,000 children below the age of 18.[7]

Those who are recognised as refugees are given identification card/ papers and become persons of concern to UNHCR. The Malaysian authorities have agreed that those who hold the UNHCR identification papers will not be charged with illegal entry or failure to produce valid travel documents but this is not a guarantee against possible detention and abuse by the enforcement authorities and the civilians voluntary army.[8]

In refugee situation, many of them travel without legal document and leave their country of origin and enter another country using unauthorized point of entry to evade the authority. Under Act 155, entry without valid permit or pass is an offence. A number of refugees have been charged for offences under this section. While the court is unable to spare them from jail sentence as they are bound to enforce the Immigration Act 1959/1963, the refugees manage to escape whipping because their status as refugee under the UNHCR mandate are being used as a mitigating factor.

In Tun Naing OO v. PP [2009] 6 CLJ 490-500, the High Court held that:

"[33] Going by humanitarian grounds, it is not humane to give an asylum- seeker or refugee two strokes of whipping. Such person is already running away from his own country to avoid pressure and persecution. It serves no purpose to whip him and add to his suffering when, as learned counsel for the applicant stated, after serving his sentence of imprisonment, the applicant would be deported. In any event, the UNHCR is now seeking to assist the applicant and finally to get him resettled in a suitable country.

7 UNHCR Malaysia, Figures at a Glance, https://www.unhcr.org.my/About Us-@ Figures At A Glance.aspx , accessed 23 August 2017.

8 Dina Imam Supaat, 'Refugee Children under the Malaysian Legal Framework', UUM Journal of Legal Studies, ISSN: 2229-984 X, vol. 4, 2014, pp. 118-148.

[34] This court is therefore of the firm opinion that asylum seekers and refugees, if they have not committed acts of violence or brutality, or are habitual offenders, or have threatened our public order, should not be punished with whipping. However, such persons can help themselves by giving documentary proof of their registration with their own community here or with the UNHCR office in Kuala Lumpur to satisfy the subordinate courts that they are genuine asylum-seekers or refugees who are only waiting to be resettled. That would, hopefully, avert future cases of whipping being imposed as a sentence for similar offences".

Although Malaysia is not a State Party to the 1951 Convention and its Protocol Relating to the Status of Refugees, the Malaysian government is nevertheless a member of the United Nations. That being so, Malaysia is obligated to co-operate — and she does — with the UNHCR in addressing refugee issues on humanitarian grounds.

As to the rights of the refugees, Malaysia is in the midst of finalizing her National Human Rights Action Plan. This is our 1 st National Human Rights Action Plan. Our Plan of Action on refugees are strengthening the management of refugees, cooperation with the Joint Task Force between the Government of Malaysia and UNHCR, increasing the participation of the stakeholders such as UNHCR, SUHAKAM, NGO by way of official dialogue sessions and enhancing the knowledge of the officials who involved with refugees.

There are currently no legislative or administrative provisions in Malaysia to deal with the situation of asylum seekers or refugees. The UNHCR undertakes all activities pertaining to the reception, registration, documentation and status determination of asylum-seekers and refugees.

To date, the UNHCR has registered more than 45,000 persons of concern consisting of Myanmars, Sri Lankans, Iraqis, Somalis and Palestinians. Myanmars tally the highest owing to the presence of the repressive military junta in Myanmar. Unfortunately, as Malaysia is yet a signatory to the Convention, the identity cards issued by

UNHCR remain unrecognised by our authorities, resulting in arrests, detention and deportation under Malaysia's immigration laws.

V. ISSUES AND COUNTERMEASURE

A. Immigration: Issues

• *Human Trafficking*

Foreign workers primarily from Indonesia, Bangladesh, the Philippines, Nepal, Burma, and other Southeast Asian countries, often voluntarily migrate to Malaysia in search of greater economic opportunities. Some migrants are subjected to forced labour or debt bondage by their employers, employment agents, or labour recruiters. Many foreign workers are employed by recruiting or outsourcing companies rather than by the factory or plantation where they work, making workers more vulnerable to exploitative labour conditions and limiting the ability of factories, manufacturers, and employers to address some labour concerns.

In addition, recruitment and contracting fees are sometimes deducted from workers' wages, increasing workers' vulnerability to debt bondage. In accordance with governmental regulations, the burden of paying immigration and employment authorization fees is placed on foreign workers. Authorities report large organized crime syndicates are responsible for some instances of trafficking. Refugees in Malaysia, including Rohingya men, women, and children lack formal status or the ability to obtain legal work permits, leaving them vulnerable to trafficking. Many incur large smuggling debts, which traffickers use to subject some refugees to debt bondage. An estimated 80,000 Filipino Muslims without legal status, including 10,000 children, reside in Sabah, with some vulnerable to trafficking. Children from refugee communities in Peninsular Malaysia are reportedly subjected to force begging.

In 2014, the government reported 186 investigations of potential trafficking cases, compared with 89 in 2013. It initiated prosecutions against 54 alleged trafficking offenders (including 26 for forced

labour, 12 for sexual exploitation, and an unknown charge for 16 cases), an increase from 34 in 2013.

The Parliament of Malaysia has enacted the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 [Act 670]. Act 670 or ATIPSOM Act is a legislation to prevent and combat trafficking in persons and smuggling of migrants and to provide for matters connected therewith.

The ATIPSOM Act was enacted pursuant to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime. Malaysia ratified the Convention in 2004 and the Protocol in 2009. Amendments in 2010 to add provisions related to smuggling of migrants were made pursuant to the Protocol Against the Smuggling of Migrants by Land, Air and Sea, which Malaysia has not yet signed.

Under the ATIPSOM Act, Malaysian courts have jurisdiction to hear prosecutions of any person charged with an offense under the Act, whether or not the alleged offense occurred within or outside Malaysia and regardless of the nationality of the offender, if Malaysia is a receiving country, transit country, or if the trafficking starts in Malaysia. The ATIPSOM Act also extends jurisdiction to extraterritorial offenses committed by Malaysian citizens or permanent residents.

The ATIPSOM Act established the Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants that consist of senior government officials. The council formulates policies and programs, including in relation to enhancing public awareness of human trafficking in the protection of trafficked persons, and is responsible for gathering data and authorizing research on human trafficking issues.

The ATIPSOM Act also established a High Level Committee (HLC) consisting of the Ministries who are represented on the Council. The HLC shall deliberate on and decide the recommendations made by the Council.

The government convicted three traffickers for forced labour and none for sex trafficking, marking a decrease from nine traffickers convicted in 2013. Sentences ranged from two to five years' imprisonment for each trafficking charge. Malaysia's 2007 Anti-Trafficking in Persons Act (amended in 2010) prohibits all forms of human trafficking and prescribes punishments of up to 20 years' imprisonment, which are sufficiently stringent and commensurate with those prescribed for other serious offenses, such as rape.

• ***Forced labour***

Due to certain reasons, there are foreign workers that would have to be highly dependent of their employers so much so they have to sacrifice their freedom and which makes it difficult for them to leave their employer. This creates conditions for potential debt bondage and forced labour. Some migrants are subjected to forced labour or debt bondage by their employers, employment agents, or labour recruiters. Some foreign migrant workers on agricultural and palm oil plantations, at construction sites, in the electronics industry, and in homes as domestic workers are subjected to practices indicative of forced labour, such as restricted movement, wage fraud, contract violations, passport confiscation, and imposition of significant debts by recruitment agents or employers.

Some employers withhold an average of six months' wages from foreign domestic workers to recoup recruitment agency fees and other debts. Some forced labour victims in Malaysian waters, including Cambodian and Burmese men on Thai fishing boats, reportedly escape in Malaysian territory. One of the reasons why such problems occurred is that the foreign workers who came to Malaysia was not briefed on their rights as foreign workers in Malaysia. Innocence and naivety had caused them to be susceptible to false promises by the agents and also their employers which eventually be deprived of their legal rights. Some agents of whom responsible to bring them into Malaysia and finding employers for them ended up become the reason of their misery in Malaysia.

• ***Domestic Servitude***

Over the past few decades, Malaysia has attracted a steady supply of women workforce from its neighbours namely Indonesia, Philippines, Thailand, Myanmar and Cambodia. So far, Malaysia has employed more than 300,000 foreign women who serve as maids or housekeepers of which, more than 230,000 are from Indonesia, according to Malaysian Maid Employers Association (MAMA).

The vulnerability of the migrant domestic worker's position as a resident in the home of her employer, the lack of legislation to protect the migrant domestic worker and the tendency of state and local policies to safeguard the interests of the employer rather that the migrant domestic worker all combine to create situation in which abuse likely to occur. Also, some employers have misconception and paranoia against domestic workers. Some of them generalising all domestic workers as liars, promiscuous and flirtatious. Therefore, some employers resort to ill treatment to instil fear in their helper.

Immigration: Countermeasure

When discussions are held with regard to the issues above, often they are associated with the same topic, which is human trafficking. Looking at the worrying statistic of trafficking cases in Malaysia, the government issued a written directive in August 2014 requiring public prosecutors to engage with victims at least two weeks prior to trial. Prosecutors reported they spent time with victims in government facilities, better understood victims' concerns about the trial process and timing, and worked to address these concerns.

The Royal Malaysia Police operated a specialized anti-trafficking unit, and the immigration and labour departments had specialized trafficking enforcement agents. The Attorney General's Chambers had 29 deputy public prosecutors throughout Malaysia specializing in human trafficking cases. Prosecutors reported increased interaction with law enforcement during the investigation process and were more familiar with victims' accounts prior to courtroom appearances than during the previous reporting year.

In 2014, the enforcement agencies continued to conduct anti-trafficking trainings, reaching nearly 700 officials. For example,

Malaysian officials trained 103 coast guard officers on trafficking in Sabah, Kuantan, and Sarawak. Several ministries coordinated a series of anti-trafficking trainings on investigative interview techniques for 205 frontline officials. The Attorney General's Chamber hosted and convened a seminar for 30 judges and prosecutors throughout Malaysia to discuss victim-cantered approaches to prosecution. Topics included effective victim interviewing, identifying and meeting victims' needs, and working with interpreters. These measures are taken in order to have more sensitive officials handling trafficking.

Also, other than the concerted efforts by many agencies in combating trafficking in Malaysia, in 2016, Malaysia has decided to set up Anti-Trafficking in Persons and Anti-Smuggling of Migrants Task Force in partnership with the United Nations Office on Drugs and Crime (UNODC) with the objective to strengthen the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act (ATIPSOM) 2007 or Penal Code. The decision to set up the task force was made at the Anti-Trafficking in Persons and Anti- Smuggling of Migrants Council (MAPO). The task force is fully managed by the enforcement agencies in the country. The task force is made up of representatives from the Attorney General's Chambers, Police, Immigration, Malaysian Maritime Enforcement Agency, Customs, National Security Council and Human Resource Department.

Apart from improvement with regard to investigation and prosecution for human trafficking cases, Malaysia has also taken action to refine the victim-protection system. The government consulted with civil society stakeholders to draft amendments to the existing anti-trafficking law and 2015, Malaysia has taken a step ahead where Parliament has passed the bill to amend Anti-Trafficking in Persons and Anti- Smuggling of Migrants Act. Among others, the amendments include the adding of Section 51(a) which reads:

"51A. (1) Subject to any regulations made under section 66, any person to whom an interim protection order has been granted, or any trafficked person to whom a Protection Order has been granted, may be given permission by the Council -

To move freely; or

To be employed, engaged or contracted with to carry out work in any during the period of the interim protection order or Protection Order, as the case may be.

(2) A foreign national who is granted permission to work under subsection (1) shall be subject to any restrictions and conditions as may be imposed by the relevant authorities relating to employment of foreign nationals in Malaysia.".

The purpose of the 2015 amendment is clear, which is to allow employment of trafficked persons or smuggled migrants under the said Act. According to section 2 of the Act, a smuggled migrant "means a person who is the object of the act of smuggling of migrants regardless of whether that person participated in the act of smuggling of migrants", while a trafficked person refers to "any person who is the victim or object of an act of trafficking in persons". Refugees clearly fail under one or both of these categories. Malaysia's collective efforts in combating human trafficking locally and regionally are bearing fruit as the country improved its position in the United States' Trafficking in Persons (TIP) report. Currently Malaysia has improved its position to Tier 2 status in the Trafficking in Persons Report 2020 and hope to reach Tier 1 status in the year 2020.

In pursuance of its continuous efforts in combatting trafficking, the government has also taken measures to spread awareness on forced labour indicators, such as passport retention, among 100 companies in the electronics industry by organising outreach sessions in Penang, Shah Alam and Johor. On the other hand, the government's anti-trafficking awareness campaign highlighted criminal penalties associated with commercial sexual exploitation and the information was disseminated via television and radio media, public fora, and at specific engagements with target groups such as manufacturers.

In respect of domestic helpers, in February 2015, Malaysian and Indonesian officials announced the creation of an "official

channel" for domestic worker recruitment, which aims to expedite recruitment and minimize the number of migrants who seek work illegally. Further, the Ministry of Home Resources and collaboration with ILO after a series of consultations with employers of foreign domestic helpers and several associates published a guidebook called Guidelines and Tips for Employers of Foreign Domestic Workers ("The Guidebook"). The publication portrays the seriousness of the Government and the ministry, especially in ensuring the welfare, rights and protection of foreign domestic helpers be given top priority as they too play an important role in contributing to the development of our country.

According to the Guidebook, the employers must be informed that among others, FDH are not allowed to assist in their employer's business or commercial activities, or help out at a relative's house. They must also be given a day off to ensure the domestic helper stays healthy, both physically and mentally, to be able to carry out tasks assigned. There are also tips on how to manage the relationship between the employer and the domestic helper to create a trustworthy and harmonious environment at home.

This includes providing a comfortable living environment, establishing mutually beneficial working conditions, contract of employment and parameters, job scope, working hours, weekly rest day, salary and other remuneration, home leave, insurance coverage and other legal matters. It also provides tips on dealing with language barriers, emergencies, hygiene and personal safety. The Guidebook, published in English and Bahasa Malaysia, and is available on the ministry and Labour Department websites. Although the document is not legally binding, the Government hoped that employers would abide by the guidelines.

B. Refugees: Issues

Despite the fact that Malaysia is not a signatory to the 1951 Convention and has yet to have domestic law on refugees there is continuous zeal in ensuring the refugees in Malaysia are well treated in the country after facing grotesque torture in their own homeland leaving them in disdain. Further, for the past 40 years,

Malaysia has been a major destination for refugees seeking either temporary or permanent refuge from devastating conflicts in the region and further afield. This shows Malaysia has taken this issue seriously and is willing to cater for the poor refugees or stateless persons on the basis of humanitarian ground.

It is indeed Malaysia has been an ardent support of protection for refugees as manifested by its action of receiving refugees that makes up more than 150,000 population in Malaysia. Be as it may, there are problems arising in respect of controlling and catering for the refugees in Malaysia. Malaysia has been called out for its failures to provide convenient living environment and also in upholding the rights of the refugees which eventually created a precarious existence on the margins of society. The issues arose in consonance to the situation must be laid out in order to find the best solution for each issue.

- ***Lack of legal framework***

As of the end of April 2017, there are about 150,662 refugees and asylum- seekers registered with the UNHCR in Malaysia. Of these refugees, about 89 percent are persecuted ethnic groups from Myanmar, comprised of Rohingyas, Chins, Myanmar Muslims, Rakhines and Arakanese. About 11 percent of registered refugees are from other countries, including Pakistan, Sri Lanka, Yemen, Somalia, Syria, Iraq, Afghanistan and Palestine. About 67 percent of refugees and asylum-seekers are men, and 33 percent are women. About 36,331 refugees are children under the age of 18. The number of refugees in Malaysia may not be as large as the number of refugees welcomed in Germany, however effort by Malaysia in welcoming refugees deserves respect and commendation globally.

Malaysia could be the saviour for the refugees who have been forcibly displaced from their homes by war or persecution but being in Malaysia does not necessarily mean that they can become Malaysians and have the equal rights as the locals. Malaysia is neither party to the United Nations 1951 Refugee Convention nor its 1967 protocol. Malaysia is also not a party to the 1954 and 1961 U.N. Statelessness Convention and has remained steadfast

against inking the convention, while expressing its commitment to continue extending assistance to refugees from the Middle East and the Rohingya Muslim minority who fled Myanmar.

Malaysia lacks a legal framework for managing refugees, so third party will need to intervene to properly manage them. Collaboration with UNHCR has tremendously relieved Malaysia in managing the refugees as UNHCR has better expertise in handling the same. Malaysia has always been open to any efforts by UNHCR in improving living quality of refugees in Malaysia.

- ***Registration, documentation and status determination***

The fact that Malaysia is not a signatory to the 1951 Convention and its Protocol makes it difficult for Malaysia to have a systematic legal framework for the refugees. There is no domestic law that could cater the legal needs of the refugees albeit there are policies drafted by the government to manage issues on refugees. Due to this reason, UNHCR conducts all activities concerning the registration, documentation and status determination of refugees. The Malaysian Government will cooperate with UNHCR in addressing refugee issues. Upon registration, refugees will be issued with the UNHCR refugee cards which are meant for them to be recognised as refugees instead of illegal immigrants and be protected from arrest.

The problem arising from the current system is that the government of Malaysia could not obtain direct and prompt information on refugees as the government will have to go through bureaucracy of the UNHCR. Also, the government was having problem to control the issuance of UNHCR card to the refugees as it was reported that those who are not recognised as asylum seekers were also given the identification card regardless of their status as illegal immigrants. This will cause misuse of the UNHCR cards. This situation is exacerbated with the possibility that there could be fugitives or criminal be given the card if not properly checked and filtered.

In addition to that, it is indeed the refugees are granted refugees card to avoid arrest however it is often reported that refugees are

still vulnerable to arrest and detention as illegal immigrants. This is because the UNHCR card has no legal standing and that many enforcement officers have yet to be familiarised with UNHCR cards. It could have been more effective and safer if the registration, documentation and status determination of refugees is done by the governmental agencies like the Immigration Department and also the Department of Registration so that the government will be well informed of the issues concerning the refugees at first hand and manage to solve the matter at once.

In order to have better control and management of the refugees, the Malaysian Cabinet has agreed to have the documentation of refugees be handled by the Immigration Department and the Home Ministry and UNHCR will be barred from issuing identification card. This is also to curb the indiscriminate issuance of the cards without the government's knowledge, and that the documentation was only part of the process. It was also the prerogative of the government to determine if an immigrant should be granted refugee status, a decision that should not solely be made by UNHCR. It is said that it would be improper that the UNHCR cards could be issued without the involvement of the local authorities.

The spill-over effects of problems in refugee communities would be minimised if refugees are registered with Government identification and given opportunities to be self-sufficient. Social ills associated with alienating or marginalised refugee communities, such as criminal activities and anti-social behaviour, would subsequently decrease. This also manifests the empathetic measure by Malaysia to help the refugees. In taking over the registration and documentation of refugees in Malaysia by the government, we hope to see better management of refugees in the country.

• ***Access to basic needs like employment, healthcare and education***

Upon fleeing their homes, refugees are forced to leave behind their normal life including the job they used to have back in their home country leaving them in disdain. They came to Malaysia seeking refuge in new land with the hope of a better life. For decades,

refugees relied on donations and helps by the government and non-governmental organisations (NGOs). However, donations alone are not sufficient for long term survival. Plus, as there is no refugee camps in Malaysia, refugees are gallivanting all over city until they found place to settle. This situation will eventually contribute to urban poverty and this is exacerbated by the fact that refugees in Malaysia are not allowed to work and because of this, desperate refugees will engage in very low paying level jobs. Due to their status as refugees, most of them have to resort to dirty, dangerous and difficult works to earn some money for them and also for their whole family.

In order to curb the problems and issues arose with regard to refugees, the government of Malaysia has come up with policies that could improve the life of refugees in Malaysia. Beginning March 2017, Malaysia came up with a pilot project where Rohingya refugees are allowed to work legally in the country. This pilot project is open for only to Rohingya who are UNHCR cardholders and have undergone health and security screenings. Successful applicants will be placed with selected companies in the plantation and manufacturing industries. They will be able to gain skills and income to make a living before being relocated to a third country. The project will help to address the human trafficking issue and prevent exploitation of Rohingya as forced labour and illegal workers in the country.

The training provided by the government will help them to be equipped with the appropriate skill for the semi-skill areas and those who have gone through training will be entitled for Temporary Employment Passes (PLKS). Temporary Employment Passes (PLKS) which will then enable them to obtain employment. Having given the right to legally work in the country, this will definitely help the refugees to earn for living and will eventually have better life for the whole family. With the money earned, they can afford to go for medical treatment from public and private medical centres.

The regularisation of status and permission to work, in addition to access to healthcare and education, would impact positively on

law and order in Malaysia. Regularisation of status and permission to work for refugees will limit the politicisation of the refugee issue as a threat to national and social cohesion. A national database will also ensure law enforcement is properly conducted without arbitrary arrest, bribery and detention. This will benefit Malaysian society at large as it will improve confidence in the Government management of immigration flows.

• ***Access to healthcare and education***

Other than employment and education, access to healthcare is also one of the most prominent needs of the refugees. In Malaysia, while refugees are able to access public and private healthcare facilities, this is often hindered by a variety of factors including the cost of treatment, fear of moving in public in order to access those services, and language barriers. Therefore, Malaysia has taken the initiative to introduce a policy where registered refugees are entitled for 50% discount of treatment bill at any government healthcare centres.

Many non-governmental organisations (NGOs) have taken proactive actions by organising Healthcare Programs for refugees all over Malaysia. Malaysia Life Line for Syria (MLLFS) partnered with Malaysian Islamic Youth Movement organised a healthcare program for Syrian refugees. The program named 'From the Heart of Malaysian to the Heart of Syria' was meant to provide basic medical treatment and also free supply of medication to those in need.

In addition to that, realising the importance of healthcare for the refugees, UNHCR in Malaysia has joined force with RHB Insurance Berhad to launch Refugee Medical Insurance Scheme (Remedi). The Refugee Medical Insurance Scheme (Remedi) is fixed at RM164.30 annually per refugee, for hospitalisation and surgical coverage of RM10,000. On the other hand, families of five or fewer members pay RM206.70 per annum, with an additional RM20 fixed per child if there are more than three children. The scheme covers up to RM12,000 per family and for an additional RM12.20, refugees can get personal accident coverage of RM23,000.

Apart from access to legal employment and healthcare service, education plays a profound part of living. As for access to education, there are quite a number of non- governmental organisations that have taken the initiative to open education centres for refugees. Future Global Network Foundation (FGN), a non-governmental organisation opened an education centre for refugees in July 2010. Presently, FGN has opened three schools for Rohingyas one in Penang, Selangor and Pahang. They also formed a collaboration with other NGO namely Pencerdasan Container Ummah Malaysia to open the second school in Klang, Selangor. FGN is only one of the many NGOs in Malaysia that have been relentlessly helping the refugees to get access to education. There is about 120 informal learning centres throughout **Malaysia, run by the refugee community or faith-based organizations, with support from UNHCR.**

V. CONCLUSION

As a developing nation, Malaysia is facing many challenges specifically in integrating international obligations in the country's policies. It is always important for a nation to safeguard the country's security, economic interest, financial investment and socio-political stability. Hence, Malaysia is taking its time to draft a proper policy on immigration and refugees matter as there is a responsibility to balance the rights of its citizens and the international human rights obligations for other citizens of the world.

LEGAL STATUS OF IMMIGRANTS AND REFUGEES IN MONGOLIA AND ITS CURRENT CONDITION

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MONGOLIA

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I. INTRODUCTION

The purpose of this paper, to present an outline of legal status of immigrants and refugees in Mongolia, how it's regulated in accordance with the statutes of Mongolia and international treaties to which Mongolia is party of and its present condition.

The country of Mongolia currently has no major concerns regarding immigrant issues. Mongolia, as a democratic country with free economy, protects human rights in an appriopricte manner and as a country of peace and no war, there's no refugees leaving Mongolia to other countries. Since, Mongolia is geographically located between Russian Federation and People's Republic of China, with a population of over three million and a small economy, it's very uncommon to foreign citizens to seek an asylum and immigrate to Mongolia.

Until the early years of 1990s, Mongolian citizens had limited rights to travel abroad under the restrict regime of a single party. Today, Mongolian citizens with an appropriate permission can freely travel to foreign states for official and personal purposes and likewise any foreign citizens can freely visit Mongolia in accordance with it's legislation, can reside for a short and long term and can become citizen of Mongolia. It is also stated and legislated in the relevant statutes of Mongolia.

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Although, the Law of Mongolia on the Legal Status of Foreign Citizens was approved and came into force in 1995 for the first time as the relations with foreign states were extended and developed, it was necessary to make appropriate improvements and amendments to the legislation regarding foreign affairs. Taking these social needs and demands into consideration, the State Great Khural of Mongolia has revised the law in 2010 and since been complied.

The Law of Mongolia on the Legal Status of Foreign Citizens is a fundamental legal source which defines the rights and responsibilities of foreign citizens, regulating their legal status. Owing to the of that the Constitutional Court of Mongolia does implement an abstract and no concrete control, no disputes have been arisen regarding the fundamental rights of the immigrants and refugees to date.

II. LEGAL STATUS OF IMMIGRANTS IN MONGOLIA

With this section, I aim to present an outline of legal status of immigrants in Mongolia, how it's regulated in accordance with the statutes of Mongolia and its present condition.

The term "immigrant" is defined in the statutes of Mongolia, in particular, Law on Legal Status of Foreign Citizens of 1993 defined that foreign citizens who came to live in Mongolia for a term of more than 5 years for private business shall be considered as immigrants, and the law on Legal Status of Foreign Citizens as amended in 2010 defines as such, **"immigrant"** means a foreign national or a stateless person who gained residence permission from the authorized state body of Mongolia. It also defines as follows, **"foreign national"** means a person who has foreign citizenship, but not Mongolian citizenship; **"stateless person"** means a person with no nationality and citizenship of any state. As defined in the Civil Code of Mongolia, Mongolian and foreign citizens, individuals without citizenship participating in the private legal relationship shall be deemed as **"citizens"**.

Furthermore, Mongolian linguist Mr. Tsevel.Ya defines the term 'foreign citizen' as *"person with citizenship of other states"*[1] and

1 Tsevel.Ya. 1999: Dictionary: Ulaanbaatar, p. 69.

academician Mr. Narangerel.S defines it as '*person who is not a citizen of the present state but of another state with legal documentation certifying their foreign citizenship'*[2].

When Mongolia chose democracy in 1991, the development of mining and tourist industry accelerated and Mongolian economy became open to foreign investors and businesses. Moreover, numerous administrative restrictions and regulations imposed upon foreign citizens to enter and visit to Mongolia were annulled and as a consequence the number of construction workers, professionals and experts who are going to reside in Mongolia for long duration and tourists remarkably increased.

As of 2016, the number of citizens with permission to immigrate and reside in Mongolia is 1943, 1237 of which are citizens of Peoples republic of China and 640 are of Russian Federation.

A. Regulations in the Constitution of Mongolia on Legal Status of Immigrants

The new democratic Constitution was adopted in 1992, and among the various specialized statutes revised accordingly was the legislation of the status of immigrants in alignment with modern social development.

The legal basis of immigrants status was legislated in the Constitution as such: "*the rights and duties of foreigners residing in Mongolia are regulated by Mongolian law and by treaties concluded with the state of the person concerned.'*[3], and '*in allowing the foreign nationals and stateless persons under the jurisdiction of Mongolia to exercise the basic rights and freedoms, the State of Mongolia may establish necessary restrictions upon the rights other than the inalienable rights spelt out in international instruments to which Mongolia is a Party, out of the consideration of ensuring the security of the country and population, and public order'*.[4]

The principles and norms of human rights universally recognized by international treaties serve as a fundamental norms for States in defining the legal status of foreign citizens residing in their State. The

2 Narangerel.S. 2007: Dictionary of law: UB, p. 326.
3 Article 18.2 of Constitution of Mongolia.
4 Article 18.5 of Constitution of Mongolia.

legal status of immigrants is regulated by the laws and regulations of the residing country, international treaties the country is part of and general principles recognized by international laws.

In 1985, United Nations General Assembly adopted the Declaration on the human rights of individuals who are not nationals of the country in which they live is prohibited to subject foreign citizens to torture or to cruel, inhuman or degrading treatment or punishment or to arbitrarily deprive of his or her lawfully acquired assets'. [5]

International covenants of 1966 such as The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights have approved and legislated the aforementioned matters[6].

The Constitution of Mongolia declares that *'all persons lawfully residing within Mongolia are equal before the law and the courts'*[7]; *'no person may be discriminated on the basis of ethnic origin, language, race, age, sex, social origin or status, property, occupation or post, religion, opinion, or education*[8]*'* and therefore legislating the rights of every person which apply equally to foreign citizen, stateless person.

The aformentioned norms stated in the Constitution of Mongolia are in compliance with the article of Civil and Political Rights Covenant: '*Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'*.[9]

Such legislative guarantees exist due to the fact that national and special regimes for foreign citizens are in force. National regime is described as the exercising of same rights of foreign nationals as citizens of their nationals. The special regime is described as the

5 http://www.mfa.gov.mn/?page_id=26007.

6 United Nations. 2011: Fourth national report of Mongolia on implementation of the international covenant on economic, social and cultural rights: UB. p. 4.

7 Article 14.1 of Constitution of Mongolia.

8 Article 14.2 of Constitution of Mongolia.

9 Article 2.1 of Civil and Political Rights Covenant.

exercising of rights of foreign citizens provided by the national laws and international treaties.

For instance, foreign citizens are prohibited by law to be employed as civil servants, to be elected or to vote, to have access to state secrets of the State in which they are present. The fact that the United Nations Charter obligated its member countries to respect human rights and freedom is a valid justification for recognizing a person as an international legal subject. [10]

B. Mongolian Statutes and Legislations about Legal Status of Foreign Citizens

With this section, I aim to present an outline of Mongolian statutes and legislations about legal status of foreign citizens.

Legislation of categorizing foreign citizens into different types in the Law on Legal Status of Foreign Citizen of 2010 was based on the concept of determining their legal statuses varyingly by other laws. This concept of law is to coordinate the policy-oriented relations such as purpose, reason, duration of stay, life condition of the foreign citizen. The Law on Legal Status of Foreign Citizen defines the foreign citizens variably as follows:

- "Immigrant" means a foreign national or a stateless person who gained residence permission from the authorised state body Mongolia[11];
- "Foreign national" means a person who has foreign citizenship, but not Mongolian citizenship;[12]
- "Temporary visitor" means a foreign national visiting Mongolia for up to 90 days; [13]
- "Resident for a private purpose" means a foreign national who is residing in Mongolian territory over 90 days period for private purposes, such as study, work, investment, family, business and other; [14]

10 Charter of the United Nations, 1945. Preamble.
11 Article 5.1.8 of Law on Legal Status of Foreign Citizens.
12 Article 5.1.1 of Law on Legal Status of Foreign Citizens.
13 Article 5.1.4 of Law on Legal Status of Foreign Citizens.
14 Article 5.1.5 of Law on Legal Status of Foreign Citizens.

- "Resident for official purpose" means a foreign national being invited by the government organizations and foreign nationals who are employed in foreign diplomatic and consular services representative offices, Intergovernmental agreement organizations, UN and its specialized organizations representatives, foreign and international press representatives and their family members who is going to reside for more than 90 days;[15]
- "Stateless person" means a person who has no nationality of any state.[16]

C. About Foreign Immigrants

With this section, I aim to present an outline of Mongolian statutes and legislations about legal status of foreign immigrants.

In the Law on the Legal Status of Foreign Citizens in force, it's unclear how to define the term 'immigration permit', for which purposes to grant immigration permit to foreign citizens.

"The Procedure on Residence and Registration of Foreign Citizens" approved by the Government resolution number 340 of 2010 stated that a foreign citizen who requests immigration to Mongolia should meet the following criteria:

- The monthly income should be no less than a salary 5 times that lower than lowest level salary of Mongolia;
- He/she should hold an undergraduate degree or has a profession that is deemed necessary for Mongolia;
- He/she has not been to convicted;
- He/she has not been deported from and been deprived the right to enter Mongolia.

Foreign citizens with immigration permit exercise more rights and subject to more responsibilities than that of foreign citizens with temporary and ordinary residence permit. In principle, they have the same rights and duties as the citizens of the present State apart from political and other special rights and duties prohibited

15 Article 5.1.6 of Law on Legal Status of Foreign Citizens.
16 Article 5.1.7 of Law on Legal Status of Foreign Citizens.

by law. Therefore, they are allowed to hava a right to education, social security services, such as right to reside, travel, work, services of medical and social welfare systems[17].

D. About Permanent Residents

With this section, I aim to present an outline of Mongolian statutes and legislations about legal status of permanent residents.

Before defining the term permanent residents, the types of residency of foreign citizens in Mongolia should be taken into consideration.

The law on the legal status of foreign citizens specified the types of residency as official and personal purposes.

The law considers the ***residents for official purposes*** as foreign nationals being invited by the government organizations and foreign nationals to be employed in foreign diplomatic and consular services representative offices, Intergovernmental agreement organizations, UN and its specialized organizations representatives, foreign and international press representatives and their family members who is going to reside for more than 90 days, whereas foreign nationals who is residing in Mongolian territory over 90 days period for private purposes, such as study, work, investment, family, business and other are considered as ***residents for private purposes.***

There are 17[18] residency types for foreign citizens and they can

17 The National Legal Center. 2015: Some regulations on the legal status of foreign citizens (comparative study): UB. p. 65.

18 "The Procedure on Residence and Registration of Foreign Citizens" approved by the Government categorized foreign citizens residency for official and private purposes. into more detailed types as follows:

Foreign citizens and their family members who will work at foreign diplomatic or consular missions, a permanent mission of the UN or its specialized organizations, and foreign and international press

Foreign citizens who will work at intergovernmental organizations upon the invitation of governmental organizations

Foreign citizens who are married to a Mongolian citizen and registered their marriage

Children who are born from a Mongolian citizen, under age of 16 years and have a foreign citizenship

Foreign citizens who are married to a Mongolian citizen and registered their marriage, wife/husband, father, mother and children of foreign citizens who will reside for other private purposes

specify the purpose of residency for foreign citizens.

As mentioned above, it's necessary to define the identity of permanent residents in legislative acts.

"The Procedure on Residence and Registration of Foreign Citizens" approved by the Government resolution number 340 of 2010 states that registration number can be issued to the following foreign citizens:

1. Foreign citizens who are married to a Mongolian citizen and registered their marriage;
2. Children who are born from a Mongolian citizen, under age of 16 years and have a foreign citizenship;
3. Foreign citizens born from a Mongolian citizen, above the age of 16 years;
4. Foreign citizens immigrating to Mongolia;
5. Foreign citizens who has done a great deed for Mongolia; or holds a profession or specialty that is essential to Mongolia; or has achieved or has a potential to achieve great accomplishments in one of the areas of science

The advantages of defining the identity of permanent residents

Wives/husband, father, mother and children of foreign citizens who will reside in Mongolia for official or private purpose and engaged in work, investment, and professional development studies

A foreign citizen who requests immigration to Mongolia

A foreign citizen who resides in Mongolia for the purpose of employment

A foreign citizen who resides in Mongolia as an investor

A foreign citizen who resides in Mongolia for the purpose of studies, professional development, internship or conducting scientific research and studies in Mongolia

A foreign citizen who has renounced his or her Mongolian citizenship

A foreign citizen who is born from a Mongolian citizen, above the age of 16 years

A foreign citizen who has done a great deed for Mongolia; or holds a profession or specialty that is essential to Mongolia; or has achieved or has a potential to achieve great accomplishments in one of the areas of science

A foreign citizen whose stay in Mongolia is considered necessary until the legal authorities settle the issues related to the foreign citizen and based upon the proposal by the relevant organization

A foreign citizen who resides for other private purposes

A foreign citizen who will work at a religious organization

A foreign citizen who will work at a non-governmental organization or international humanitarian organization.

is to form the necessary conditions for foreign citizens who belong to this definition to benefit from equal legal protection.

E. About Stateless Person

With this section, I aim to present an outline of Mongolian statutes and legislations about legal status of stateless person.

Stateless person in international law is called an apatride[19]. Mongolian The Law of the Legal Status of Foreign Citizens defines the term "stateless person" as a person who has no nationality of any state.

As a result of conflicting legislations on granting citizenship of countries, a person can end up having no citizenship of any state and it's a consequence that usually occurs when a person loses his or her citizenship and cannot obtain citizenship of another State. There are common reasons for losing his or her citizenship, such as:

1. Not obtaining a new citizenship after losing his or her former citizenship
2. A child born from a stateless person who is living in country with jus sanguinis principle
3. When a woman who is a citizen of country where a person loses his or her citizenship if married to a foreign citizen marries to citizen of a country that doesn't grant citizenship to foreign citizens.
4. When a child is born from a citizen of country jus soli regime in the territory of a country with jus sanguinis principle
5. On rare occasions a person voluntarily renounces his or her citizenship and becomes stateless and/or "world citizen".

Countries either follow the principle of jus soli or jus sanguinis. Jus sanguinis is when a person acquires citizenship through their parents, irrelevant of their birth place. Mongolia follows Jus sanguinis principle. As stateless persons have no documents to

19 Khosbayar.Kh and Dugersuren.M. 1999: International law: UB. p. 88.

prove the nationality of any State, they have no constant relation with the state and their rights to own property, to possess real estate, to open bank account in their name, to marry, to register their children, to receive medical service, to be employed and paid are violated.

Mongolia determined the legal status of stateless person in compliance with national and international norms. The citizenship of a person is regulated by the statutes and other legislation such as Constitution of Mongolia, Law on Citizenship, Law on legal status of foreign citizen, Law on children's right, Civil code, Law on civil registration, Law on sending labour force abroad and receiving labour force and specialists from abroad, Civil procedure code, The procedure on establishing criteria for foreign citizens and stateless person who request citizenship of Mongolia, The procedure on residence of foreign citizens and stateless persons in Mongolia, issuance, possession, keeping and usage of travel license to stateless person, and international convetions to which Mongolia is a party of such as the Universal Declaration of Human rights, International Covenant on Civil and Political Rights.

As of 2016, among the 35 people registered stateless in Mongolia, there were 13 immigrants, 8 with religious purposes, 5 students, 1 with non-governmental and international humanitarian organization purpose, 2 temporary visitors, 1 labourer, 2 with other purposes, 2 who married to a Mongolian citizen. The date of birth of the stateless persons were between 1924 and 2007 and 33 of them were male and 2 of them female[20]. Mongolia must allow stateless persons to exercise their rights and freedom, in accordance with the principle to respect the fundamental human rights and freedom.

Article Eighteen of The Constitution of Mongolia states that 'The rights and duties of aliens residing in Mongolia are regulated by Mongolian law', 'aliens or stateless persons persecuted for their convictions or for political or other activities pursuing justice, may be granted asylum in Mongolia on the basis of their well-founded

20 The survey was obtained from an authorized official of General authority of Citizenship and migration.

requests', and 'in allowing the foreign nationals and stateless persons under the jurisdiction of Mongolia to exercise the basic rights and freedoms, the State of Mongolia may establish necessary restrictions upon the rights other than the inalienable rights spelt out in international instruments to which Mongolia is a Party, out of the consideration of ensuring the security of the country and population, and public order'. The law on citizenship states that a child born when one of parents was a Mongolian citizen and the other was a stateless person shall be Mongolian citizen irrespective of place of birth; a child who is within the territory of Mongolia whose both parents are unidentified shall be a Mongolian citizen; a child who born from stateless parents permanently residing in the territory of Mongolia may have Mongolian citizenship, after reaching the age of 16, if he or she will to do so; Mongolian citizen who is adopted by a stateless person and who has not reached the age of 16 shall remain to be a Mongolian citizen[21]. A foreign citizen or a stateless person may acquire Mongolian citizenship in accordance with legislations and the Grounds for Refusal or Restraint of Granting Mongolian Citizenship[22] are specified as such:

- when it is proved that a person has committed a crime against humanity as defined by international legal regulations;
- when a person has conducted or is conducting an activity against national security or vital interests of Mongolia;
- when a person is being claimed as a member of international terrorist organization;
- when a person is determined by court to be a dangerous criminal;

If the aforementioned grounds are proved, The State Administrative Central body in charge of Mongolian citizenship matters shall submit its proposal on refusal of granting Mongolian citizenship to a foreign citizen or a stateless person, and the President within his or her full powers shall decide on granting Mongolian citizenship to a foreign citizen or a stateless person.

21 Article 7 of Law on Citizenship.

22 Article 10 of Law on Citizenship.

As stated in the Law on the Legal Status of Foreign Citizen: "Unless otherwise provided in other legislations, the present law concerning foreign citizens shall equally apply to stateless persons", other relevant legislations of Mongolia regulated the legal status of stateless person same as that of a foreign citizen. For example, the matters such as grant of Mongolian citizenship, issuance of travel license, issuance of authorization to operate business are legislated to be equal to foreign citizens. Stateless persons are included in the subjects applicable of the laws in force in Mongolia, although they are legislated to exercise certain rights, in practice their chance to exercise those rights are limited. Authorized legal subjects who are participating in legal relationship with stateless persons demand documents to prove one's identity issued by the authorized institutions and therefore forming limitations for stateless persons to benefit from government services and social security, to study, to own property and furthermore expose them to be victims of crime. Hence, a stateless person shall request a citizenship from the authorized organizations of the present State.

The legal status of stateless person is legislated in the Civil Code of Mongolia as such: the civil legal capacity of foreign citizens and stateless persons shall be equal to that of citizens of Mongolia; the legal capacity of stateless persons shall be determined by the law of the country where they reside; the legal capacity of foreign citizens and stateless persons in respect of their contractual obligations and torts occurring on the territory of Mongolia shall be determined by Mongolian law, the legal capacity of stateless persons residing in the territory of Mongolia shall be determined by the law of Mongolia. Moreover, the declaration of any person to be missing or dead shall be made in accordance with the law of country of his or her residence, if the stateless person has no country of residence Mongolian law shall apply[23]; when the court of Mongolia reviews and resolves cases concerning foreign citizens and entities, stateless person, unless otherwise stated in the law shall exercise equal rights to that of citizens of Mongolia[24].

23 Article 546.2 of Civil code.
24 Article 189.1 of Civil code.

The right to citizenship is considered to be a fundamental human right and it was guaranteed by international acts on human rights and freedom. The Universal Declaration of Human Rights, the basic norms of human rights of humanity, states that everyone has the right to a nationality and that no one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality. Mongolia in its' Constitution confirmed this provision and stated that the grounds and procedure for Mongolian nationality, acquisition, or loss of citizenship may be defined only by law; deprivation of Mongolian citizenship, exile, or extradition of citizens of Mongolia are prohibited and thus prohibited deprivation of citizenship without the consent of the citizen[25]. Even though such legislations are in force in Mongolia, the cases where the President of Mongolia deprived Mongolian citizenship from people who acquired citizenship of other States /dual citizenship/ conflicts with the aforementioned provision. The International Covenant on Civil and Political Rights says that every child has the right to acquire a nationality[26]. This provision prevents violation of children's right for the fact that there are cases in countries with jus sanguinis regime, a child born to stateless person becomes a stateless person. The convention on the Rights of the Child states: 'States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.'

II. LEGAL STATUS OF REFUGEES IN MONGOLIA

With this part, I aim to present an outline of Mongolian statutes and legislations about legal status of refugees.

Today, the refugee situation is critically intensifying in the world and particularly in the Asian region. However, Mongolia is less associated with the refugee situations concerning social, economic, political challenges and it's not one of the major issues of Mongolia. In spite of that, from the perspective of its national security interests, Mongolia shall not overlook this issue.

25 Article 15 of Constitution of Mongolia.

26 Article 24.3 of the International Covenant on Civil and Political Rights.

The National Security Concept of Mongolia stated as such: an early-warning and rapid-deployment system shall be put into operation to prevent mass refugee border-crossings or related emergency situations while a set of legal, political and diplomatic actions shall be undertaken; a current record of foreign citizens, aliens and migrants shall be maintained while registration, monitoring, information data processing, legal environment, management and organization shall be improved; protect the domestic labor market while undertaking a consistent strategy on eradication of poverty by creating secure jobs.

The questions, concerning how to solve the issue of refugees entering Mongolia from other States, whether to accept them or not, how to deport them, arise.

The recommendations issued by the international conference on refugees held in Beijing in 1998 recommended: 'In dealing with issues of refugees crossing the border of a State, first of all, the State in concern must allow a meeting to take place to discuss their goals and opinions of the refugees. Particularly, consulting with their leaders is crucial in establishing a condition to work effectively'.

Mongolia has never experienced a situation of admitting refugees and settling them. Convention relating to the Status of Refugees adopted by the UN in 1951 stated as such: 'the Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to specific rights such as right to elementary education and to wage-earning employment, shall accord the same treatment as nationals'. They are issued travel documents for crossing the border of a State. Contracting States of the Conventions are obliged not to turn them back to their country, to coordinate the process of integration and obtaining citizenship as much as possible. Taking in to consideration the demographic characteristics, current social, economic conditions of Mongolia, it's essential for Mongolia to seriously consider joining the Convention relating to the Status of Refugees adopted by the UN in 1951.

III. CONCLUSION

The law on legal status of foreign citizen defined a foreign citizen as a person who has foreign citizenship, but not Mongolian citizenship and specified their rights and responsibilities. Except only establishing necessary restrictions upon the rights other than the fundamental rights out of the consideration of ensuring the independence, national security of Mongolia, protecting public order, they are to exercise the same rights and fulfill the same duties as that of a Mongolian citizen. Foreign citizens residing in the territory of Mongolia have the following rights to enter Mongolia and reside, to be employed, to seek political asylum; and the following responsibilities to obey law and respect Mongolian national traditions and customs, to be registered, to pay taxes, to be within the permitted period of valid Mongolian visa and residence permission or to exit Mongolia within permitted period of time or as instructed by the relevant authority of Mongolia unless the international treaties to which Mongolia is a Party provide otherwise, to hold valid foreign passports or equivalent legal documents permitted to reside in Mongolia.

If a foreign national is a citizen of a country who has entered into a mutual legal assistance treaty with Mongolia, the rights and responsibilities stipulated in the treaty shall apply. As of today 19 countries have entered into mutual legal assistance treaty with Mongolia. The fundamental principle this law and mutual legal assistance treaties is to maintain equality. As stated in the law on legal status of foreign citizen as 'Unless otherwise provided in other legislations, the present law concerning foreign citizens shall equally apply to stateless persons', stateless person residing in the territory of Mongolia are subject to the equal rights and duties as that of a foreign citizen. When a stateless person requests citizenship from the authorized organization of Mongolia and the authorized organization grants permission, he or she may become an 'immigrant'. As determined in the law on the legal status of foreign citizen, a foreign citizen or a stateless person persecuted for their convictions or for political or other activities pursuing justice may request political asylum and the President of Mongolia may grant the permission.

Since no complaints, feedbacks were filed, or no conflicts registered in the Constitutional Court against the Article 18 of the Constitution of Mongolia which defined the legal basis of foreign citizens and stateless person, it can be considered that all issues are duly regulated by the law.

References

Books, textbooks and manuals

1. Amarsanaa.J. 2000: Human right. International and domestic legal issues: Ulaanbaatar.

2. Gerelchuluun.Kh. 2013: Manual book: Citizenship and migration: Ulaanbaatar.

3. Khosbayar.Kh and Dugersuren.M. 1999: International law: Ulaanbaatar.

4. Mendsaikhan.Kh. 2012: Issues of Foreign citizenship in Mongolia /1921-1940/: Ulaanbaatar.

5. Gerelchuluun.Kh. 2011: Migration of citizens: Ulaanbaatar.

6. Davaanyam.A. 2005: The structure of Civil registration and information authority of Mongolia: Ulaanbaatar.

7. The National Legal Center. 2015: Some regulations on the legal status of foreign citizens (comparative study): Ulaanbaatar.

8. International Organization for Migration. 2004: Glossary on Migration: Switzerland

Laws and legislations

1. Law of the Legal Status of Foreign Citizen, 1993

2. Civil Code, 2002

3. Law on Citizenship, 1995

4. Law of the Legal Status of Foreign Citizen, 2010

5. Law on Civil Registration, 2003

6. Law on sending labour force abroad and receiving labour force and specialists from abroad, 2001

7. Civil Procedure Code, 2002

8. Appendix of Government resolution no. 62 "The procedure on establishing criteria for foreign citizens and stateless person who request citizenship of Mongolia", 2003

9. Appendix of Order no. 187 of Minister of Justice "The procedure on residence of foreign citizens and stateless persons in Mongolia and issuance, possession, keeping and usage of travel license to stateless person", 2014

10. Government resolution no. 340, "The Procedure on Residence and Registration of Foreign Citizens", 2010

International acts

1. Universal Declaration of Human Rights, 1948
2. International Covenant on Civil and Political Rights, 1966
3. Convention on the Reduction of Statelessness, 1954
4. Convention relating to the Status of Stateless Persons, 1948
5. Convention on the Nationality of Married Women, 1957

IMMIGRATION AND REFUGEE LAW

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MONTENEGRO

IMMIGRATION AND REFUGEE LAW

Zorka KARADŽIĆ[*]

I. LEGAL FRAMEWORK

A. Introduction

Article 44 of the Constitution of Montenegro[1] , Chapter II (Individual rights and freedoms) guarantees the right to asylum, which is implemented in the manner stipulated by law. The Law on Asylum[2] sets out the principles, conditions and procedure for granting asylum, refugee status recognition and approval of additional and temporary protection, state authorities responsible for decision-making, rights and obligations of asylum seekers, persons who are recognized as refugees and approved additional or temporary protection, and the reasons for termination and revocation of refugee status and subsidiary protection and termination of temporary protection in Montenegro. As a result of new Law on International and Temporary Protection of foreigners[3], being adopted in 2016, Law on Asylum, will cease to be effective on 1. January 2018. New law is expected to ensure full harmonization with the legislation of the European Union and provide efficient and unique system of asylum, which guarantees to foreigners who are seeking international protection, equal chances for success

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1 A foreign national reasonably fearing from persecution on the grounds of his/her race, language, religion or association with a nation or a group or due to own political beliefs may request asylum in Montenegro. A foreign national shall not be expelled from Montenegro to where due to his race, religion, language or association with a nation he/she is threatened with death sentence, torture, inhuman degradation, persecution or serious violation of rights guaranteed by this Constitution. A foreign national may be expelled from Montenegro solely on the basis of a court decision and in a procedure provided for by the law.

2 Official Gazette of Montenegro No 45/06.

3 Official Gazette of Montenegro No 2/17.

in the procedure. In addition to the above, new law is prescribing faster, more efficient and more economical procedure, as well as the possibility of preventing abuse of procedure and sanctioning such actions. The Constitution of Montenegro incorporates ratified international treaties and generally accepted rules of international law into the national legal system, prescribing their direct implementation and priority over national legal provisions (Article 9).

International Documents that incorporate norms and standards in the field of migrant protection that are legally binding for Montenegro are: UN Universal Declaration of Human Rights, UN Convention on the Status of Refugees (1951). Geneva Convention supplemented by New York Protocol of 31. January 1967, International Covenant on Civil and Political Rights, International Covenant on economic, social and cultural rights, the UN Convention on the Rights of the Child together with her two protocols, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and procedures, the European Convention for the Protection of Human Rights and Fundamental Freedoms.

In relation to foreigners, Montenegro Constitutional Court considered a number of constitutional appeals that were related to the social and acquired rights in the field of retirement and disability pension, citizenship rights, property rights, criminal, civil and labor rights, etc. however none was related to refugees or asylum seekers, nor has the Court decided on constitutionality of Law on asylum, Foreigners Law or constitutionality and legality of any bylaw adopted on basis of these laws. Therefore this presentation is mainly based on legislation concerning this subject.

B. Law on Asylum

According to the article 4 of Law on Asylum, that defines meaning of terms used in Law:

- **asylum** is the right to residence and protection given to an foreigner who, on the basis of a decision of the authority that adjudicates asylum claims, has been recognized as a refugee or accorded another form of protection pursuant to this law;

- a **refugee** is an foreigner who, owing to a well-founded fear of being persecuted for reasons of race, religion, citizenship, membership of a particular social group or political opinion, is outside of his or her country of origin and is unable or, owing to such fear, unwilling to avail himself or herself of the protection of that state, or an foreigner without citizenship who is outside of the country of his or her last habitual residence and unwilling, or owing to such fear, unwilling to return to the country of origin;
- a **person with refugee status recognition** is an foreigner who is on the territory of Montenegro and who has been found by the competent authority to have a well-founded fear of persecution in his or her country of origin on account of race, religion, citizenship, membership of a particular social group or political opinion, to be unable or unwilling, owing to such fear, to avail himself or herself of the protection of his or her country of origin.

1. ***Basic Principles of Law on Asylum***

- Subsidiary Protection[4] If an authority, after conducting the procedure to adjudicate an asylum application, determines that the conditions for refugee status recognition have not been fulfilled, it is obligated to determine whether the conditions for according another form of protection have been fulfilled as provided for by this Law.
- Non-Refoulement[5] A person who has been granted asylum or whose asylum has ceased or been revoked, shall not be returned or expelled to the border of a state where: 1) his or her life or freedom would be threatened on account of race, religion, citizenship, membership of a particular social group or political opinion; 2) he or she could be subjected to torture, inhuman or degrading treatment or punishment; 3) his or her life, safety or freedom would be threatened on account

4 Article 5 of the Law on Asylum.
5 Article 6 of the Law on Asylum.

of generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances 5) which seriously threaten life, safety or freedom. These rights may not be invoked by a person if there are serious reasons to believe that he or she is a threat to the security of Montenegro, or if he or she, after being convicted through a final court judgment of a serious criminal offence, constitutes a danger to the community, except in the case referred to in point 2, paragraph 1, of this Article. After it is established that a person meets the conditions described in point 2, paragraph 1, of this Article, the person shall be given authorization for residence in accordance with the law governing the residence of foreigners.

- Non-Discrimination[6] Discrimination in the asylum procedure is prohibited on any basis, and in particular on the basis of race, color, sex, citizenship, social origin or birth, religion, political or other opinions, country of origin, economic status, culture, language, age, or mental or physical disability.

- Confidentiality and Data Protection[7] All personal data contained in individual asylum applications, as well as all statements, explanations and data from documents that become known or are used in the course of the procedure, shall be confidential and constitute official secrets. The authorities conducting the procedure, other authorities and persons involved in the procedure shall store the personal data they collect or learn in the course of the procedure in accordance with ratified international agreements, regulations on personal data protection and the provisions of this Law. The authorities and persons referred to in paragraph 2 of this Article are obligated to ensure that the statements, explanations and data from the documents referred to in paragraph 1 of this Article do not become available to the authorities of the asylum seeker's country of origin. The Office of the United Nations High Commissioner for Refugees (hereinafter: UNHCR) shall

6 Article 7 of the Law on Asylum.
7 Article 8 of the Law on Asylum.

be given unhindered access to asylum seekers, their files, information and statistical data.

- Family Unity[8] With the consent of the asylum seeker, measures shall be taken in the asylum procedure for safeguarding family unity.
- Non-Punishment for Unlawful Entry or Residence[9] An asylum seeker who has come directly from a state where his or her life or freedom was threatened in the sense of Article 2 of this Law shall not be punished for unlawful entry or residence, provided that he or she files an asylum application without delay and cites reasons, recognized as valid, for his or her unlawful entry or residence. A person referred to in paragraph 1 of this Article shall not be deprived of liberty except as prescribed by law.
- Protection of Persons with Special Needs[10] In the asylum procedure, care shall be taken of the special needs of minors, persons completely or partially deprived of legal capacity, unaccompanied minors, persons with mental or physical disabilities, the elderly, pregnant women, single parents with minor children, persons subjected to torture, rape or other serious forms of mental, physical or sexual violence and other vulnerable persons.
- Provisions Relating to Gender[11] Asylum seekers shall be treated in a gender sensitive manner at all the stages of the asylum procedure. An asylum seeker shall have the right to communicate with an official and interpreter of the same gender. Females who are accompanied by males shall be informed of their right to file their own personal asylum applications.
- Respect for Legal Order[12] An asylum seeker or person granted asylum is obligated to abide by the Constitution, laws, other

8 Article 9 of the Law on Asylum.
9 Article 10 of the Law on Asylum.
10 Article 11 of the Law on Asylum.
11 Article 12 of the Law on Asylum.
12 Article 13 of the Law on Asylum.

regulations and ratified international agreements, and to act according to the measures of the competent authorities.

- Restriction of Political Activity[13]An asylum seeker or person granted asylum is prohibited from founding, taking part in or assisting political and other organizations that, through their activities, threaten Montenegro's security and public order, or that have goals contrary to the principles of international law.
- Voluntary Return[14] The competent authorities may provide assistance to recognized refugees or persons accorded another form of protection who voluntarily return to their country of origin or a third country. Upon the cessation or revocation of refugee status and subsidiary protection, or the cessation of temporary protection, the Office described in Article 19, paragraph 2, of this Law may organize, in cooperation with UNHCR, voluntary return to the country of origin or a third country.
- Cessation of Protection[15]A decision on the cessation or revocation of refugee status and subsidiary protection may be issued only after conducting a procedure and establishing one of the reasons for cessation or revocation of protection prescribed by this Law.
- Legal Protection[16] An appeal may be lodged against any decision of the first-instance body conducting the procedure. The appeal must be lodged within 15 days from the day on which the first-instance decision is served, unless a shorter period is provided in this Law. An administrative dispute may not be lodged against a decision of the second-instance body.
- Cooperation with UNHCR[17] The first- and second-instance bodies referred to in Article 17 of this Law shall cooperate with UNHCR at all the stages of the asylum procedure and share

13 Article 14 of the Law on Asylum.
14 Article 15 of the Law on Asylum.
15 Article 16 of the Law on Asylum.
16 Article 17 of the Law on Asylum.
17 Article 18 of the Law on Asylum.

information and statistical data on asylum seekers, or persons who have been granted asylum, and on the implementation of the Convention Relating to the Status of Refugees and other international instruments concerning refugees, as well as laws and other regulations that are in force or that will be promulgated in the future.

2. ***Procedure***

Ministry of Interior affairs and Public Administration has the first instance jurisdiction to conduct the procedure in the field of asylum. According to the Law on Asylum, operations within the jurisdiction of Ministry are performed by the Asylum Office. The appellate procedure against decisions of the first instance authority is conducted by The State Commission that adjudicates appeals for asylum. All asylum seekers are allowed to apply for asylum, giving a statement of the facts and circumstances which are relevant for the decision, as well as the submission of written statements in language that they understand, in manner that Asylum Office provides an interpreter.

C. Asylum Seekers

On the basis of the offered evidence and established facts, a decision shall be reached to terminate the procedure, grant the application and recognize refugee status, accord subsidiary protection, or reject the application. Until the procedure is terminated and decision reached, an asylum seeker has the right to residence and freedom of movement, provision of accommodation, health care, primary and secondary education, family unity, legal aid, humanitarian assistance etc.[18] However, he is obliged to reside

18 An asylum seeker has the right to: 1) residence and freedom of movement; 2) an identification document proving his or her identity, legal status, residence right and other rights prescribed in this Law; 3) an foreigners' travel document for the purpose of traveling abroad, pursuant to the regulations on the residence of foreigners; 4) free primary and secondary education in public schools; 5) provision of accommodation to the extent necessary, and appropriate living standards; 6) health care, in accordance with separate regulations; 7) family unity; UNHCR Representation in Montenegro 8) legal aid; 9) work within the Center or other facility for collective accommodation; 10) social welfare; 11) freedom of religion; 12) access to UNHCR and non-governmental organizations for the purpose of obtaining legal aid in the asylum procedure; 13) humanitarian assistance.

in the Center or other facility for collective accommodation, to cooperate with the bodies charged with the implementation of this Law, submit identity documents and all documents in his or her possession, not to leave Montenegro without permission during the pendency of the asylum procedure and to abide by any decision on the temporary restriction of movement.[19]

Procedure for granting asylum will also terminate if, among other thing prescribed by law, asylum seeker abandons his or her asylum claim, orally on the record or in writing, refuses to cooperate in establishing his or her identity, leaves the Center or other facility for collective accommodation without prior notice and fails to return within three days of his or her arbitrary departure, as established on the basis of official records or departs Montenegro during the procedure, without authorization, which is what happens most commonly according to the statistics.[20]

An asylum application shall be rejected if it has been established

19 An asylum seeker is obligated: 1) to reside in the Center or other facility for collective accommodation to the extent that accommodation and maintenance is not provided for in another manner; 2) to cooperate with the bodies charged with the implementation of this Law, submit identity documents and all documents in his or her possession, facilitate searches of his or her person, luggage and vehicle, provide data on property and income and other data that may be used as evidence in the procedure; 3) to remain accessible and reply to requests by the Office and the competent body; 4) to report to the competent body changes in finances and property that could affect eligibility for social welfare, accommodation, maintenance, health care and other rights; 5) to report to the Office changes of residence and address within three days from the day of the change, in as much as the asylum seeker has provided for his or her own accommodation; 6) not to leave Montenegro without permission, during the pendency of the asylum procedure; 7) to submit to a medical examination and other measures aimed at preventing the spread of infectious diseases, in accordance with health regulations; 8) to respect the house rules of the Center or other facility for collective accommodation; 9) to abide by any decision on the temporary restriction of movement. UNHCR Representation in Montenegro.

20 Article 39 A decision may be taken to terminate the procedure if the asylum seeker: 1) abandons his or her asylum claim, orally on the record or in writing; 2) fails to respond to the Office's summons as well as to the resent summons, without first giving a valid reason; 3) fails to inform the Office of a change in place of residence or address, or otherwise prevents service of the summons, without a valid reason; 4) refuses to cooperate in establishing his or her identity; 5) deliberately avoids providing information on the facts or circumstances, or submitting evidence in his or her possession, essential for establishing the merits of the application; 6) leaves the Center or other facility for collective accommodation without prior notice and fails to return within three days of his or her arbitrary departure, as established on the basis of official records; 7) departs Montenegro during the procedure, without authorization. An appeal against the decision referred to in paragraph 1 of this Article may be filed within eight days from the day of its service. The State Commission shall issue a decision on the appeal referred to in paragraph 2 of this Article within 30 days from the day on which the appeal is lodged.

that there is no well-founded fear of persecution or real risk or there is a reason for exclusion.

1. ***Reasons For Exclusion***

Refugee status shall not be recognized in the case of an alien with respect to whom there are reasonable grounds to believe: 1) that he or she has committed a crime against peace, a war crime or a crime against humanity, within the meaning of the international instruments that contain provision on such crimes; 2) that he or she has committed a serious crime under international law, outside Montenegro and prior to arrival in Montenegro; 3) that he or she is guilty of acts contrary to the purposes and principles of the United Nations.

2. ***Persons Recognized As Refugees***

A person recognized as a refugee shall have the right to:

- residence;
- a travel document and an identity card confirming his or her identity, the right to residence and other rights prescribed by this Law;
- freedom of movement and choice of place of residence;
- unimpeded access to courts of law and legal aid;
- freedom of religion;
- free primary and secondary education in public schools, and post-secondary and higher education in the public institutions founded by the state, on the terms prescribed for aliens;
- work; (A person recognized as a refugee shall exercise the right to work on the same terms as those prescribed for aliens with authorized habitual residence)
- social welfare; (A person recognized as a refugee shall exercise the right to social welfare in accordance with separate regulations on social welfare, but for at most one year from the

day on which the decision granting refugee status becomes final. Bylaw that regulate this field is Decree on financial aid for asylum seekers, persons recognizes as refuges and persons granted subsidiary protection adopted by Government in 2008)

- family reunification; (A family member, within the meaning of paragraph 1 of this Article, is considered a spouse, if legal marriage was entered into prior to arrival in Montenegro, a minor child, and the guardian of a minor child)
- accommodation, to the extent required, but not for a period longer than six months from the day on which refugee status is recognized; (A person recognized as a refugee shall exercise the right to accommodation in accordance with bylaw: Rules on mode of exercising right to accommodation for asylum seekers, persons recognizes as refuges and persons granted subsidiary or temporary protection adopted by Ministry of labor and social care in 2014)
- health care, pending the acquisition of the status of an insured person, in accordance with a separate regulation; (A person recognized as a refugee shall exercise the right to health care in accordance with bylaw: Rules on mode of exercising right to healthcare for asylum seekers, persons recognizes as refuges and persons granted subsidiary or temporary protection adopted by Ministry of health care in 2010)
- acquisition of movable and immovable property, on the terms set out by law, with exemption from reciprocity after three years' residence in Montenegro;
- assistance with inclusion in society (Depending on economic and other capabilities, conditions shall be created for the inclusion of persons recognized as refugees in social, economic and cultural life, through the organization of language courses, and provision of information on state regulation, history and culture, and through the organization of seminars and other forms of training.)

A person's refugee status shall cease if: 1) he or she voluntarily re-avails himself or herself of the protection of the country of citizenship; 2) after having lost his or her citizenship, he or she voluntarily reacquires that citizenship; 3) he or she acquires a new citizenship, and enjoys the protection of the new country of citizenship; 4) he or she has voluntarily reestablished residence in the state that he or she had abandoned or outside of which he or she had remained owing to fear of persecution; 5) he or she can no longer refuse to avail himself or herself of the protection of the country of his or her citizenship, because the circumstances due to which he or she was recognized as a refugee have ceased to exist; 6) being a stateless person, he or she is able to return to the state in which he or she had a place of habitual residence, because the circumstances due to which he or she was recognized as a refugee have ceased to exist.

3. *Subsidiary Protection*

Subsidiary protection shall be accorded to a person to whom refugee status was not recognized, but with respect to whom there are serious reasons to believe that he or she would be exposed to genuine risks upon return to his or her country of origin or another state. Subsidiary protection shall last one year. The duration of subsidiary protection may be extended for six-month periods as long as the reasons for granting subsidiary protection exist.[21]

4. *Temporary Protection*

Temporary protection shall be accorded to persons in need of protection provided that they had: 1) habitual residence in the

21 Article 55 of the Law on asylum.
A person accorded subsidiary protection shall have the right to: 1) residence; 2) freedom of movement and choice of place of residence; 3) an identification document confirming his or her identity, legal status, right to residence and other rights defined by this Law; 4) an aliens' travel document, in accordance with the regulations on the residence of aliens, for the purpose of traveling abroad; 5) unimpeded access to courts of law and legal aid; 6) freedom of religion; 7) free primary and secondary education in public schools; 8) work pursuant to Article 46 of this Law; 9) social protection pursuant to Article 45 of this Law; 10) basic accommodation, if required, until means for existence have been secured, and for at most six months from the day when the decision on the authorization of subsidiary protection becomes final; 11) free emergency medical treatment; 12) assistance with inclusion in society; 13) family reunification. A person accorded subsidiary protection has other rights and obligations as are accorded an alien granted residence in Montenegro for a specified period of time.

country of origin and they directly entered Montenegro; 2) lawful residence in Montenegro and are temporarily prevented from returning to the country of origin upon the expiry of such residence. Temporary protection shall last one year. The duration of temporary protection may be extended for six-months, and at most one year.[22]

II. NEW LAW ON INTERNATIONAL AND TEMPORARY PROTECTION OF FOREIGNERS

According to the reasoning of draft Law on International and Temporary Protection of Foreigners[23], new law implements international standards of humanitarian law and human rights standards in the development and implementation of reception policies and the need to create a safe and dignified environment for foreigners seeking an international protection, discouraging any kind of abuse in the asylum system.

Therefore provision of new Law:

- recognize the need to establish and apply fair and expedited asylum procedures, in order to identify in a timely manner those in need of international protection and those for which this is not the case, which will avoid a long period of uncertainty for foreigners seeking international protection, discouraging the abuse of the asylum system and facilitating the overall requirements in reception system;
- recommend that the admission of foreigners seeking international protection should be managed inter alia by the following general principles:
    - on respect for human dignity and applicable international and human standards rights;

22 Article 60 of the Law on asylum.
A person accorded temporary protection shall have the right to: 1) residence; 2) freedom of movement; 3) an identification document confirming his or her identity, legal status, right to residence and other rights prescribed by this Law; 4) an aliens' travel document, in accordance with the regulations on the residence of aliens, for the purpose of traveling abroad; 5) basic living conditions in organized accommodation; 6) work in the facilities for organized accommodation; 7) free emergency medical treatment;. 8) free primary and secondary education in public schools; 9) unimpeded access to courts of law and legal aid; 10) freedom of religion; 11) humanitarian assistance.

23 Available in Montenegrin at http://zakoni.skupstina.me/zakoni/web/dokumenta/zakoni-i-drugi-akti/61/1333-8448-24-4-16-2.pdf

- access to appropriate government and non-governmental entities, in need of help to meet their basic needs for support, including food, clothing, accommodation and health care, as well as respect for their privacy;
- about gender sensitivity and sensitivity to the age of foreigners seeking international protection - especially educational, psychological, recreational and other special needs of children, especially unaccompanied and separated children, as well as victims of sexual abuse and exploitation, trauma and torture, including other vulnerable groups;
- Enabling family unity, especially in the context of staying in admission centers: for the purpose of protecting the return of foreigners seeking international protection they should be registered and issued with appropriate documentation that reflects their status, which should remain in force until the final decision is made upon request for asylum;
- Creating a public opinion for the benefit of foreigners seeking international protection and refugees and trust in building trust in the asylum system.

The Law on International and Temporary Protection of Foreigners defines the following European Legislation institute:

- acts of persecution;
- perpetrators of persecution;
- reasons for exclusion
- safe country of origin
- safe third country
- safe European third country
- unacceptable requirements
- border procedure
- judicial protection.

Special procedural guarantees provide adequate support to foreigners who seek international protection in view of their special circumstances, inter alia, age, sex, sexual orientation, gender identity, serious illness, mental health or consequential schooling, rape or other serious forms of psychological, physical or gender-based violence, in order to exercise the rights and obligations of this law. Temporary protection of foreigners makes a clear distinction between the category of a foreigner seeking international protection and persons with approved protection. A person with an approved protection will enjoy all rights as ''our own citizens'' (social security, health care, the right to education, the right to recognize diplomas, and in cases where there is no material evidence - Prior learning). Persons with approved protection are in full responsibility of the Ministry of Labor and Social Welfare, which is obliged to provide them with accommodation for the duration of the year, and to adopt an Integration Plan that provides persons full inclusion in the Montenegrin society. On the other hand, the obligation to create a regulated system of migration of especially irregular migrations, the role of foreigners seeking international protection has led to the relocation of Center for acceptance to the competence of the Ministry of the Interior affairs, which, among other things, creates the formal prerequisites for the implementation of norms related to administrative detention within the Center (which was not possible until now due to the civil character of the Ministry of Labor and social services under the jurisdiction of the Center). Dublin III imposed an obligation to keep fingerprint printers of persons seeking international protection for ten years (Dublin II prescribed keeping fingerprints for five years) and for the first time gave Europol the right to use the Hero III in cases where there is a reasonable suspicion that a person is involved in the execution of the criminal offense of Terrorism, because the previous analysis found the most recent number of perpetrators of terrorist acts are persons who were once in the asylum system. Until recently, the law prescribed the right of administrative detention in Article 31, unfortunately this norm could not have been implemented because the Directorate for the Care of Refugees within the jurisdiction of the Center for asylum seekers did not have the legal capacity to make decisions limiting the freedom of asylum seekers or factual

possibilities that involve the use of coercion means restrictions on freedom of movement, which is the original competence of police officers. This solution also has a preventive effect in terms of reducing the number of foreigners seeking international protection who, once they become aware of a well-controlled asylum system and migration, the possibilities of detention will be less likely to use the territory of Montenegro as a free transit zone.

III. STATISTICS

Statistical data[24] received from the Directorate for Asylum within the Ministry of Interior of Montenegro and provided below reflect the data on total number of asylum seekers since 2007 until today..

In Montenegro, there are 16 currently valid approved protections, including eight refugee statuses and eight special protections. Refugee status has been awarded to six nationals of Yemen and two nationals of Syria. Special protection has been awarded to two residents of Marroco and Ukraine, and one from Belarus, Nigeria, Russia and Yemen respectively.

Regarding the applications for asylum, statistics for previous 10 years, valid as of 24 June 2016, are shown in the following table:

Year	No. of applications	Approved protection
2007	3	1 (refugee status)
2008	7	1 (special protection)
2009	20	-
2010	9	-
2011	239	3 (special protection)
2012	1529	1 (refugee status) + 1 (special protection)
2013	3554	-
2014	2312	2 (refugee status) + 2 (special protection)
2015	1611	14 (refugee status) + 2 (special protection)
2016	93	5 (refugee status) + 2 (special protection)
Total	9377	34

24 Data and explanation from the Research paper Effect of migrant crisis in Montenegro published by Parliament of Montenegro in 2016, available at http://www.skupstina.me/images/dokumenti/biblioteka-i-istrazivanje/2017/18.pdf

Out of all applicants, 85% were male and 15% female, while minors made up a share of 7%. The Ministry of Labour and Social Welfare announced that 965 people, or 62% of the total number of applicants, have been placed in accommodation facilities for asylum seekers. Out of those people, 78% were male and 22% female, while minors made up 7% of that number. During the months of July and August a significant decrease in the number of applications for asylum has been noted, with four and five applications received in those two months respectively. During 2014, there were 2312 asylum seekers in Montenegro. Out of this number, 71% asylum seekers were from Syria.

According to data of the Ministry of Interior affairs of Montenegro[25], in the majority of other cases, the asylum procedure is suspended as asylum seekers do not respond to the invitation to give statements on circumstances of leaving their countries of origin since they leave the Montenegrin territory within several days. The main changes are recorded for countries of origin of illegal migrants, i.e. asylum seekers in Montenegro. Over the last two years, there has been a significant reduction in the number of asylum seekers from Pakistan, Algeria, Morocco and Afghanistan, while the strongest increase was seen for persons from Syria, followed by persons from Somalia and Congo to a somewhat lesser extent. The transit route of these "false asylum seekers" usually goes from Albania through Montenegro towards Serbia, and further towards Hungary and other EU countries. The entry point from Albania to Montenegro is the area around the border crossing of Božaj and further towards Podgorica where, after submitting asylum applications, "false asylum seekers" stay in the Spuž reception centre for several days, after they continue towards Rožaj, in whose vicinity they illegally cross the border with Serbia, most often around the crossing of Dračenovac.

Annual report of Ministry of labor and social care and its Agency for refugees care showed that during 2016, 273 persons from the

25 Risk assessment from organized crime SOCTA MNE 2013 and 2015 Available at http://www.mup.gov.me/ResourceManager/FileDownload.aspx?rId=158838&rType=2 http://www.mup.gov.me/ResourceManager/FileDownload.aspx?rId=219582&rType=2

asylum system were taken care of, out of which 265 were asylum seekers, 7 persons with recognized refugee status and 1 person granted additional protection. All these persons are taken care of at the Center for accommodation of asylum seekers. During the reporting period, 45 persons who expressed their intention to seek asylum were also taken care of. The care work involved providing accommodation and an appropriate standard of living, food and hygiene, health care, psycho-social assistance etc. Activities for adults from the asylum system (occupational therapy) were organized, involving 41 persons. For juvenile asylum-seekers, age-appropriate daily activities are conducted, involving 31 persons. There were 259 basic health and hygiene examinations and 138 general health examinations. Activities were undertaken with the aim of achieving health care for persons at higher levels. There were 17 training for employees on topics: "Standards and Practice of Medical Reporting in the Case of Torture", "Fight against Trafficking in Human Beings", "Prohibition of Discrimination", "Legal Technical Rules for Legislation with Guidelines for Compliance with EU Legislation" "Human rights system", "Improving the strengthening of cross-border cooperation in solving illegal migration in the Western Balkans", "Vulnerable groups - identification of vulnerable groups", "Hiv and blood of transmissible diseases", "Integration of persons under international protection in Montenegro-challenges and Practice "," Protection of Migrants and Refugees "," Gender Equality "," Personality Protection ", TAIEX-IPA Expert Mission, etc. The training was attended by 25 employees. Continuous work was carried out on maintenance of facilities and equipment of the Center in a functional state. Several assistance programs have been implemented in cooperation with UNHCR, IOM and the Red Cross. Cooperation with a number of international organizations and institutions and the non-governmental sector was achieved.

IV. CONCLUSION

Growing demographic trends in some parts of the world, the consequences of the economic crisis on global level, the rise and intensification of conflicts at different geo-political locations, as well as constant ambitions for achieving a better standard of living and

social security still burdens a large part of the world's population that continues to migrate to a safer place or even more economically more promising destinations.

Despite Montenegro's limited impact from migrant crisis compared to other Western Balkan countries, it is worth noting that, according to the UNHCR Asylum Trends 2014 report, Montenegro ranks fifth on the list of asylum seeking countries in Europe relative to the size of its population - Montenegro (12.3 applicants per 1,000 inhabitants each)[26].

Law on Asylum, met the standards of the Geneva Convention relating to the Status of Refugees,1951 and the New York Protocol, 1967 and ensured the observance of principle of absolute ban on deportation.

In addition to the above new Law on International and Temporary Protection of foreigners was not adopted primarily to tackle the impact of migration crisis in Europe, it was however, intended to harmonize national legislation with the European Union legislation in the field of asylum and create normative base for implementation of the Common European Asylum System (CEAS). New legislation is expected to provide efficient and unique system of asylum, which guarantees to foreigners who are seeking international protection, equal chances for success in the procedure. Other important novelty of this law is prescribing faster, more efficient and more economical procedure, as well as the possibility of preventing abuse of procedure and sanctioning such actions.

26 According to the UNHCR Asylum Trends Report 2014, available at http://www.unhcr.org/551128679.pdf

CERTAIN ASPECTS OF LEGAL STATUS OF FOREIGN CITIZENS (STATELESS PERSONS) IN DECISIONS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

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THE RUSSIAN FEDERATION

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Konstantin BAIGOZIN[*]
Dmitrii KUZNETSOV[**]

I. GENERAL CHARACTERISTICS OF NATIONAL LEGAL REGULATION

The initial legal provision determining legal status of foreign citizens and stateless persons in the Russian Federation is the provision of the Constitution of the Russian Federation: [f]oreign citizens and stateless persons shall enjoy rights and bear obligations in the Russian Federation on a par with citizens of the Russian Federation, except in those cases envisaged by federal law or by an international treaty of the Russian Federation.[1]

In the development of this constitutional provision the federal legislator has adopted a number of laws regulating the rights and obligations of these individuals. These legislative acts primarily include: Federal Laws "On Legal Status of Foreign Citizens"; "On Migration Registration of Foreign Citizens"; "On the Procedure of Entering (Leaving)".

For instance, the Federal Law "On Legal Status of Foreign Citizens in the Russian Federation" divides all foreigners legally residing in Russia in: temporarily staying (for example, those who arrived with a visa, but who do not have a residence permit or a

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1 Constitution of the Russian Federation, 12 December 1993. Article 62, Section 3. The English translation is available: http://www.ksrf.ru/en/INFO/LEGALBASES/CONSTITUTIONRF/Pages/default.aspx [the last access on 30 August 2017].

temporary residence permit); temporary residing (those who have received a temporary residence permit); permanently residing (those who have a residence permit).[2] The period of allowed stay in the territory of Russia is determined by the fact of belonging to one of these categories.

Under the Constitution foreign citizens and stateless persons have the same rights and duties as citizens of the Russian Federation. Exceptions to this rule can be established by law. Here we discuss cases when the rights and duties are related to the status of citizen of the Russian Federation, i.e. they emerge and are carried out because of the special relationship between the state and its citizens.

Foreign citizens have the right to freedom of movement within the territory of the Russian Federation with certain restrictions established by law. Foreign citizens do not possess the right to elect and to be elected to the bodies of public power, they do not have the right to serve as municipal and state officials. They cannot be conscripted.

An employer has the right to recruit and use foreign workers if so authorised. Thus, a foreign citizen has the right to work in the Russian Federation only if he or she has a work permit.

There are certain restrictions in respect of these individuals in the sphere of property rights. For example, foreign citizens can possess agricultural land plots only on the right of lease.[3] This restriction is due to the special purpose of this type of lands - to ensure the country's food-security.

As it concerns the issue of bringing foreigners to judicial liability, they are subject to prosecution on a general basis applicable in respect of citizens of the Russian Federation.

Violation by a foreign citizen (a stateless person) of the rules of entry into the Russian Federation or the regime of staying (residing) in the Russian Federation entails administrative punishment,

2 Federal Law of 25 July 2002 N 115-FZ "On Legal Status of Foreign Citizens in the Russian Federation". Articles 5-6.

3 Federal Law of 24 July 2002 N 101-FZ "On the circulation of agricultural land". Article 3.

consisting of their forced and controlled expulsion across the state border of the Russian Federation.[4]

Previously the Constitutional Court of the Russian Federation pointed out that the establishment by the federal law of an administrative expulsion from the Russian territory as a mandatory sanction for certain migration offenses does not contradict the Constitution of the Russian Federation.[5]

It should be noted that the Constitutional Court of the Russian Federation recognises the right of foreign citizens (stateless persons) to challenge constitutionality of a law which allegedly violates their rights and which has been applied in their case.

A. Examples of Defects of Legal Regulation in the Field of Migration Repealed as the Result of Consideration of a Case by the Constitutional Court of the Russian Federation

1. The case concerning unconstitutionality of legal provisions prohibiting stateless persons from challenging reasonableness of their detention in a special facility with the aims of their administrative expulsion (Judgement of the Constitutional Court of 23 May 2017 No.14-P)

History of the question:

Resident of Saint Petersburg, native Georgian Noe Mshiladze was convicted several times for committing a number of crimes. In 2014 Russian authorities issued decisions regarding undesirability of his stay in Russia and his deportation from the Russian Federation. With this regard Mr Mshiladze was placed in a special detention facility for foreign citizens. However, Georgia refused to accept Mr Mshiladze since the he, being a stateless person, does not possess Georgian citizenship. Thus, in August 2015 he was released from the special facility.

In December 2015 the applicant was found liable under Article 18.8 part 3 of the Code of the Russian Federation of Administrative

4 Code of the Russian Federation of Administrative Offenses, adopted on 30 December 2001, N 195-FZ. Article 18.8.

5 Decisions of the Constitutional Court of the Russian Federation of 6 March 2014 No. 628-O and 24 June 2014 No. 1416-O.

Offences. He was sentenced to administrative fine and removal from the territory of Russia. Mr Mshiladze was placed in a detention facility for foreign citizens of the Saint-Petersburg and Leningrad Region Department of the Federal Migration Service of Russia, where he has been kept because neither Georgia nor any other country are willing to accept him. All attempts to repeal the enforcement of the decision about his removal or to release him from the special detention facility initiated by the applicant himself and by official of the Federal Bailiff Service of Russia were declined by courts. In their decisions they referred to the fact that the challenged legal provisions, establishing two years limitation term for execution of any administrative punishment, do not provide for reconsideration of the decision on administrative removal and for cessation of its execution due to *de facto* lack of possibility of such a removal of a concrete person.

Applicant's position:

According to the applicant the challenged provisions do not let courts, before the expiration of the two years limitation term for execution of decision on administrative removal, decide on the merits whether detention of a person in a special detention facility is legal, whether there is a real possibility to remove him and to release him in case where there is no such a possibility. On this basis the applicant claims that the challenged legal provisions do not conform the Constitution of the Russian Federation and its Articles 15 (Section 4), 17 (Section 1), 21, 22, 46 (Section 1 and 2) and 54 (Section 2).

Position of the Constitutional Court (as the result of the deliberations):

The Constitution of the Russian Federation guarantees to everyone the right to freedom and personal security; any legal limitations having as their consequence deprivation of liberty shall correspond to criteria of legality.

The Constitutional Court of the Russian Federation has already noted that limitation of the right to freedom and personal security

within an indefinite period of time contradicts to constitutional guarantees. The European Court of Human Rights also stresses that any deprivation of liberty has to correspond to Conventional requirements protecting an individual from arbitrary actions of authorities, and grounds for the legality thereof cannot be interpreted expansively.

Reviewing the legal regulation of expelling foreigners and stateless persons, the ECtHR highlights that the length of detention shall not exceed a term reasonably necessary for the realisation of legitimate aims thereof.

The Code of the Russian Federation of Administrative Offences does not require a judge to establish a limited term of keeping foreigners or stateless persons to be expelled under detention. Moreover, the law does not provide for judicial review of legality and reasonableness of such a detention in case the expelling procedure faces significant challenges. With that the Code of Administrative Proceedings of the Russian Federation, within the course of consideration of the issues of administrative expel, unequivocally obliges a court to establish a concrete term of detention of those under the expelling procedure in a detention facility. It testifies eloquently to the fact that individuals to be expelled, in contrast to individuals under the deportation (readmission) procedure, are legally put into the situation of uncertainty regarding the issue of their isolation in a special facility and do not have the right to effective court protection.

Thus, the challenged provisions do not correspond to the Constitution of the Russian Federation.

The Federal legislator shall amend the Code of the Russian Federation of Administrative Offences in a way which will provide for reasonable judicial review in respect of the terms of detention of stateless persons to be expelled and detained in special detention facilities.

The legislator has the right to include into the Code of the Russian Federation of Administrative Offences an obligation for

judges to establish concrete terms of application of such an interim measure (in analogy to the migration legislation in force) as well as to establish a special legal status of a stateless person, released from a special facility, which would let to control him before expiration of the limitation term of execution of an administrative order regarding his expel.

Before the legislative amendments required under this Judgment of the Constitutional Court are introduced, it is necessary to secure individuals placed in special facilities, in case of lack of real possibility to expel them, with the right to challenge at the court legality of their subsequent detention, at any rate after the expiration of the three-month term from the court decision to expel such a person.

Law-enforcement decisions in the applicant's case shall be reviewed.

2. Case concerning unconstitutionality of certain provisions of the Law "On Migration Registration" leading to uncertainty of interpretation of the "place of stay in the Russian Federation" category (Judgement of the Constitutional Court of 19 July 2017 No. 22-P).

History of the question:

Applicants came to Russia as volunteers invited by the religious organisation "the Church of Jesus Christ of Latter-day Saints". The inviting party submitted all the data necessary for their registration in the migration registry in the city of Samara where the organisation is situated; they were settled in an apartment with another address, which was also rented by the organisation in the same city. The migration bodies found a violation of the rules of stay in the Russian Federation. Courts also found applicants liable for violation of the regime of stay (living) in the Russian Federation and fined them with subsequent expel from the Russian territory. According to the challenged provisions, a foreign citizen is obliged within seven days to register at the place of stay. The notion of "the place of stay" was interpreted by the courts as a place of *de facto* residence of an individual.

Applicants' position:

The applicants claim that there is uncertainty in the rules of registration of foreign citizens temporarily residing in the Russian Federation that lead to imposition of administrative liability. They believe that the challenged provisions are contrary to Articles 2, 18, 45 (Section 1) and 46 (Section 1) of the Constitution of the Russian Federation.

Position of the Constitutional Court (as the result of the deliberations):

Foreign citizens and stateless persons, similarly to Russian citizens, are under protection of the Constitution.

The state has the right to establish a legal regime of stay of foreigners in the Russian territory and to establish administrative liability for violation thereof.

However, the content of the concept of "place of stay" in the Law "On Migration Registration of Foreign Citizens" is broader in comparison to the definition given by the Law "On the Right of Citizens of the Russian Federation to Freedom of Movement" since it includes other premises, institutions or organisations therein.

The legislator had to take into account the understanding of the "place of stay" established in the Russian legal system (as connected to a temporary stay not in the place of residence) or express its specifics in the legislation more clearly. With regards to uncertainty of the law, a foreign citizen is at risk of being brought to legal liability, despite the fact that he is deprived of the opportunity to realise the illegality of his behaviour.

Therefore, the disputed provisions do not correspond to the Constitution of the Russian Federation and the legislator shall eliminate the uncertainty of the normative content of the law.

Until then, the disputed provisions cannot be regarded as obliging foreign citizens and stateless persons, registered at the location of the organisation inviting them, to register at the location of the dwelling provided by the organisation.

In all other cases foreign citizens and stateless persons must register at the place of their stay at the place of actual residence.

Also, when deciding on the application of administrative liability to such persons, courts shall consider whether a foreign citizen could have realised that the actual place of his stay does not coincide with the one indicated in the migration registration data.

Enforcement decisions on the cases of Nathanael Joseph Worden and Parker Drake Oldham shall be revised.

3. Case concerning unconstitutionality of legal provisions prescribing expulsion of a foreign citizen in case of single non-compliance with the rules of notification on confirmation of the fact of living in the Russian Federation (Judgement of the Constitutional Court of 17 February 2016 No. 5-P).

History of the question:

By a court decision a citizen of the Republic of Moldova was found guilty of committing an administrative offense provided for by Article 18.8, Section 3 of the Code of Administrative Offenses of the Russian Federation, when after receiving a residence permit, he did not fulfil the obligation to notify the authorities about his residence in the Russian Federation. He was found liable and sentenced to administrative fine with administrative expulsion from the Russian Federation.

Applicant's position:

The challenged legal provisions contradict Articles 19 (Sections 1 and 2), 45, 46 (Sections 1 and 2) and 55 (Section 3) of the Constitution of the Russian Federation. They allow courts, without taking into account any other circumstances, except for the violation *per se*, to sentence an alien who has a residence permit in the Russian Federation, who carries out his labour activity and who pays taxes, - to administrative expulsion from the territory of Russia as a punishment for failure to fulfil the obligation to notify the authorities about the residence in the Russian Federation. Thus, the limitation of the rights of foreign citizens is disproportionate to constitutional goals and values.

Position of the Constitutional Court (as the result of the deliberations):

Measures of administrative liability and the application rules thereof, established by the legislation on administrative violations, shall correspond to the nature of an administrative violation, its danger to the values protected by law. They shall ensure that the causes and circumstances of the offense, as well as the identity of the offender and the degree of the offender's guilt, are taken into account, thereby ensuring the reasonableness of the negative consequences for the person brought to administrative liability implied as a result of an administrative offense. At the same time excessive state coercion should not be tolerated, there is a need in keeping the balance of individual fundamental rights and the public interest.

When considering cases of violation of the regime of stay in the Russian Federation by foreign citizens punished by administrative expulsion from the Russian territory, courts while imposing administrative sanctions should be able to take into account circumstances that allow proper assessment of proportionality of the negative consequences thereof to legitimate aims of introducing such measure of administrative liability. Under this circumstances it is necessary to evaluate, for example: the length of foreign citizen's residence in the Russian Federation, his or her marital status, the attitude to the payment of Russian taxes, his or her income and the housing conditions in the territory of the Russian Federation, occupation and profession, law-abiding behaviour, an application for admission to the Russian citizenship.

Enforcement decisions in the applicant's case are subject to review.

4. Case concerning unconstitutionality of legal provisions limiting the right of a foreign citizen to leave Russian Federation (Judgement of the Constitutional Court of 16 February 2016 No. 4-P).

History of the question:

In January 2015, the applicant (a citizen of Nigeria) was going to fly from Moscow to his homeland. The Nigerian citizen was legally residing in Russia with a temporary residence permit. Despite this, he was not allowed to leave the country, and then fined 3,000 Roubles for violating the order of crossing the border. Passport control officers at the airport found that to leave Russia the applicant was required to have a valid visa or residence permit. The permission for temporary residence, in their opinion, did not provide such an opportunity. The court, where the applicant challenged the decision on the fine, agreed with such an interpretation of the law.

Applicant's position:

The applicant claimed that the restriction of the right to leave the country was unjustified, excessive and violated the principle of equality before the law. In his opinion, this was facilitated by the uncertainty and inconsistency of the contested provisions. He demanded to recognise these norms contrary to Articles 19, 27, 45, 46, 55 and 62 of the Constitution of the Russian Federation.

Position of the Constitutional Court (as the result of the deliberations):

The constitutional right to freely enter and leave Russia extends to foreigners legally residing in the country. Obtaining a temporary residence permit does not cancel their ties with the historical homeland, which should be taken into account both by legislation and by law enforcement practice.

In itself, the requirement for a visa to be shown by a foreigner leaving Russia does not contradict the Constitution of the Russian Federation. It allows the authorities to check the legality of entering the country and staying on its territory.

Nevertheless, in practice, the challenged norms do not establish clear requirements in respect of a foreigner receiving temporary residence permit and of the state agencies responsible for issuing visas. As a result, a foreign citizen may find him or herself in an

uncertain legal status, subject to administrative liability and lose the opportunity to leave the Russian Federation on a formal basis - due to the absence of a valid visa. Accordingly, this practice of applying legislation is contrary to the Constitution of the Russian Federation.

The federal legislator should regulate the procedure for issuing visas to foreign citizens having temporary residence permit.

The case of the Nigerian citizen is subject to revision.

5. Case concerning unconstitutionality of legal provisions allowing deportation of a HIV-positive foreign citizen who has a family in the Russian Federation (Judgement of the Constitutional Court of 12 March 2015 No. 4-P).

History of the question:

The applicant (a Ukrainian citizen) has lived in Russia since 2011 in a partnership with a Russian citizen whom she married in March 2012. With regard to the identification of the HIV-positive status of the applicant, the state agency in charge on 9 June 2012 decided on the undesirability of her stay (residence) in the territory of the Russian Federation. On 23 August 2012 the couple gave birth to a son who obtained Russian citizenship. After leaving the country in 2012 for Ukraine, the applicant could not return to Russia as she was informed about the ban on entry the Russian territory. At the time of the appeal to the Constitutional Court she was living in Ukraine, and her husband and son were living in Russia. The appeal of the husband (the Russian citizen) to recognise illegality of the ban on the entry of his wife was not satisfied by the courts of all instances, there was no assessment of family circumstances in this case.

Applicant's position:

The Law allows law-enforcement agencies to deport foreign citizens who are married to citizens of the Russian Federation and/or to deny them entry to the Russian Federation, and to issue a temporary residence permit in the Russian Federation on a mere formal basis - the HIV-positive status and do not oblige these bodies to take into account humanitarian considerations and the family situation.

Position of the Constitutional Court (as the result of the deliberations):

The federal legislator has the right to regulate migration for the purposes of public health protection. In particular, it can impose bans and restrictions on entry into the Russian Federation and stay on its territory of foreign citizens and stateless persons whose health status is a threat to the health of the population of the Russian Federation and, therefore, a threat to national security.

However, at the same time, the rights that the Constitution guarantees to foreign citizens on an equal basis with citizens of the Russian Federation should not be allowed to be revoked.

The challenged legal regulation does not comply with the Constitution of the Russian Federation, its Articles 19 (Sections 1 and 2), 38 (Sections 1 and 2), 45, 46 (Sections 1 and 2) and 55 (Section 3), since it allows to take a decision on the undesirability of the foreigner's (stateless person's) residence in the Russian Federation and on his or her deportation or a decision on the refusal of such a person to enter the Russian Federation when his or her family members are permanently residing in the territory of the Russian Federation, solely on the basis of the fact that such person has HIV infection. Such decisions could be taken in the absence of both the violations by a foreign citizen of the requirements that are established by law in relation to HIV-positive persons and are aimed at preventing further spread of the disease, as well as other circumstances indicating the need to apply such restrictions to this person.

Enforcement decisions in the applicant's case are subject to review.

6. Case concerning unconstitutionality of legal provisions preventing return of a foreign citizen who has recovered from an infectious disease to the territory of the Russian Federation (Judgement of the Constitutional Court of 20 October 2016 No. 20-P).

History of the question:

The applicant (a citizen of the Republic of Korea) was diagnosed with infiltrative pulmonary tuberculosis while he was in the territory of the Russian Federation. During the treatment, which began immediately after the discovery of the disease, the applicant was offered amputation of the lung. Since the treatment methods used in the clinics of the Republic of Korea allow such a diagnosis to avoid surgical intervention, he refused treatment in the Russian Federation and went to the Republic of Korea, where he underwent intensive antituberculous therapy, including a month of inpatient treatment. According to the medical report issued by the clinic where the treatment was carried out, the applicant's state of health was found to be satisfactory, allowing him to lead a normal life without danger to others.

After receiving the medical report, the applicant applied to the district court of the city of Moscow with a request for the repeal of the decision (issued during his treatment in the Republic of Korea) on the undesirability of his stay in the Russian Federation referred to infectious diseases that pose a danger to others, in connection with his infiltrative tuberculosis diagnosis.

The court disagreed with the arguments of the applicant's representative who said that the applicant had recovered from the disease which was the ground for the decision, and that he was no longer the source of the infection. The court did not take into account submitted medical documents. It noted that the recovery of a foreign citizen does not indicate illegality of the previously adopted decision on the undesirability of his stay in the Russian Federation.

Applicant's position:

The law empowers enforcement agencies with the competence to make decisions on the undesirability of staying in the Russian Federation of a foreign citizen who has been diagnosed with an infectious disease such as infiltrative tuberculosis, to establish an indefinite ban on the entry of this foreign citizen into the Russian

Federation, regardless of the fact of the subsequent recovery from this disease.

Position of the Constitutional Court (as the result of the deliberations):

In determining conditions for realisation of fundamental rights, the federal legislator shall, taking into account the principle of equality and the criteria of reasonableness, necessity and proportionality, ensure the balance of constitutional values, as well as the rights and legitimate interests of participants of specific legal relations.

The challenged law does not comply with the Constitution of the Russian Federation, its Articles 17, 19 (Sections 1 and 2), 45, 46 (Sections 1 and 2), 55 (Section 3) and 62 (Section 3), since it creates insurmountable obstacles for the entry of a foreign citizen (stateless person) into the Russian Federation - regardless of the fact of his or her subsequent documented recovery from an infectious disease.

The federal legislator should make the necessary changes to the current legal regulation: to provide for the procedure for suspending the adoption or another action regarding undesirability of stay in the Russian Federation of a foreign citizen or stateless person suffering from an infectious disease that poses a danger to public health if he or she refuses to undergo treatment in the Russian Federation and decides to leave for this purpose to another state, as well as the procedure for the cancellation of such a decision in case of confirmation of the recovery of a foreign citizen or stateless person who has undergone treatment in the country, and the procedure for confirmation of this fact.

Enforcement decisions are subject to review.

B. General Conclusion in Respect of This Category of Cases

The Constitution of the Russian Federation is the primary normative basis ensuring protection of the foreign citizens' rights in the territory of the Russian Federation. At the same time, protection of constitutional rights is guaranteed only to those persons who stay lawfully in the territory of the Russian Federation.

Such a legal regime is operational in conditions when the state represented by the federal legislator has a wide discretion in passing laws concerning the rules for the stay of foreign citizens on its territory and establishing objectively determined differences in legal status of citizens and foreigners. This is due to the state's responsibility for ensuring public law and order.

An excessive restriction of the state powers in this sphere would create conditions for the legalisation of the illegal immigration or presence of foreign citizens in the state. At the same time, a reasonable and proportionate regulation of these relations is envisaged without belittling human rights and undue restrictions, with a fair correlation of public and private interests.

The discussed decisions of the Constitutional Court of the Russian Federation are aimed at elimination of unreasonable encumbrances of legal status of foreign citizens balanced with public interest in the sphere of migration. Moreover, the activity of the Constitutional Court of the Russian Federation ensures the operation of general legal criteria of certainty, clarity and unambiguousness of a legal provision in order for foreign citizens to clearly understand the limits of the permitted rules of conduct, and for the state bodies were deprived of the possibility of unlimited discretion in law enforcement.

IMMIGRATION AND REFUGEE LAW

Nataliya RAHIMOVA
TAJIKISTAN

IMMIGRATION AND REFUGEE LAW

Nataliya RAHIMOVA[*]

Уважаемый Председатель!

Уважаемые Участники Пятой Летней Школы!

Дамы и господа!

В начале хотелось бы поблагодарить организаторов за замечательную организацию данного курса на тему: «Иммиграция и Закон о беженцах», в особенности признательны уважаемому ЗУХТУ АРСЛАНУ за представленную возможность принять участие представителям Конституционного Суда Республики Таджикистан в такой благоприятной обстановке которая несомненно будет способствовать успешному окончанию данного курса (Пятой Летной Школы).

Действительно данная тема очень актуальна во всем мире и законодательство в этой отрасли во многих странах особенно в Средней Азии возникло после 1990 годов.

Наша Республика относится в число тех стран, бывших постсоветских республик законодательство которого в этой области появилось только после распада Советского союза.

В 1994 году на всенародном референдуме Республика Таджикистан приняла Конституцию как основной регулирующий закон своего независимого государство. В нём четко определено: «Человек и его права и свободы являются высшей ценностью.

Жизнь, честь, достоинство и другие естественные права че-ловека неприкосновенны. Права и свободы человека

[*] Leading Specialist, Constitutional Court Of Tajikistan.

и гражданина признаются, защищаются и соблюдаются государством», статья 5 Конституции.

А также в статьи 24 Конституции Таджикистана указано, что: «Гражданин имеет право на свободное передвижение и выбор место жительства, выезд за пределы республики и возвращение в нее.».

Как Вам известно наша Республика пережила очень страшное время как гражданская война и в последствий многие наши соотечественники стали иммигрантами других стран таких как Российская Федерация, Афганистан, Пакистан, Казахтан и эти иммигранты назывались вынужденные беженцы.

Таджикская государство с целью защиты прав и свобод своих граждан, в том числе иностранцев и лиц без гражданства приняло ряд правовых актов которые сопутствуют сегодняшнему законодательству республики:

Конвенция о статусе беженцев, Протокол касающийся статуса о беженцев, Закон Республика Таджикистан «О беженцах», Правило пребывания иностранных граждан в Республика Таджикистан, Постановления Правительства Республика Таджикистан «О перечне государств, временное проживание в которых до прибытия в Республику Таджикистан является основанием для отказа в регистрации ходатайства о признании иностранца беженцем и отказе в признаний беженцем», Постановление Правительства Республики Таджикистан «Об утверждении положения об удостоверении беженца», Постановление Правительства Республика Таджикистан «О перечне населенных пунктов Республика Таджикистан и другие правовые акты.

Следует отметить, что Республика Таджикистан ещё с первых дней государственной независимости принимает все меры для соблюдения прав и свобод человека, общепризнанные ценности, международные нормы и принципы, в этой области.

Именно с принятием Конституции независимого Таджикистана права и свободы человека признаны в качестве высшей ценности, они стали доминирующими в определении целей,

содержания и применения законов, деятельности законодательной и исполнительной властей и обеспечиваются судебной властью. В рамках Конституции все основные права и свободы нашли всестороннее регулирование.

В соответствии со статьей 19 Конституции Республики Таджикистан «каждому человеку гарантируется судебная защи-та». Термин «каждый» обозначает любой субъект права - граж-данин Таджикистана, иностранец и лицо без гражданство, ко-торый находится на территории Таджикистана на законных основаниях а в случае нарушения прав может предпринять меры по их защите и восстановлению.

Как Конституции других стран, Конституция Республики Таджикистан тоже провозглашает равенство всех перед законом и судом. Права и свободы каждого гарантируются государством независимо от его национальности, расы, пола, языка, вероисповедания, политических убеждений, образования, социального и имущественного положения. Это предполагает равенство всех в процессе использования предоставленных им прав на равную защиту в случае их нарушения. Этими правами обладают, в том числе иностранцы и лица без гражданства, к числу которых относятся беженцы и лица, ищущие убежище и признанные таковыми в установленном законом порядке.

Всем нам присутствующим известно, что возрастающие потоки вынужденной миграции населения являются следствием затянувшихся военных конфликтов и появления новых очагов вооруженных противостояний по всему миру. В настоящее время на орбиту вынужденной миграции, вовлечены практический все страны (в качестве принимающих и отправляющих). Статистические данные позволяют отметить, что большинства беженцев и лиц ищущих убежище, приезжают из стран в который практикуются серьезные нарушения прав человека, либо эти страны раздираемы внутренними конфликтами.

Принцип не высылки является фундаментом, на котором основана международная защита беженцев. В связи с этим пре-

доставляется целесообразным исследовать развития и регламентацию указанного принципа в национальном законодательстве и практике, учитывая, что международно - правовая разработка принципа не высылки разработана более глубоко, чем в национальном праве.

Наша Республика в 1994 году присоединилось к Конвенции 1951 года о статусе беженца и Протоколу 1967года, что обусловило необходимость разработки национального законодательства, практикующего соблюдение принципа не высылки.

Толкования действующего законодательство позволяет решать коллизии в пользу международных норм, признанных Таджикистаном, особенно в отношении принципа не высылки, анализ административной практики по делам беженцев и лиц ищущих убежище, показывает, что применение международных правовых актов отвечает требованиям положений статьи 10 Конституции Республика Таджикистан о приоритете норм международного права.

Данное положению для соблюдения вышеназванного принципа дополнит часть 3 статья 14 Конституции Республики Таджикистан «Ограничения прав и свобод человека и гражданина допускаются только с целью обеспечения прав и свобод других, общественного порядка, защиты основ конституционного строя, безопасности государство, обороны страны общественной морали, здоровье населения и территориальной целостности республики».

Если раскрыть понятие различного вида выдворение иностранных граждан из страны, то мы выходим за пределы понятия что: Депортация, высылка выдворение, административное выдворение, принудительное выдворение - все эти термины связаны между собой своей процедурой, в результате которых лица возвращаются (удаляются) в страну своей гражданской принадлежности, постоянного место жительства или в другую третью страну. Для удобства совокупность этих терминов мы будем обозначать их как «удаление иностранных граждан из территории страны».

В современной юридической науке под депортацией понимается принудительный вывоз за пределы государства отдельных лиц или группы лиц по решению государственных органов.

Римский Статут международного суда трактует понятие «депортация» как преступление против человечества, заключающееся в насильственном перемещении лиц подвергающихся выселению или иным принудительным действием из района, в котором они законно пребывают.

Если вспомнить массовую депортацию во времена Второй мировой Войны на оккупированных Германией территориях было провозглашено, как военная преступление Нюрнбергском судом 1945 – 1946 гг. Тогда особой формой депортации являлась высылка.

Нужно отметить, что Конвенция о статусе беженцев от 1951 года оперирует такими терминами, обозначающими удаление беженцев или лиц, ищущих убежище, с территории государства как «высылка» и «принудительное возвращение» В 1933 году в международном договоре для обозначения принудительного возвращения или не допуска за границу было использовано французское слово «refoulement», от которого и образован общепринятый термин для обозначения не высылки - « non – refoulement».

Мы можем для рассмотрения действия этого принципа проанализировать законодательство нашей Республики нормы нескольких отдельных правовых актов, касающихся прав беженцев:

-Законодательство Республики Таджикистан оперирует различными терминами, касающиеся удаления иностранных граждан с территории страны, как административное выдворение, депортация и принудительное выдворение. Например в Уголовном Кодексе Республики Таджикистан, депортация, как одно из запрещенных средств и методов ведения войны, предусмотрена как преступное деяние.

«Статья 403.УКРТ. Умышленные нарушение норм междуна-родного гуманитарного права, совершенное в ходе вооружен-ного конфликта

1) Умышленное нарушение норм Международного Гуманитарного Права, совершенное во время международного или внутреннего вооруженного конфликта, то есть нападение на гражданское население или на отдельных гражданских лиц, нападения неизбирательного характера затрагивающие гражданское население или гражданские объекты, нападения на установки или сооружения, содержащие опасные силы, напа-дения на лицо прекратившее принимать участие в военных действиях, превращение необороняемых местностей и демили-таризованных зон в объект нападения, уничтожение или пов-реждение исторических памятников, произведения искусств или мест отправления культа, которые являются культурным или духовным наследием народов, вероломное использование отличительного знака Красного Креста и Красного Полумесяца и иных защитных знаков и сигналов, признаваемых в соответ-ствии с международным гуманитарным правом, перемещение оккупирующей державой части её гражданского населения на оккупируемую ею территорию или депортация или перемеще-ние всего или части населения оккупированной территории в пределах этой территории или за её пределы, неоправданная задержка репартации военнопленных или гражданских лиц, применение практики апартеида или других негуманных и унижающих действий, оскорбляющих достоинство личности, основанных на расовой дискриминации и повлекшее за собой смерть или серьёзный ущерб физическому и психическому сос-тоянию любого лица или причинившие крупный ущерб,-

наказывается лишением свободы на срок от десяти до пятнадцати лет. ***(зрт от 17.05. 04г, №35).***

2) Умышленные нарушения норм Международного Гуманитарного Права, совершенные во время международного или внутреннего вооруженного конфликта, направленные против лиц которые не принимают участия в военных действиях или не обладают средствами для защиты, а также против раненных,

больных, равно как и против медицинского и духовного персо-нала, санитарных частей или санитарных транспортных сред-ств, против военнопленных, гражданских лиц, гражданского населения, находящегося на оккупированных территориях или в зонах военных действий, против беженцев и апатридов, равно как и против других лиц, пользующихся защитой во время военных действий, выразившееся в:

а) пытках и бесчеловечном обращении, включая биологи-ческие эксперименты, проводимые над людьми;

б) причинении тяжких страданий или действий, угрожаю-щих физическому или психическому состоянию;

в) принуждение военнопленного или покровительствуемого лица к службе в вооруженных силах противника;

г) лишение военнопленного или иного покровительству-емого лица прав на беспристрастное и нормальное судопро-изводство;

д) депортации или незаконной высылке или задержании покровительствуемых лиц;

е) взятии заложников;

ж) произвольном и производимом в большом масштабе раз-рушении или присвоении имущества, не вызываемого военной необходимостью, -

наказывается лишением свободы на срок от пятнадцати до двадцати лет. ***(зрт от 01.08.03г.N45); (зрт от17.05.04г, №35).***

Следующий примером может стать то, что термин «*депор-тация*» *используется также в Правилах о порядке оформления и выдачи виз Республика Таджикистан иностранным гражданам и лицам без гражданства, утвержденных Постановлением Правительства Республика Таджикистан от 27 февраля 2009 года, №122, в п.7.2 раздела 7 данного Правила где отмечается: «в случае принятия решения об административном выдворении или депортации иностранного гражданина, его виза аннулируется консульским управлением МИД Республика Таджикистан*

путем проставления мастичного штампа «Аннулировано» и его биометрические данные вносятся в Список….». Далее приво-дится «Административное выдворение или депортация инос-транного гражданина осуществляются в порядке, предусмо-тренном законодательством Республика Таджикистан».

Также о депортации говорится в п.32 Правила пребывания иностранных граждан в Республика Таджикистан, утвержденным постановлением Правительства Республика Таджикистан от 15 мая 1999 года, где отмечается. «*В случае невыезда по собственному желанию иностранного гражданина или лица без гражданства из Республика Таджикистан в установленный срок, органы безопасности принимают меры по его депортации в порядке. Предусмотренным законодательством Республика Таджикистан*».

Если выходить из современной юридической науки под «выдворением» понимается принудительное препровождение за пределы территории государства определенной категории лиц, являющихся иностранными гражданами или лицами без граж-данства, по основаниям и в порядке, предусмотренным зако-ном.

К примеру, за нарушении Правил выдачи разрешения на работу иностранным гражданам и лицам без гражданства, которые осуществляют трудовую деятельность в Республика Таджикистан, утвержденных Постановлением Правительства Республика Таджикистан от 31 октября 2008, №529, «*иностранный гражданин или лицо без гражданства которые прибыли в Республика Таджикистан для трудоустройства, должны в течение 5 суток покинуть территорию республики. В случае невыезда иностранный гражданин подлежит выдворению из страны уполномоченными органами*».

Следует отметить, что применение различных видов удаления согласно действующему законодательству Республика Таджикистан оснований по которым осуществляются процедуры удаления иностранных граждан с территории страны, в основном схожи. В случае совершения беженцем или лицам, ищущим убежище, нарушения правил проживания

в Республика Таджикистан, они могут быт подвергнуты как выдворению, депортации, так и административному выдворению.

Депортация по своим правовым последствиям отличается от административного выдворения. Согласно части 4 статьи 24 Закона «О правовом положении иностранных граждан», иностранным гражданам, ранее выдворенным из Республика Таджикистан в административном порядке, запрещается выезд в Республика Таджикистан в течение пяти лет со дня вынесения решения о выдворении. Основанием для осуществления административного выдворения должно быть совершение административного правонарушения и вынесение судебного решения.

Согласно части 1 статьи 46 Кодекса Республика Таджикистан об административных правонарушениях предусматривает, что административное выдворение с территории Республика Таджикистан иностранных граждан и лиц без гражданства, как административное взыскание, заключается в принудительном выезде иностранных граждан и лиц без гражданства с территории Республика Таджикистан. Можно отметит, что административное выдворение осуществляется исключительно по основаниям, предусмотренным в соответствующих законодательных актах. В действующем законодательстве Республика Таджикистан определены основания, по которым воз-можно выдворение. Так, например, в статье 31 Закона Республика Таджикистан «О правовом положении иностранных граждан в Республика Таджикистан», №230 от 1 февраля 1996 года основания для выдворения иностранного гражданина или лица без гражданства могут быт следующим:

- если действия лица противоречат интересам обеспечения национальной безопасности или охраны общественного порядка;

- если это необходимо для охраны здоровья и нравственности населения, защиты прав и законных интересов граждан Республика Таджикистан;

- если иностранный гражданин или лицо без гражданства нарушил требования Закона Республика Таджикистан «О правовом положении иностранных граждан в Республика Таджикистан», таможенного валютного законодательства Республика Таджикистан или иных нормативных правовых актов Республика Таджикистан.

В этих случаях решение о выдворении принимается Государственным комитетом национальной безопасности республики с согласия Генерального Прокурора республики, если выдворяемый в недельный срок после принятия решения о выдворении не обратится в суд о законности данного решения, то оно приводится к исполнении. Решения суда принимается по установленному порядку для граждан Республика Таджикистан.

Министерство юстиции Республика Таджикистан не позднее, чем за два месяца до окончания срока наказания осужденного иностранного гражданина, подлежащего выдворению за пределы Республика Таджикистан, информирует территориальные органы по миграции, внутренних дел и безопасности по месту расположения учреждения или органа, исполяющего уголовное наказание, о его предстоящим освобождении.

Таким образом в Республика Таджикистан, субъектами принимающим решения, являются органы безопасности, органы внутренних дел и суд.

Дорогие друзья!

Теперь остановимся на вопросах выдворения в отношении лиц и беженцев в законодательстве Республики Таджикистан.

Как вам известно Республики Таджикистан свою независимость приобрела только в 1991 году. И в течении этих 26 лет законодательство молодой республики находится в процессе совершенствования, приведения в соответствии с международными стандартами. При этом соблюдению принципа не высылки рекомендуется уделять первоначальное значение, так

как он лежит в основе мер по обеспечению международной гуманитарной защиты.

Обязательства Таджикистана, как участника Конвенции ООН 1951 года налагают ответственность за соблюдение принципа невысылки в отношении лиц, ищущих и получивших убежище в Таджикистане. Это обусловлено, тем, что принцип не высылки, изложенный в статьи 33 (1) Конвенции 1951 года является краеугольным камнем международной защиты бежен-цев.

Удаление с территории Таджикистана беженцев и лиц ищущих убежище в качестве административной ответственности может применятся за нарушения правил проживания в Таджикистане (часть 3 статьи 499 Кодекс об административных правонарушениях Республики Таджикистан. Здесь законнодатель раскрывает понятие «нарушения правил проживания: «… то есть проживание без документов на права жительства в Республики Таджикистан или проживание по недействительным документам, несоблюдения установленного порядка регистрации или прописки. либо передвижения и выбора место жительства, уклонение от выезда по истечении определенного срока пребывания…»

А также процедура выдворения беженцев и лиц, ищущих убежище, регулируются положением абзацев 2 и 3 части 2 статьи 5 Закона Республики Таджикистан «О беженцах», где предусматривается следующее.

«орган национальной безопасности Республики Таджикистан по согласованию с Генеральной прокуратурой Республики Таджикистан принимает решения по выдворению лиц в отношении которых принято решения об отказе в регистрации ходатайства о предоставлении статуса беженца, утрате членов их семей, не покинувшими в установленный срок территорию Республики Таджикистан, а также осуществляет выдворение лиц, в отношении которых принято решение об их выдворении в случаях, если выдворяемые в течение одной недели после принятия данного решения не обратились в вышестоящий орган или суд.

Таким образом, основанием для выдворения беженцев и лиц ищущих убежище в Республики Таджикистан, является случаи прекращения законных основании для дальнейшего нахождения ими, а также членами их семей в Республики Таджикистан по причине принятия в отношении них решения об отказе в регистрации ходатайства о предоставлении статуса беженца совместно с членами их семей, которое не было обжаловано в установленный срок.

Согласно статье 32 Конвенции ООН 1951 года «О статусе беженцев», беженцы не могут быть подвергнуты высылке иначе как по соображениям государственной безопасности или об-щественного порядка. Более того, высылка таких беженцев дол-жна производиться только во исполнении решений, вынесенных в судебном порядке, за исключением случаев, когда этому препятствуют уважительные соображения государственной бе-зопасности, где беженцам будет дано право представления в свое оправдание доказательств и обжалования в надлежащих инстанциях или перед лицом или лицами, особо назначенными надлежащими инстанциями, а также право имеет для этой цели своих представителей. Важно, что таким беженцам должен предоставляться достаточный срок для получения законного права на выезд в другую страну.

Теперь можно о соблюдении вышеназванного вопроса в правоприменительной практике в Республики Таджикистан

В законодательстве Республики Таджикистан принцип не высылки является одним из основополагающих принципов международной защиты прав беженцев.

Смысл принципа не высылки согласно Конвенции 1951 года заключается в том, что: « …Договаривающиеся государства не будут никоим образом высылать или возвращать беженцев на границу страны, где их жизни или свободе угрожает опасность вследствие их расы. Религии, гражданство, принадлежности к определенной группе или политическим убеждениям».

Принцип не высылки (non – refoulement) запрещает каким либо образом возвращать беженцев в страны или территории, где их жизни или свободе угрожает опасность вследствие их расы, религии, гражданства, принадлежности к определенной социальной группе или политическим убеждениям.

Можно отметить, что запрещение высылки является неотъемлемой частью запрета пыток и других видов жестокого обращения в соответствии со статьей 3 Конвенции ООН против пыток от 1984 года и статьи 7 Международного Пакта о гражданских и политических правах от 1966 года.

В действующем законодательстве Республики Таджикистан данный принцип закреплен в части 1 статьи 14 Закона Республики Таджикистан «О беженцах», что гласит:

«…Лица, ищущие убежище, ходатайствующие о признании их беженцами, утратившие статус беженца или лишенные статуса беженца, не могут быть возвращены или высланы протих их воли на территорию государства, где их жизни или свободе угрожает опасности преследований по расовым признакам, религиозным убеждениям, гражданству, принадлежности к определенной социальной группе или политическим убеждениям».

Анализ судебных и административных дел показывает, что при соблюдения принципа не высылки наиболее распространённым видом административного правонарушения, по которым возбуждаются дела в отношении беженцев и лиц ищущие убежище являются нарушение правил пребывания в Республики Таджикистан. Согласно требованиям часть 3 статьи 499 Кодекс об административных правонарушениях Республики Таджикистан административное взыскание не может иметь своей целью унижение достоинства лица, совершившего административное правонарушение, или причинение боли и страданий, физического или нравственного запугивание, дискриминацию любого характера или унижение человеческого достоинства физического лица.

Как правило, за совершение административного правонарушения по 3 статьи 499 Кодекс об административных правонарушениях Республики Таджикистан назначается наказание в виде административного штрафа и выдворение с территории Республики Таджикистан.

Чаще всего основанием для возбуждения административного дела в отношении лица ищущих убежище и беженцев по части 3 статьи 499 Кодекс об административных правонарушениях Республики Таджикистан являются нарушение требования Постановления Правительства Республики Таджикистан №325 от 26 июля 2000 года « О перечне населённых пунктов Республики Таджикистан, временное проживание в которых лицам, ищущим убежище, и беженцам неразрешено».

Как так

В целом следует отметить, что институт конституционного контроля в нашей стране как важнейший демократический институт является относительно молодым и расширение его полномочий и правильное его функционирование, конечно же, выступает гарантом обеспечения соблюдения норм Основного закона страны и его непосредственного действия.

В итоге своего выступления пользуясь, случаем, позвольте еще раз поблагодарить организаторов в частности Конституционный Суд дружественного нам государства Турецкой Республики за радушный прием, а Вам участникам летней школы позвольте пожелать плодотворной и успешной работы.

Благодарю за внимание!

IMMIGRATION AND REFUGEE LAW

Chenwiwatt THONGPASONK
Kongkieat SURAKA

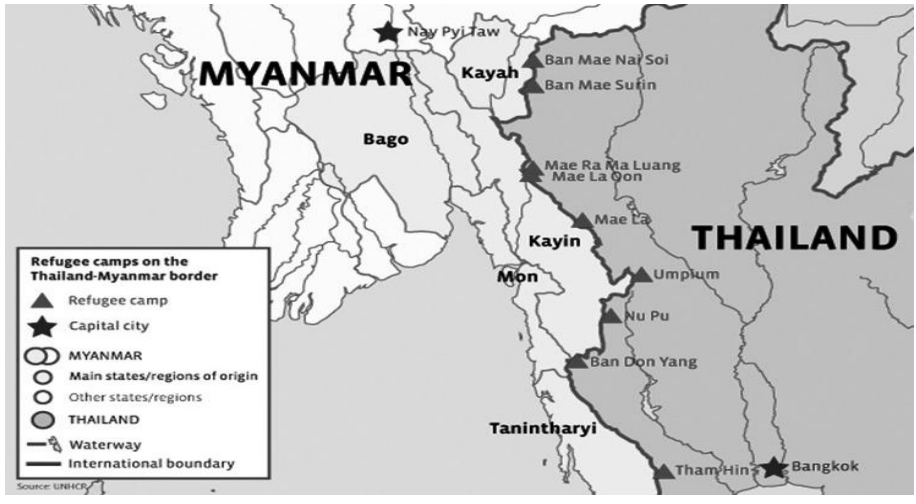
THAILAND

Immigration and Refugee Law Speech by Chenwiwatt Thongpasonk Kongkieat Suraka The Constitutional Court of the Kingdom of Thailand The 5th Summer School Program Ankara , 17-24 September 2017

Chenwiwatt THONGPASONK[*]
Kongkieat SURAKA[**]

General Information About Refugees in Thailand

9 camps along Thai - Myanmar border



[*] Officer, Constitutional Court Of Thailand.
[**] Officer, Constitutional Court Of Thailand.

Ban Mae Surin

- Maehongson Province
- 848 refugees

Ban Mae Nai Soi Camp

- Maehongson Province
- 8,016 refugees

Ban Mae La Ma Luang Camp

- Maehongson Province
- 7,866 refugees

Ban Ra Ma Laung Camp

- Maehongson Province
- 7,866 refugees

Ban Mae La Camp

- Tak Province
- 21,195 refugees

Ban Umpiem Camp

- Tak Province
- 7,292 refugees

Ban Nu Po Camp

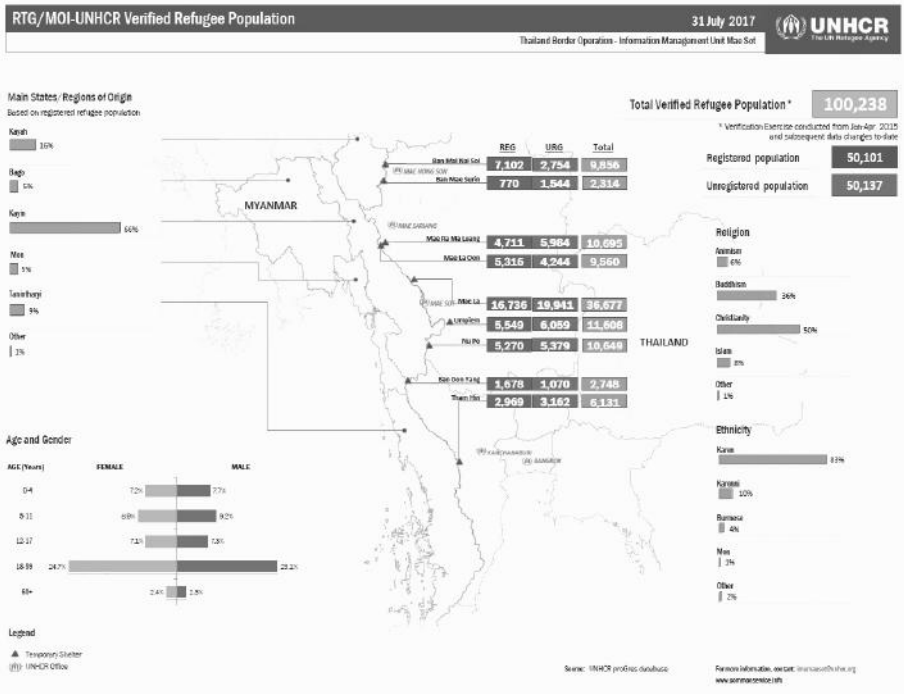
- Tak Province
- 6,930 refugees

Ban Don Yang Camp

- Khanchanaburi Province
- 1,992 refugees

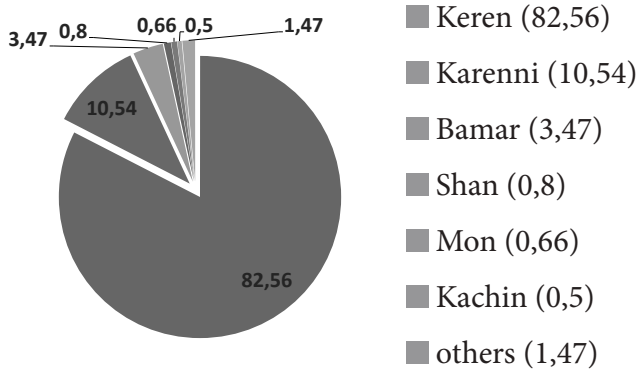
Ban Tham Hin Camp

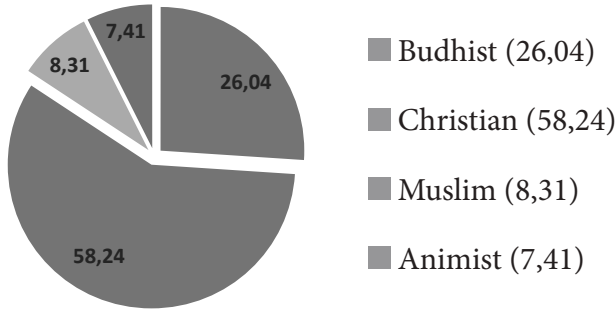
- Ratchaburi Province
- 2,862 refugees



The Number of Refugees in Thailand 2017		
Camp	**UNHCR**	**DOPA**
Ban Mai Nai Soi	9,856	8,016
Ban Mae Surin	2,314	848
Ban Mae La Oon	9,560	9,096
Ban Ra Ma Laung	10,695	7,866
Ban Mae La	36,677	21,195
Ban Umpiem	11,608	7,292
Ban Nu Po	10,649	6,930
Ban Don Yang	2,748	1,992
Ban Tham Hin	6,131	2,862
Total	**100,238**	**66,097**

Classification of Ethnic





Government Agencies Which Oversee Refugees in Thailand

Ministry of Interior

Department of Provincial Administration

Internal Security Affairs Bureau

Border and Displaced Person Affairs Division

Department of Provincial Administration's expenditure on refugees

support budget approximately 166,000 USD a year

- Employee Salaries
- Allowances for government officers
- Electricity fees at Mae La and Ban Umpiem camps [Tak Province]
- fuel, equipment etc.

The Organization of Camp Administration

Deputy District

Governing officers and government employees [10 officers]	Clerks [27 officers]	Casual workers [assistant of deputy district translator] by UNHCR budget [24 officers]	Territorial Defence Volunteers [297 officers]

The Objectives of Department of Provincial Administration

Creating preventive measures in order to control inbound and outbound refugees at the camps

↓

Maintaining peace and order of refugees at the camps

↓

Monitoring Fire prevention

↓

Registering and recording refugees' statistics

Education and Training

- Adventist Development and Relief Agency : ADRA
- Agency for Technical Cooperation and Development : ACTED
- Handicap international

- Jesuit Refugee Service : JSR

- Right to Play Thailand Foundation

- Shanti Volunteer Association : SVA

- Save the Children : STC

- Women's Education for Advancement and Empowerment foundation : WEAVE

- Ruammit Foundation - DARE

- World Education/Consortium : WE/C

- Teipei Overseas Peace Service : TOPS

Health care

- Teipei Overseas Peace Service : TOPS
- International Rescue Committee : IRC
- Malteser International : MI

Consuming Goods

- Catholic Office for Emergency Relief and Refugees : COERR
- The Border Consortium: TBC

Public Utilites

- American Refugee Committee : ARC international

Thai Goverment Agencies

- The planned Parenthood Association of Thailand : PPAT
- Shoklo Malaria Research Unit : SMRU

Myanmar Refugees returning home


Return of the pilot group of
ced persons fr Myanmar to their home
ot Internationa rder Che nt, Thaila
on 2 tober 2016

- Myanmar: Refugees returning home
- This video follows the first group of refugees as they go home from Nu Po camp near the Thailand-Myanmar border.
- https://www.youtube.com/watch?v=hgNoy3k0C6A

Thank you

THE ECHR AND THE RIGHT TO ASYLUM

Prof. Dr. Rick LAWSON
NETHERLANDS

THE ECHR AND THE RIGHT TO ASYLUM

Prof. Dr. Rick LAWSON[*]

§ 1 Introduction

The European Court of Human Rights is a unique institution. In terms of numbers, no other international tribunal deals with so many cases. In terms of substance, no other supervisory body has been able to reach such a degree of sophistication in shaping and refining human rights standards. In terms of significance, the Court's judgments have an impact matched by no other human rights body — not only on the parties whose disputes are settled in final and binding rulings, but also on the community of 47 States Parties who are bound by the European Convention of Human Rights (ECHR) and who develop their domestic law and practice in a continuous process of interaction with the highly dynamic jurisprudence of the Court.

This may appear to be a bold claim, but the topic of our conference – asylum law – offers a compelling illustration of the Court's role. It is not an exaggeration to say that the Convention is *the* essential text in the area of European asylum law. That is all the more remarkable if one realises that the Convention itself is silent on the issue of asylum or even on migration more in general. The protection that refugees and asylum-seekers derive from the Convention is judge-made: it is the case-law of the Court that has gradually given shape and substance to modern European refugee law. The purpose of this contribution is to analyse the Court´s contribution to this branch of the law. As we will see, this contribution, developed over a period

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of more than 30 years, has been rich in terms of numbers, substance, and impact.

Since this contribution is addressed to a partly non-European audience, it seems useful to start with a brief sketch of the Convention itself (§ 2). This will provide at least some context; the reader who is interested in more detailed background information is referred to the abundance of academic writing on the European Convention.[1] We will then, in § 3, turn our attention to Article 3 ECHR, the prohibition of torture and other forms of ill-treatment. As we will see, it is this provision that offers the basis for extensive case-law in the area of refugee law. In § 4 this case-law will be examined in more detail, whereas § 5 offers a short outlook.

It is worth mentioning at the outset that this contribution will focus on asylum, and thus on asylum-seekers and refugees. Other forms of migration – such as family reunification and labour migration – are outside the scope of our analysis, and so is trafficking in human beings. The same applies to the position of immigrants who are settled in a European country but deported to their country of origin, for instance following a criminal conviction; they may claim that such a deportation interferes with their right to respect for family life (Article 8 ECHR) – but if their claim is not based on fear for ill-treatment in the receiving country, their situation falls outside the scope of this contribution.

The last preliminary remark concerns the notion of 'asylum' itself. Article 14 of the Universal Declaration of Human Rights states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution". The concept of 'persecution' also emerges in the 1951 UN Convention Relating to the Status of Refugees, according to which a refugee is "any person who ... 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 nationality and is

1 See, e.g., P. van Dijk et. al., *Theory and Practice of the European Convention on Human Rights* (5th ed., 2018); D.J. Harris et al., *Harris, O'Boyle & Warbrick, Law of the European Convention on Human Rights* (3rd ed., 2014); B. Rainey et al., *Jacobs, White & Ovey, The European Convention on Human Rights* (7th ed., 2017). On the domestic impact of the ECHR, see R. Blackburn and J. Polakiewicz (eds.), *Fundamental Rights in Europe: The ECHR and Its Member States 1950–2000* (Oxford: Oxford University Press, 2001).

unable, or owing to such fear, is unwilling to avail himself of the protection of that country". The basic obligation under the Refugee Convention is not to expose refugees to the very threats that they fled: the principle of *non-refoulement*. This contribution will not, however, limit itself to asylum in this classic sense. As will become clear, we will also take into account the situation of a third-country national who does not qualify as a refugee but who, if returned to his or her country of origin, would face a real risk of suffering serious harm.

§ 2 A Brief Sketch of the European Convention

§ 2.1 The Origins of the Convention

The European Convention on Human Rights came into being against a troubled background: the atrocities and large-scale destruction of World War II on the one hand, the emerging Cold War on the other.

The founders of the United Nations stated their determination 'to reaffirm faith in fundamental human rights', but did little in concrete terms. The UN Charter did not contain detailed references to human rights, let alone that it provided for an effective enforcement mechanism. The Universal Declaration of Human Rights filled this gap only to some extent: it did proclaim a wide range of civil, political, social, economic and cultural rights, but the participating states were not prepared to grant legally binding effect to this document. In Europe, frustration about the slow progress in the UN joined forces with initiatives for regional integration: various quarters called for a legally binding text in order to ensure effective respect for human rights.[2]

Within the framework of the newly established Council of Europe work progressed with an impressive speed. On 4 November 1950 the text of the *Convention for the Protection of Human Rights and Fundamental Freedoms* was signed in Rome.

2 For a detailed account, see A.W.B. Simpson, *Human Rights and* the End of Empire (Oxford: Oxford University Press, 2001) and E. Bates, The Evolution of the European Convention on Human Rights (Oxford: Oxford University Press, 2010).

The Preamble to the Convention reflects the determination of its drafters "to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration". To that end, two specific bodies would be set up: the European Commission of Human Rights and the European Court of Human Rights. Both bodies would have their seat in Strasbourg, France, where the headquarters of the Council of Europe are based — hence the common reference to the 'Strasbourg organs' and the 'Strasbourg Court'. The primary function of the Commission and the Court would be to deal with complaints, lodged either by States Parties to the Convention or by private individuals. Basically the Commission's responsibility would be to review all complaints, reject unmeritorious ones and identify serious cases; the Court's task would be to deliver binding judgments in cases submitted to it. Given the broad language in which the Convention was drafted, both organs, and the Court in particular, were to develop authoritative interpretations of the Convention whilst applying it. For present purposes it suffices to underline that the powers accorded to the Commission and the Court were unprecedented in the history of international law.

The drafters' ambitions were modest – realistic, one might say, shortly after the War: to limit the Convention to "certain of the rights stated in the Universal Declaration". The Convention was to protect a small number of civil and political rights, from the right to life and the prohibition of torture to the freedom of expression and of association. There were no economic and social rights in the Convention; nor was there a right to enter a country, to stay there and, if applicable, to enjoy asylum.

The Convention was open to the signature of the members of the Council of Europe. Following ratifications by ten Member States, the Convention entered into force on 3 September 1953. Shortly thereafter, on 18 May 1954, Turkey ratified the Convention. On 5 July 1955, after six states had accepted the right of individual petition, the European Commission of Human Rights became competent to deal with individual complaints. The first elections for the Court

took place on 21 January 1959, after eight states had recognized the Court's jurisdiction.

§ 2.2 Procedure

The number of cases brought before the Convention institutions started to grow in the late 1980s. The increasing case-load led to a reform of the Convention supervisory machinery. Protocol No. 11 simplified the structure with a view to shortening the length of proceedings and, at the same time, strengthened the judicial character of the system. The most prominent feature was that the existing, part-time Court and Commission were replaced by a single, full-time Court. Further amendments to the system were introduced by Protocol No. 14.

The Court is composed of a number of judges equal to that of the Contracting Parties. Although it does not have all the powers which domestic courts usually have, the Court is essentially a judicial organ. That is: it processes cases submitted to it, either by State Parties (Article 33 ECHR) or by individual victims (Article 34 ECHR).[3] The Court does not issue statements of its own motion (unlike the general comments of, for instance, the UN Human Rights Committee). Nor does it have the power to intervene in a conflict of its own motion or to prevent violations.

Under the terms of Article 19 and Article 32 § 1 ECHR, the Court´s mandate is limited to supervising compliance with the European Convention. This is relevant for present purposes since the Court cannot review whether the provisions of, for instance, the 1951 Refugee Convention have been correctly applied by the domestic authorities. [4]

Articles 34 and 35 of the ECHR set out the various admissibility requirements. Space does not permit an elaborate discussion of

3 All references are to the current version of the Convention (as amended by Protocol No. 11 which entered into force 1 November 1998 and Protocol No. 14 which entered into force 1 June 2010), unless indicated otherwise.

4 On this latter issue see, *e.g, I. v. the Netherlands* (Application no. 24147/11), admissibility decision of 18 October 2011, § 43. All judgments and decisions can be found easily through the 'HUDOC' search engine at the Court's website, <www.echr.coe.int>. References to these cases follow the Court's official guidelines, hence the sometimes seemingly inconsistent use of source names.

these grounds. Suffice it to say that domestic remedies should be exhausted before a complaint is lodged in Strasbourg;[5] that the complaint should be lodged within six months from the date on which the final decision was taken;[6] that the complaint must be addressed against one or more of the Contracting Parties (and not, for instance, against a private individual); and that the applicant must claim to be the victim — there is no *actio popularis* for individual applicants and one cannot complain about a provision of national law simply because one considers, without having been directly affected by it, that it may contravene the Convention.[7] Also, by virtue of Article 35 of the ECHR, a case may be rejected if it is 'manifestly ill-founded'. Although this expression suggests that the complaint obviously has no merits at all, the Strasbourg bodies have always adopted a very liberal interpretation of this term. Some cases have been rejected as 'manifestly ill-founded' only after lengthy deliberations. In 2010, when Protocol No. 14 entered into force, another ground for inadmissibility was added: a complaint may be rejected if, in essence, the applicant did not suffer "a significant disadvantage".[8]

For present purposes it is important to note that nationality – or residence status – is irrelevant for the admissibility of a complaint. This reflects the broad and inclusive obligation to secure human rights laid down in Article 1 ECHR: " The High Contracting Parties shall secure to *everyone* within their jurisdiction the rights and freedoms defined in Section I of this Convention". So the migrant and the undocumented asylum-seeker are as much as anyone entitled to the enjoyment of the rights and freedoms laid down in the Convention.

5 But see *Akdivar et al. v. Turkey* (Application no. 21893/93), judgment of 16 September 1996, Reports of Judgments and Decisions 1996–IV, §§ 65–77.

6 But see *Chitayev and Chitayev v. Russia* (Application no. 59334/00), judgment of 18 January 2007, §§ 117–122.

7 See *Klass et al. v. Germany* (Application no. 5029/71), judgment of 6 September 1978, Publications of the European Court of Human Rights, Ser. A, no. 28, § 33, and *Burden v. the UK* (Application no. 13378/05), judgment of 29 April 2008, §§ 33–35.

8 The introduction of this new criterion was criticised by NGOs that feared a weakening of the right to individual petition. For an application see *Bazelyuk v. Ukraine* (Application no. 47295/08), decision of 27 March 2012.

Over 90% of all applications do not survive the admissibility stage. In the remaining cases, the Court will decide on the merits by way of a judgment. Article 46 ECHR provides the binding force and execution of judgments: "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties". At the same time the Court's powers are limited. The Court cannot re-open proceedings at national level, strike down laws which are found to be incompatible with the Convention, or grant a resident permit. Pursuant to Article 41 of the ECHR, the Court may (or may not) find one or more violations of the Convention, and, if a violation is found, award 'just satisfaction' to the victim. Judgments will indicate if the decision was reached with unanimity and if not, how the votes were divided. Judges may add their own concurring or dissenting opinions to the judgment.

The Committee of Ministers is responsible for supervising the execution of judgments (Article 46 ECHR). The Committee will ensure in the first place that payment of any just satisfaction decided by the Court is made as ordered. Secondly, the Committee will see to it that individual measures are, where necessary, taken in order to ensure *restitutio in integrum* — i.e., that the victim is put, as far as possible, in the same situation as he or she enjoyed prior to the violation of the Convention.[9] Thirdly, the Committee of Ministers will examine if general measures are, where necessary, adopted in order to avoid new similar violations of the Convention in the future.[10] In case the execution of a judgment is hindered by a problem of interpretation, the Committee may ask the Court to clarify the meaning of the judgment. It may also bring proceedings before the Court against a party that refuses to abide by the Court's final judgment.[11]

9 These measures may consist, for instance, of re-opening of proceedings at national level, granting of a resident permit, striking-out of criminal records.

10 *E.g.*, constitutional, legislative or regulatory amendments, a change in administrative practice or in case law, publication and/or dissemination of the Court's judgment.

11 In 2017 the Committee of Ministers made use of this possibility for the first time. In the case of *Ilgar Mammadov v. Azerbaijan* (Application no. 15172/13), judgment of 22 May 2014, the Court had found that the detention of the applicant, an opposition politician, was in breach of the Convention. Three years later he was still in prison. See Council of Europe press release, 5 December 2017, *Committee of Ministers launches infringement proceedings against Azerbaijan*, at www.coe.int.

§ 2.3 Further Developments

Leaving substantive developments aside for now, the institutional growth of the Convention system may be summarised in three dimensions: more texts, more countries, more cases.

The text of the Convention has changed over the years. So far, no less than 16 protocols have been added to the Convention. From a legal point of view, these are separate treaties which require separate ratification by the parties to the Convention. Amending protocols require ratification by *all* parties to the Convention before they enter into force. Once this has happened, these protocols are incorporated in the Convention; they are no longer 'visible' as separate texts. Additional protocols enter into force, for those parties that ratified them, after a certain number of ratifications – usually five or ten.

Six additional protocols (numbers 1, 4, 6, 7, 12 and 13) added further rights to the Convention. These protocols continue to exist as separate texts, appended to the Convention, but the rights that they contain enjoy the same legal status as the rights in the Convention itself, and all are subject to same supervision mechanism. Some of these protocols have been widely ratified; others have attracted less ratifications. A well-known provision, for instance, is Article 1 of Protocol No. 1, which protects the right to respect for property; in fact a very large proportion of all cases concerns property rights. Protocol No. 6, abolishing the death penalty, has been ratified by all States Parties to the Convention, except for Russia.[12] Of special interest for current purposes are Article 4 of Protocol 4 which prohibits collective expulsion of aliens, [13] and Article 1 of Protocol 7 which offers procedural safeguards relating to expulsion of aliens. [14]

12 When acceding to the Council of Europe (on 28 February 1996), the Russian Federation undertook to ratify the ECHR as well as its Protocols Nos. 1, 2, 4, 7 and 11 within one year. It did so on 5 May 1998. Russia also undertook to ratify Protocol No. 6 within three years; so far it has not done so. See Parliamentary Assembly, Opinion 193 (1996) on Russia's request for membership of the Council of Europe.

13 See *Čonka v. Belgium* (Application no. 51564/99), judgment of 5 February 2002, Reports of Judgments and Decisions 2002-I, and *Hirsi Jamaa and Others v. Italy* (application no. 27765/09), judgment of 23 February 2012, Reports of Judgments and Decisions 2012-II.

14 See *Ljatifi v. "the former Yugoslav Republic of Macedonia"* (Application no. 19017/16), judgment of 17 May 2018.

The remaining protocols aimed to improve the internal functioning of the supervision mechanism established by the Convention, or added some procedural rights to the Convention Especially Protocol No. 11 is relevant as it caused a major overhaul: with its entry into force (1 November 1998), a new full-time Court replaced the old Court and Commission. Protocol No. 14 contained a set of measures designed to further streamline the procedure before the Court. Two more protocols are currently in the pipeline. Protocol No. 15, which will only enter into force once all the States Parties to the Convention have ratified it, will insert a reference to the principle of subsidiarity and the doctrine of the margin of appreciation in the preamble to the Convention. It also reduces from six to four months the time-limit within which an application may be made to the Court following the date of a final domestic decision. On 1 August 2018, Protocol No. 16 to the Convention will enter into force (in respect of the States which have signed and ratified it). It will allow the highest courts and tribunals of a State Party to request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the protocols thereto.

A second trend is that the geographical scope of the Convention has grown considerably over the years. Membership of the Council of Europe was relatively stable until 1989. By 1955, as many as 12 states were bound by the Convention. Cyprus was, in 1962, the fourteenth state to ratify the Convention. Liechtenstein, which acceded to the Convention 20 years later, was the twenty-first state to do so. After the collapse of the communist regimes in Central and Eastern Europe, however, membership of the Council of Europe grew dramatically. At present (July 2018), the Council of Europe has 47 members. Each Member State has ratified the Convention and most of its Protocols.[15]

A third development to note is a virtual explosion of the number of applications (the term used in Strasbourg for complaints). It is not surprising that very few individual complaints were lodged in

15 Up-to-date overviews of all ratifications can be found on the Court's web site, <www.echr.coe.int>.

the early years. The Convention was hardly known either by the public at large or by the legal profession. Arguably, the Convention was perceived as a solemn statement of common values, not as a legal tool for use in the court room. Whatever the reasons, the Commission received only 138 applications in 1955. Ten years later the number had tripled (310 applications) but it was still very modest. The situation was still comparable in 1975 (466 new complaints) and even in 1985 (596 new cases). But this stability ended in the late 1980s. At a time that the Convention became better known in the existing States Parties, many countries from Central and Eastern Europe acceded to the Council of Europe and ratified the ECHR. As a result, the number of applications rose from 1,009 (1988) to 2,037 (1993) to 5,981 (1998) to 27,189 (2003). According to the most recent data, relating to 2017, the Court allocated 63,350 new cases to a judicial formation, declared over 70,000 cases inadmissible and delivered no less than 15,595 judgments.

§ 3 Article 3 ECHR – some general observations

We will now focus on substance. Article 3 ECHR prohibits torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention, Article 3 makes no provision for exceptions. No derogation is permissible under Article 15 ECHR: even in the event of a public emergency threatening the life of the nation the authorities cannot have recourse to ill-treatment. Consequently, the Court has always taken the position that the prohibition of Article 3 is absolute and applies irrespective of the applicant's conduct. In 2008, the Grand Chamber confirmed in unequivocal terms that the fight against terrorism cannot justify recourse to ill-treatment in breach of Article 3 ECHR.[16] Likewise, in 'ticking bomb' situations, where the authorities seek to save a person's life, they cannot ill-treat a suspect in order to extract information from him.[17] In this respect the protection offered by Article 3 is more far-reaching than that of Article 2, which protects the right to life.

16 *Saadi v. Italy* (Application no. 37201/06), judgment of 28 February 2008, Reports of Judgments and Decisions 2008.

17 *Gäfgen v. Germany* (Application no. 22978/05), judgment of 30 June 2008, § 69; in essence confirmed by Grand Chamber judgment of 1 June 2010, Reports of Judgments and Decisions 2010, § 107.

The Court regards 'torture', 'inhuman treatment or punishment' and 'degrading treatment or punishment' as distinct concepts. Treatment qualifies as 'degrading' when it is such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance, or when it drives the victim to act against his will or conscience.[18] But there is a threshold. In order for a punishment to be 'degrading', the suffering or humiliation involved must go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment. More in general, the Court has observed that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim.[19]

Treatment has been held to be 'inhuman' because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering.[20] 'Torture' is reserved for the most serious cases: deliberate inhuman treatment causing very serious and cruel suffering.[21]

Cases typically involve allegations of ill-treatment during arrest, custody or detention.[22] Around the turn of the century the Court started to review poor prison conditions under this heading.[23] Some recent cases suggest that the Court becomes more generous

18 *Tyrer v. the UK* (Application no. 5658/72), judgment of 25 April 1978, Publications of the European Court of Human Rights, Ser. A, no. 26, § 30.

19 See, *e.g.*, *Price v. the UK* (Application no. 33394/96), judgment of 10 July 2001, Reports of Judgments and Decisions 2001–VII, § 24.

20 See, *e.g.*, *Jalloh v. Germany* (Application no. 54810/00), judgment of 11 July 2006, §§ 68–83.

21 See *Aksoy v. Turkey* (Application no. 21987/93; judgment of 18 December 1996, Reports of Judgments and Decisions 1996–VII), where the Court for the first time in its history found that 'torture' had occurred. See also *Selmouni v. France* (Application no. 25803/94), judgment of 28 July 1999, Reports of Judgments and Decisions 1999–V, § 96.

22 See, *e.g.*, *Rehbock v. Slovenia* (Application no. 29462/95), judgment of 28 November 2000, Reports of Judgments and Decisions 2000–XII.

23 See, *e.g.*, *Kalashnikov v. Russia* (Application no. 47095/99), judgment of 15 July 2002, Reports of Judgments and Decisions 2002–VI. The leading case is *Mursic v. Croatia* (Application no. 7334/13), Grand Chamber judgment of 20 October 2016, Reports of Judgments and Decisions 2016.

in qualifying situations as 'degrading'.[24] If this trend continues, it remains to be seen how the slowly expanding scope of Article 3 will be reconciled with the absolute nature of *all* the elements of the prohibition enshrined in this provision.

It frequently occurs in cases of alleged ill-treatment that the facts of the case are disputed. Police officers may deny that they ill-treated anyone, and there are usually no independent eye-witnesses who could confirm (or refute) the applicant's allegations. Against that background the Court took an important step in the case of *Ribitsch* where it reversed the burden of proof: if it can be shown that injuries were sustained during the applicant's detention, while he was entirely under the control of state officials, the state is under an obligation to provide a plausible explanation of how the injuries were caused.[25] A failure to do so will lead the Court to conclude that a violation of Article 3 has occurred.

Sometimes an individual cannot supply medical evidence in support of his allegations, for instance, because he spent a long time in detention and did not have access to a doctor. The Court may then have insufficient evidence to decide whether there has been a violation of Article 3 or not. In response to this unsatisfactory situation, the Court has developed a 'procedural dimension' to Article 3, just as it did in connection to other articles of the ECHR. Where an individual makes a credible assertion that he has suffered treatment infringing Article 3 at the hands of the police or other similar agents of the state, there should be an effective official investigation. Such investigation should be capable of leading to the identification and punishment of those responsible. Otherwise, the Court argued, 'the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite

24 See, *e.g.*, *Moisejevs v. Latvia* (Application no. 64846/01; judgment of 15 June 2006), where the applicant, on the days of the trial hearings, had only been given a slice of bread, an onion and a piece of grilled fish or a meatball by way of lunch. The Court considered that such a meal was clearly insufficient to meet the body's functional needs, especially in view of the fact that the applicant's participation in the hearings by definition caused him increased psychological tension. Furthermore, on a number of occasions when returning to the prison in the evening the applicant had received only a bread roll instead of a full dinner. The Court considered that the suffering experienced by the applicant had amounted to 'degrading treatment'.

25 *Ribitsch v. Austria* (Application no. 18896/91), judgment of 4 December 1995, Publications of the European Court of Human Rights, Ser. A, no. 336, § 34.

its fundamental importance … be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity'.[26]

§ 4 Article 3 ECHR and asylum law

§ 4.1 The Soering *principle*

Article 3 is also highly relevant for asylum law. In the leading case of *Soering* (1989), the Court accepted in essence that a Contracting Party may violate this provision if it deports an individual to a country where he or she faces a real risk of ill-treatment.[27]

This judgment has had a very significant impact on asylum policies throughout Europe and the '*Soering* principle' is often invoked in Strasbourg. It is therefore useful to discuss the case in some detail. Mr Soering, a German national, was arrested in the UK. The United States asked for his extradition under the US-UK extradition treaty, as he was charged with capital murder in Virginia. It was likely that Mr Soering, once returned to the US, would be found guilty and then sentenced to death. In Virginia the average time between the imposition of the death sentence and its execution is seven years. Mr Soering argued that to extradite him would violate Article 3 as he would be subjected to a long period of uncertainty as to his life, under harsh circumstances. The UK, on the other hand, maintained that it could not be held responsible for events taking place abroad and, at any event, there was no certainty that Mr Soering would be convicted and end up on death row.

It was clear at the outset that the United States, which never ratified the European Convention, were in no way bound by it. Under public international law, treaties only bind those States which are party to it (*pacta tertiis nec prosunt nec nocent*; see Article 34 of the Vienna Convention on the Law of Treaties). Acts committed by the US authorities could not, therefore, violate the Convention.

26 *Labita v. Italy* (Application no. 26772/95), judgment of 6 April 2000, Reports of Judgments and Decisions 2000–IV, § 131.

27 *Soering v. the UK* (Application no. 14038/88), judgment of 7 July 1989, Publications of the European Court of Human Rights, Ser. A, no. 161.

Neither could the UK under international law be held responsible for acts of the USA as a third State, the only exception to this rule being the unusual situation in which a State exercises the power of direction or control over another State. Finally, the Convention does not require the Contracting Parties to impose its standards on other States. As the Court held in *Soering*, Article 1 of the Convention "cannot be read as justifying a general principle to the effect that, notwithstanding its extradition obligations, a Contracting State may not surrender an individual unless satisfied that the conditions awaiting him in the country of destination are in full accord with each of the safeguards of the Convention".[28]

However, this does not entirely exclude State responsibility under the Convention with respect to events taking place outside the jurisdiction of the Contracting Parties. In a series of 'old' cases the Commission had held that a person's deportation or extradition may give rise to an issue under Article 3 of the Convention when there are serious reasons to believe that the individual will be subjected, in the receiving state, to treatment seriously violating the most fundamental values of the Convention. In *Soering*, the first such case to reach the Court, this principle was confirmed.

At first sight this may come as a surprise. The right to political asylum is not contained in either the Convention or its Protocols, which are silent on the issue of migration. As a result the Contracting States are free, subject to their treaty obligations, to expel foreigners. *A fortiori* they are free to extradite them when extradition treaties oblige them to do so. Moreover international cooperation in the fight against crime is obviously the important, and extradition is an important element of it. The Court acknowledged this expressly in *Soering.*

Yet the Court found that the specific importance of preventing torture justifies an exception to the States' freedom when treatment contrary to Article 3 may be expected:

28 *Soering*, § 86.

> The question remains whether the extradition of a fugitive to another State where he would be subjected or be likely to be subjected to torture or to inhuman or degrading treatment or punishment would itself engage the responsibility of a Contracting State under Article 3. That the abhorrence of torture has such implications is recognised in Article 3 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that "no State Party shall ... extradite a person where there are substantial grounds for believing that he would be in danger of being subjected to torture". The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3, would plainly be contrary to the spirit and intendment of the Article, and in the Court's view this inherent obligation not to extradite also extends to cases in which the fugitive would be faced in the receiving State by a real risk of exposure to inhuman or degrading treatment or punishment proscribed by that Article. [29]

And so the Court adopted its *Soering* principle: "the decision by a Contracting State to extradite a fugitive may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment in the requesting country". [30]

29 *Soering*, § 88.
30 *Soering*, § 91.

To avoid misunderstandings the Court added that, although the establishment of such responsibility involves an assessment of conditions in the requesting country – in this particular case the USA – against the standards of Article 3 ECHR, there is no question of adjudicating on or establishing the responsibility of the receiving country, whether under general international law, under the Convention or otherwise. In so far as any liability under the Convention is or may be incurred, it is liability incurred by the extraditing Contracting State – i.e. the UK – by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment.

The difference with the scope of the 1951 Refugee Convention will be clear. The ECHR does not require that the applicant is "persecuted", nor do the specific grounds ("for reasons of race, religion" et cetera) play a separate role. What matters as far as Strasbourg is concerned, is that there is sufficient ground to believe that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment.

§ 4.2 Developing the **Soering** *principle*

In the years that followed *Soering* the Court dealt with a large number of more or less comparable cases. This allowed it to gradually develop and refine its jurisprudence. In this contribution we will touch upon a number of interesting developments.

Soering was about extradition. But within two years the Court accepted that the *Soering* principle also applies to expulsion cases, which are in practice much more numerous. The Court came to this conclusion in the case of *Cruz Varas*, brought by a Chilean national who had applied for political asylum in Sweden. Together with his family he had fled from Chile, which at the time was under the dictatorship of General Pinochet. Mr Cruz Varas' application was rejected and the authorities decided that he had to return to Chile. Faced with the threat of expulsion, Mr. Cruz Varas applied to Strasbourg, invoking Article 3 ECHR. Although his case concerned expulsion as opposed to a decision to extradite, the Court considered

that the *Soering* principle also applies to expulsion decisions and *a fortiori* to cases of actual expulsion.[31]

On the merits, the Court did not find that the expulsion of Mr Cruz Varas was in breach of Article 3. Various factors played a role: the credibility of his account was open to doubt; the situation in Chile had improved by the time he applied for asylum; and the Court attached importance to the fact that the Swedish authorities had particular knowledge and experience in evaluating asylum claims by virtue of the large number of Chilean asylum-seekers who had arrived in Sweden since 1973. The final decision to expel Mr Cruz Varas was taken after thorough examinations of his case by the competent authorities.

Despite the actual outcome of this case, it was clear that the *Cruz Varas* judgment greatly expanded the scope of the *Soering* principle. But within six months the Court took a considerable step back. In the case of *Vilvarajah*, it introduced the so-called 'singled out' criterion. For a claim to be successful it is not sufficient to point to a generally poor human rights situation in the receiving country: the applicant must advance substantial grounds to show that he or she runs a particular risk.[32] Commentators suggested that in doing so the Court wished to reassure the Contracting States that it would not impose unreasonable limits on their asylum policies, which were traditionally seen as belonging to the core of national policies.

Since most asylum-seekers hail from third countries, such as Sri Lanka, Afghanistan or Somalia, most cases before the Strasbourg Court concern deportation to these very countries. But it is not excluded that, in exceptional circumstances, Article 3 is opposed to the deportation to another State Party to the ECHR. Thus, in the case of *Shamayev* the Court ruled that Georgia should not extradite the applicant (allegedly a Chechen fighter) to Russia. In that connection the Court pointed to "a new and extremely alarming phenomenon:

31 *Cruz Varas v. Sweden* (Application no. 15576/89), judgment of 20 March 1991, Publications of the European Court of Human Rights, Ser. A, no. 201, § 70.

32 *Vilvarajah et al. v. the UK* (Application no. 13163/87), judgment of 30 October 1991, Publications of the European Court of Human Rights, Ser. A, no. 215, and refined in *Salah Sheekh v. the Netherlands* (Application no. 1948/04), judgment of 11 January 2007, § 148, and *NA. v. the UK* (Application no. 25904/07), judgment of 17 July 2008, §§ 116–117.

individuals of Chechen origin who have lodged an application with the Court are being subjected to persecution and murder".[33]

In the case of *M.S.S. v. Belgium and Greece*, a related issue arose: is an EU Member State free to return an asylum seeker to another EU Member State under the so-called Dublin system (pursuant to which a request for asylum should be processed at the port of first entry into the EU) if the latter state is known to offer poor reception facilities and inadequate procedures? The Court answered the question in the negative and held that Belgium should not have returned the applicant, an Afghan asylum seeker, to Greece.[34]

Usually it is argued that the risk of ill-treatment in the receiving country emanates from intentionally inflicted acts of the public authorities there. But Article 3 also applies if the threat is posed by non-state actors and the domestic authorities are unable to afford the applicant appropriate protection.[35]

Seeking to extend this case law even further, Article 3 is also invoked by aliens who are suffering from a serious illness and who face deportation to a country where the medical facilities are inferior to those available in the Contracting Party. The Court has accepted such an argument in rare cases, when it found that the humanitarian grounds against the removal were compelling, but it has rejected the overwhelming majority of similar complaints.[36]

Circumstances may change over time: wars may end, dictators may fall – or the situation may get worse. Since the Court often needs several years to process a case, the question becomes relevant how much weight must be given to any change in circumstances since an application was introduced in Strasbourg. According to well-

33 *Shamayev et al. v. Georgia and Russia* (Application no. 36378/02), judgment of 12 April 2005, Reports of Judgments and Decisions 2005–III, § 368.

34 *M.S.S. v. Belgium and Greece* (Application no. 30696/09), judgment of 21 January 2011, Reports of Judgments and Decisions 2011-I. See also *Tarakhel v. Switzerland* (Application no. 29217/12), judgment of 4 November 2014, Reports of Judgments and Decisions 2014-VI.

35 See *H.L.R. v. France* (Application no. 24573/94), judgment of 29 April 1997, Reports of Judgments and Decisions 1997–III; and *N. v. Finland* (Application no. 38885/02), judgment of 26 July 2005.

36 *D. v. the UK* (Application no. 30240/96), judgment of 2 May 1997, Reports of Judgments and Decisions 1997–III. The most recent authorities are *N. v. the UK* (Application no. 26565/05; judgment of 27 May 2008), where the Grand Chamber emphasized the highly exceptional nature of the *D.* case, and *Paposhvili v. Belgium* (Application no. 41738/10), judgment of 13 December 2016, concerning the deportation of a person suffering from a serious illness to Georgia.

established case-law, the existence of any risk of ill-treatment must be assessed primarily with reference to the facts which were known or ought to have been known to the Contracting State at the time of expulsion. However, if the applicant has not yet been deported, the material point in time must be that of the Court's consideration of the case. It follows that, although the historical position is of interest in so far as it may shed light on the current situation and its likely evolution, it is the present conditions which are decisive.[37] This approach may be understandable, but it does make the Court a bit vulnerable for the claim that is in fact assuming the role of an asylum court in last resort.

On a final note, it is worth repeating that the protection offered by Article 3 is absolute and applies to "everyone", irrespective of the personal conduct of the person concerned. Accordingly the Court has insisted that persons suspected of terrorist activities are protected too, much to the anger of some governments.[38]

§ 4.3 Applying the **Soering** *principle to other provisions of the Convention*

What happens if there is a real risk that human rights other than those covered by Article 3 will be infringed by the receiving State? Two answers are possible.

According to one view, Article 3 ECHR, and Article 3 alone, would still be at stake for the extraditing or expelling State. Extradition to a State where the extradited person would be killed might be contrary to Article 3, not to Article 2, as the extraditing State would not itself be responsible for the killing. One could point in this respect to § 88 of *Soering*, quoted above, in which the Court only refers to Article 3 and speaks of an "inherent obligation" under that specific position. In this view, a possible infringement by the receiving State of human

37 See *Chahal v. the United Kingdom*, (Application no. 22414/93), judgment of 15 November 1996, Reports of Judgments and Decisions 1996-V), § 86, and *Hirsi Jamaa and Others v. Italy* (application no. 27765/09), judgment of 23 February 2012, Reports of Judgments and Decisions 2012-II, § 121.

38 *Saadi v. Italy* (Application no. 37201/06), judgment of 28 February 2008, Reports of Judgments and Decisions 2008, and *Othman (Abu Qatada) v. UK* (Application no. 8139/09), judgment of 17 January 2012, Reports of Judgments and Decisions 2012-I.

rights other than those protected by Articles 2, 3 and possibly 4 may not be sufficiently serious to come above the threshold of seriousness required by Article 3. The universal abhorrence of torture and the fact that Article 3 reflects "an internationally accepted standard" (§ 88) justify an exceptionally high level of protection of this provision. Article 3 of the UN Convention Against Torture contains a similar obligation not to expose an individual to the danger of being subjected to torture.

According to another view, to expose an individual to a violation of any of his rights protected by the Convention could entail the State's responsibility under the Convention. Article 1 of the Convention provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms". If a State exposes an individual within its jurisdiction to a violation of one of these rights and freedoms – for example by deporting him to a country while being aware that he will be held in slavery, or subjected to a trial that does not meet the standards of Article 6 – then it fails to "secure" the individual's respective rights under the Convention. Article 3 is of course an important provision, but it is not exceptional to the extent that it alone can be relevant in extradition or expulsion cases. There are no cogent arguments why Article 3 would include an "inherent" obligation not to extradite, whereas other provisions would not.

And indeed, in *Soering* the Court did accept that extradition may raise an issue under Article 6:

> The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society (…). The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.[39]

The Court has consistently repeated this position, although very few violations have actually been found. Indeed the Court's

39 *Soering*, § 113.

understanding of what constitutes a "flagrant denial of a fair trial" is quite strict:

> forms of unfairness that could amount to a flagrant denial of justice …. include conviction *in absentia* with no subsequent possibility to obtain a fresh determination of the merits of the charge; a trial which is summary in nature and conducted with a total disregard for the rights of the defence; detention without any access to an independent and impartial tribunal to have the legality of the detention reviewed and deliberate and systematic denial of access to a lawyer, especially for an individual detained in a foreign country.
>
> In other cases, the Court has also attached importance to the fact that if a civilian has to appear before a court composed, even only in part, of members of the armed forces taking orders from the executive, the guarantees of impartiality and independence are open to a serious doubt.
>
> However, "flagrant denial of justice" is a stringent test of unfairness. A flagrant denial of justice goes beyond mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself. What is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article. [40]

In the *Al Nashiri* case, where this quote comes from, the Court actually found that the threshold had been met, partly because the military commission that would try the applicant did not offer guarantees of independence of the executive. [41]

Be that as it may, it is safe to conclude that the "inherent" obligation not to extradite is not limited to Article 3 ECHR. It would follow that other provisions of the Convention, such as Articles 8-11 ECHR, could be equally relevant in this connection. But the possibility to impose restrictions under the second paragraph of these provisions would of course exist as well.[42]

40 *Al Nashiri v. Poland* (Application no. 28761/11), judgment of 24 July 2014, §§ 562-563.

41 *Al Nashiri*, § 567.

42 See on the – limited – applicability of Article 9 ECHR (freedom of religion) in this context: *Z. and T. v. the United Kingdom* - (Application no 27034/05), admissibility decision of 28 February

§ 4.4 Procedural safeguards

Hand in hand with the elaboration of the *Soering* principle, the Strasbourg case-law on the treatment of asylum-seekers has developed enormously. If immigrants are deprived of their liberty during the examination of their request for asylum, Article 5 ECHR requires a sound legal basis and the existence of remedies to challenge the lawfulness of the detention.[43] The conditions in the detention centres should meet the requirements of Article 3 ECHR, in terms of both living conditions and appropriate medical assistance.[44]

Article 13 of the Convention guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they may happen to be secured. The effect of that provision is thus to require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief. In the context of refugee law this obligation acquires a special dimension given the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged materialised and the importance which the Court attaches to Article 3. [45] So any complaint that expulsion to another country will expose an individual to treatment prohibited by Article 3 of the Convention requires close and rigorous scrutiny. Subject to a certain margin of appreciation left to the States, the competent body must be able to examine the substance of the complaint and afford proper reparation. The State may not be allowed to expel the individual concerned without having examined the complaints under Article 3 as rigorously as possible. [46]

Ms. Ljatifi fled Kosovo to the former Yugoslav Republic of Macedonia, where in 2005 she was granted asylum status. Her residence permit was extended each year until 2014, when the

2006.

43 See, *e.g., Amuur v. France* (Application no. 19776/92), judgment of 25 June 1996.

44 See, *e.g., S.D. v. Greece* (Application no. 53541/07), judgment of 11 June 2009.

45 See, *e.g., Jabari v. Turkey* (Application no. 40035/98), judgment of 11 July 2000, Reports of Judgments and Decisions 2000-VIII

46 See, *e.g., M.S.S. v. Belgium and Greece* (Application no. 30696/09), judgment of 21 January 2011, Reports of Judgments and Decisions 2011-I, § 388.

Ministry of the Interior terminated her asylum status, stating merely that she was "a risk to [national] security", and ordered her to leave the territory within twenty days. The domestic courts upheld that decision, noting that it was based on a classified document obtained from the Intelligence Agency. They considered irrelevant the applicant's argument that the document had never been disclosed to her. For the Court, this was a clear breach of Article 1 of Protocol No. 7 which offers procedural safeguards relating to expulsion of aliens.[47]

Finally, in cases concerning the expulsion of asylum seekers, the Court does not itself examine the actual asylum applications or verify how the States honour their obligations under the 1951 Refugee Convention. It must be satisfied, though, that the assessment made by the authorities of the Contracting State is adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources such as, for instance, other Contracting or non-Contracting States, agencies of the United Nations and reputable non-governmental organisations.[48]

§ 4.5 Interim measures

A last remark in this connection concerns the use of interim measures by the Strasbourg Court. Since deportation may entail irreversible consequences (both in the sense of the anticipated ill-treatment and in the sense that the applicant may not be able to be retrieved from the receiving country once the Court has found in his favour), applicants often ask the Court to prevent their deportation. Although the Convention does not specify that such interim measures may be granted, the Court may do so on the basis of Rule 39 of the Rules of Court. The Court will only do so if it is satisfied that there is an established risk of imminent and irreparable harm.

In the case of *Mamatkulov*, the Court specified that these interim measures must be complied with, since the removal of the applicant

47 See *Ljatifi v. "the former Yugoslav Republic of Macedonia"* (Application no. 19017/16), judgment of 17 May 2018.

48 See, *e.g., M.E. v. Denmark,* (Application no. 58363/10),judgment of 8 July 2014, §§ 47-51 with further references.

would undermine the right to individual petition as set out in Article 34 ECHR.[49] In general the Contracting Parties faithfully comply with these interim measures.

Occasionally, however, countries have been criticised for not complying with interim measures. In the case of *Mannai* the applicant was a Tunisian national who was suspected by the Italian authorities of involvement in a criminal conspiracy linked to fundamentalist Islamist groups. He was arrested in Austria in May 2005 and extradited to Italy in July 2005. In October 2006 he was found guilty and sentenced to approximately five years' imprisonment. The judgment specified that he was to be deported from Italy after serving his sentence. On 19 February 2010, at Mr. Mannai's request, the Court indicated to the Italian Government, under Rule 39 of the Rules of Court, that it was advisable for him not to be deported to Tunisia until further notice. After being granted a remission, Mr. Mannai finished serving his sentence on 20 February 2010. On the same day, the prefect issued an order for his deportation. Mr. Mannai was deported to Tunisia on 1 May 2010. In reply to a letter of 3 May 2010 from the Court, the Italian Government stated that Mr. Mannai had been deported because he represented a threat to national security.

In finding a breach of Article 34 ECHR, the Court noted that Mr. Mannai had been deported to a country that was not a party to the Convention, where he claimed that he would face the risk of treatment in breach of the Convention. His deportation had therefore at the very least rendered any finding of a violation of the Convention meaningless and had irreversibly weakened the level of protection of the rights set forth in Article 3. The Court also observed that the respondent Government had not requested the discontinuation of the Rule 39 interim measure, which they had known to be still in force. The fact that Mr. Mannai had been removed from Italy's jurisdiction therefore constituted a serious obstacle liable to prevent the Government from discharging their obligations to protect the his rights and to remedy the consequences of the violations found

49 *Mamatkulov and Askarov v. Turkey* (Applications nos. 46827/99 and 46951/99), judgment of 4 February 2005, Reports of Judgments and Decisions 2005–I. See also *Paladi v. Moldova* (Application no. 39806/05), judgment of 10 March 2009, §§ 86-90.

by the Court. This situation had hindered Mr. Mannai's effective exercise of his right of individual application. Accordingly, by failing to comply with the interim measure, Italy had been in breach of its obligations under Article 34 of the Convention. The Court awarded an amount of EUR 15,000 in respect of non-pecuniary damage.[50]

Clearly the course of action adopted by the Italian authorities in the *Mannai* case risked undermining the authority of the Court and the credibility of the European system for the protection of human rights. This risk was aggravated by the fact that this was not the first incident of this kind: a similar scenario had already occurred in three other Italian cases.[51] Against this background the Secretary General of the Council of Europe issued a public statement in May 2010 in which he strongly regretted the repeated expulsions by Italy. The Secretary General underlined that it was essential that measures taken by the Court, which are recognised as legally binding for all parties to the European Convention on Human Rights, were respected by all member states and that failure to do so risked undermining the system of human rights which is fundamental for the protection of all European citizens. One month later the Committee of Ministers adopted a statement in which it deplored the conduct of the Italian authorities. [52]

Following these incidents, the issue was solved. Italy resumed full compliance with interim measures by virtue of Rule 39. In this respect an important role was played by the Italian Court of Cassation. In a series of decisions the Court of Cassation underlined the binding force of interim measures; stated that all Italian authorities, including judicial authorities, must respect these measures; and held that justices of the peace should assess the concrete risks that an irregular immigrant would face in his country of origin before an expulsion order can be executed. These judgments were complement by a detailed Circular of the Ministry of Justice stressing the obligation to respect interim measures under Rule 39. Finally the relevant judgments of the European Court

50 *Mannai v. Italy* (Application no. 9961/10), judgment of 27 March 2012.

51 See the cases of *Ben Khemais, Trabelsi and Toumi v. Italy* (Applications nos. 246/07, 50163/08 and 25716/09).

52 See Interim Resolution CM/ResDH(2010)83.

were published on the website of the Court of Cassation, with a translation into Italian on the website of the Ministry of Justice. [53] Meanwhile a democratic transition occurred in Tunisia in 2011, following which the Strasbourg Court found that there was no longer a risk of treatment contrary to Article 3 in case of expulsion to this country. [54]

§ 5 Outlook

The *Mannai* case illustrates that in asylum cases the Court may be called upon to adjudicate very sensitive issues, sometimes involving national security considerations and the fight against terrorism. As we have seen, in such a context the findings of the Strasbourg Court may be challenged, and support for the Court´s authority becomes crucial. For this the Court depends not only on the quality of its own work, but also on the support of the Contracting Parties – individually and acting together in the Committee of Ministers – and the domestic authorities, including the judiciary. The aftermath of the *Mannai* case shows that each of these actors may contribute in a very meaningful way.

It is trite to say that the issue of migration continues to dominate politics, in Europe as much as in the United States – let alone in the regions where most refugees comes from. Indeed, politicians in the West sometimes appear to forget that the overwhelming majority of refugees remain within their own region. According to UNHCR statistics, of 68,5 million (!) forcibly displaced individuals worldwide, some 40 million stay within their own country.[55] Of those who are compelled to go abroad, most end up in Turkey, Uganda, Pakistan, Lebanon and Iran. In total some 85% of the world´s displaced persons are hosted in developing countries. Meanwhile the number of asylum-seekers that managed to reach the EU, dropped in 2017 with 40% when compared to the year before.

53 See Resolution CM/ResDH(2015)204, *Execution of the judgments of the European Court of Human Rights in four cases against Italy*, Adopted by the Committee of Ministers on 17 November 2015 at the 1240th meeting of the Ministers' Deputies. These resolutions can be found in the HUDOC data base too.

54 See the admissibility decisions in *Al-Hanchi v. Bosnia and Herzegovina* (Application no. 48205/09) of 15 November 2011, and *Ignaoua v. Italy* (Application no. 22209/09) of 10 July 2012.

55 See UNHCR, *Figures at a glance*, at www.unhcr.org.

Nevertheless, the perceived mass-influx of asylum-seekers continues to haunt Western politics, feeding the rise of nationalistic and xenophobic politicians. Various measures are contemplated and actually taken to 'push back' asylum-seekers and prevent them from reaching Europe. Against this troubled background, there are two cases that stand as a model for the kind of factual issues and legal questions to reach the Court in the coming years.

The first case is still pending: *Ilias and Ahmed v. Hungary*. This case concerns the border-zone detention for 23 days of two Bangladeshi asylum-seekers as well as their removal from Hungary to Serbia. The applicants allege in particular that their protracted confinement in the transit zone in substandard conditions had been inhuman. In its Chamber judgment the Court took the view that the applicants' conditions of detention had been satisfactory and that the applicants had not been more vulnerable than any other adult asylum-seeker detained at the time. Also taking into account the relatively short time involved, the Chamber found that the applicants' conditions of detention had not reached the minimum level of severity necessary to constitute inhuman treatment under Article 3. The Chamber found, however, that there had been a violation of Article 13 as concerned the lack of an effective remedy with which the applicants could have complained about their conditions of detention.[56] At the request of the Hungarian government the case was referred to the Grand Chamber, which held a hearing on the case in April 2018.

The second case, *Hirsi Jamaa and Others*, concerned 24 Somalian and Eritrean migrants on board three boats travelling from Libya in an attempt to reach Europe. On 6 May 2009 they were intercepted at sea by the Italian authorities when the boats were 35 miles south of Lampedusa. The passengers were transferred to Italian military vessels and taken to Tripoli. During the journey the Italian authorities did not tell them where they were being taken, or check their identity. Once in Tripoli, after a 10-hour voyage, they were handed over to the Libyan authorities. At a press conference the Italian Minister of the Interior said that the interception of the

56 *Ilias and Ahmed v. Hungary* (Application no. 47287/15), judgment of 14 March 2017.

vessels on the high seas and the return of the migrants to Libya was in accordance with bilateral agreements with Libya that had come into force earlier that year, which he said marked an important turning point in the fight against illegal immigration.

In their application to the Strasbourg Court, Hirsi Jamaa and his companions invoked various provisions of the Convention – and won their case. [57] What matters for present purposes is that the Court found that the applicants had fallen within the jurisdiction of Italy for the purposes of Article 1 of the Convention: in the period between boarding the ships and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive *de jure* and *de facto* control of the Italian authorities.

It is along these lines that the Court will have to decide the many legal questions that will undoubtedly be submitted to it: responsibility for the conditions in border-zone detention centres; responsibility for joint operations in the context of EU-agencies such as Frontex; [58] responsibility for 'disembarkation platforms' created by the EU in, for instance, Northern African countries; responsibility for search and rescue missions by both public and private vessels; responsibility for the use of drones – or the deliberate failure to use drones – in order to locate migrants who are making their way, often under extremely hazardous circumstances, to Europe.

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Human history is a history of migration. As long as individuals feel compelled to leave – be it to flee from war, hunger or oppression, or because they feel that they can improve their quality of life – they will have to find their way in a new environment. They may encounter hospitality or hostility. If they are met with fences rather than flowers, it is the task of the European Court of Human Rights to ensure that their basic rights are not sacrificed on the altar of selfishness.

57 *Hirsi Jamaa and Others v. Italy* (application no. 27765/09), judgment of 23 February 2012, Reports of Judgments and Decisions 2012-II.

58 See M. Fink, *Frontex and Human Rights – Responsibility in 'Multi-Actor Situations' under the ECHR and EU Public Liability Law* (PhD thesis Leiden/Vienna, 2017).

THE STATE'S POSITIVE OBLIGATIONS RELEVANT TO MIGRANT SMUGGLING IN LIGHT OF CASE LAW OF THE EUROPEAN COURT OF HUMAN RIHTS

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THE STATE'S POSITIVE OBLIGATIONS RELEVANT TO MIGRANT SMUGGLING IN LIGHT OF CASE LAW OF THE EUROPEAN COURT OF HUMAN RIHTS

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1. Introduction

This contribution is an adapted and expanded version of a speech delivered by the author on the 20th of September 2017 at the Fifth Summer School of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), organized, in its capacity as the Centre for Training and Human Resources Development under the Permanent Secretariat of the AACC, by the Turkish Constitutional Court on the theme of 'Migration and Refugee Law' in Ankara, Turkey, between 17-24 September, 2017.

Within the theme of the Summer School, the contribution focuses on the question if and if so, how the inherent 'criminal justice positive obligations' developed under the European Convention on Human Rights (ECHR) by the European Court of Human Rights (ECrtHR), which call for States to realize *elevated* standards in providing protection against certain types of crime through the vehicle of criminal law enforcement, may be extended to *victims* of human or migrant smuggling.

Given their general construct, as they have developed in ECrtHR case law, 'victim-centric' criminal justice positive obligations may apply with respect to any type of crime equating to a (horizontal) human rights violation. Case law however also shows that the ECrtHR is willing to identify particular crime types and or victims

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thereof as requiring particularly stringent protection, therewith giving itself the ability, not only to set exacting standards *in concreto*, but also to mark such crime types and the need to protect against them high on policy agendas, therewith directing Council of Europe member states to (structurally) increase their criminal law enforcement efforts in those terrains. The ECrtHR has notably raised standards in this manner with respect to domestic violence and discrimination of women and (sexual) offences against minors, but also in the context of the crime of human *trafficking*.

Whereas the latter crime phenomenon is often paired, as a related crime and policy concern, with that of human or migrant smuggling, differences between the two crime types also result in disparate narratives in the manner in which they, and victims thereof, are approached, including in the context of criminal law enforcement. While human trafficking has become solidly recognized as a crime type requiring a strong victim-oriented criminal justice response, not only in the case law of the ECrtHR, but in international and domestic law at large, acknowledgment of the need for the same type of protection may be held to be fundamentally weaker in the case of human or migrant smuggling. That is not to say that criminal law enforcement efforts against smugglers necessarily lag behind those oriented on trafficking. States may be highly active in the prosecution of smugglers where they are able to be. However, the question may be if, even if criminal justice responses against smugglers are taking place, there is due attention therein for the perspective of the victimization of smuggled persons.

Within ECrtHR case law, while there is a growing body of judgments concerning positive obligations to protect victims of human trafficking through criminal law enforcement against perpetrators, no such cases exist (in as far as known to the author), with respect to human or migrant smuggling. Smuggled persons do bring complaints against Council of Europe member states at the ECrtHR, but those complaints regard other human rights issues than that criminal law enforcement did not take place against the persons who smuggled them, or did not take place in a particular manner. Mainly, complaints brought by smuggled persons have to

do with (collective) expulsion, conditions of detention and other forms of human rights problematic commonly attached to (irregular) migration. If smuggled persons are refugees, they likewise rather complain not about being smuggled (and protected against it via the criminal law), but about issues related to that status.[1]

Such concerns may be more acutely pressing and therefore become the focus of attention in litigation, which may explain the absence of complaints in ECrtHR case law brought by victims of smuggling with respect to insufficient criminal law enforcement against their smugglers. The lack of such case law may also have to do with the fact that smuggling is 'consensual', which may make it seem counterintuitive for smuggled person to desire prosecution. Nevertheless, given human rights concerns which may be attached to smuggling, a lack of awareness, including on the part of the smuggled person, of (the extent and nature of) victimization in that regard, may mean that a sufficiently sound perspective is not only unduly absent in the context of criminal justice thereupon, but that concrete action in terms of attending to victims needs', is also inadequate.

While structural variances in internationally agreed upon policy approaches to the two crime phenomena may explain differences in States' obligations with respect to trafficking and smuggling, not only in the sphere of criminal law enforcement, but also in relation to more general duties to provide protection to trafficked versus smuggled persons, it is argued that the difference in approach results in particular deficienties in protection from a human rights perspective in the case of smuggling *victims*.[2] As formulated by

1 See for an overview of such case law, the Factsheets 'Migrants in detention', 'Accompanied migrant minors in detention', 'Unaccompanied migrant minors in detention', 'Collective expulsions of aliens' and 'Dublin Cases' of the Court's Press Unit, last available at https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=#n1347890855564_pointer, on 3 August 2018. See also generally with regards to human rights of migrants, Reginald Appleyard (Ed.), The Human Rights of Migrants, Offprint of *International Migration* Vol. 38 (6) Special Issue 3/2000, Copublished by: International Organization for Migration (IOM), United Nations, last available at: http://publications.iom.int/system/files/pdf/migrants_human_rights.pdf, on 3 August 2018.

2 See generally, Tom Obokata, Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law, (hereafter: Tom Obokata, Smuggling of Human Beings from a Human Rights Perspective), 17 Int'l J. Refugee L. 394 (2005). See also in this regard, Theodore Baird, Understanding human

Obokata, '(t)rafficking of human beings is widely regarded as a human rights issue because of the involuntary manners in which people are transported and of subsequent exploitation inherent in the act', while 'smuggling may not be treated as such, because it is characterised merely as facilitation of illegal migration'.[3] As a consequence thereof, 'those smuggled can be regarded as criminals or their collaborators, and States may place greater emphasis on immigration control in order to prevent their flow'.[4] However, the 'smuggling of human beings can equally raise human rights concerns',[5] and 'the distinction between trafficking and smuggling can undermine the protection of the human rights of those smuggled, including refugees and asylum Seekers'.[6]

Illuminating and conceptualizing various 'human rights aspects of smuggling of human beings' by looking at the 'the causes, process and consequences of the act',[7] Obokata argues that the smuggling narrative should be 'redirected' 'into a human rights discourse'[8] and a 'rights-based approach' should be developed to 'address the act'.[9] Therein, for 'effective action', various routes and devices should be utilized within a 'holistic' human rights approach, 'which addresses multi-faceted aspects of smuggling, including the causes and the consequences', and 'provides a framework for understanding the nature of the problems intrinsic in smuggling and for seeking not only legal, but also political, social and economic solutions'.[10] Obokata includes within that holistic framework, the obligations of States to provide civil and criminal remedies for victims.[11]

While the latter obligation thus represents only one of various

smuggling as a human rights issue, DIIS Policy Brief, August 2013, (hereafter: Theodore Baird, Understanding human smuggling as a human rights issue), available at: https://www.diis.dk/files/media/publications/import/extra/pb2013_understanding_human_smuggling_baird_webversion_1.pdf.

3 Tom Obokata, Smuggling of Human Beings from a Human Rights Perspective, p. 395.

4 Ibid.

5 Ibid.

6 Ibid, p. 396.

7 Ibid, p. 414.

8 Ibid, p. 395.

9 Ibid, p. 396.

10 Ibid, p. 414-415.

11 Ibid, p. 405-407 and p. 414. See ibid, p. 414-415 for Obokata's further proposals in this context.

mechanisms which can and should be utilized to bring about necessary increased protection and a whole array of (both negative) and positive human rights obligations can be operative in diverse fields of law where smuggled persons are concerned, this contribution deals only with the particular instrument of criminal remedies for victims of human and migrant smuggling. Regarding the criminal justice positive obligations developed in the case law of the ECrtHR not only as a powerful tool which may be deployed to provide protection through its own devices, but also as a manner of galvanizing a broader shift in perspectives on victimization, the focus here will be limited to the basis which may be found in that case law for the inclusion of the crime of human or migrant smuggling in the catalogue of crimes with respect to which Council of Europe member states may be held to strict(er) standards with respect to the prevention, investigation, prosecution and sanctioning of perpetrators, with an eye on victim protection.

Viewing that case law, it is suggested in this contribution that the victim-centric criminal justice positive obligations framework developed by the ECrtHR in relation to 'high priority' crimes not only provides a suitable basis to accommodate comparable protection for victims of human or migrant smuggling, but that human rights considerations attached to that crime phenomenon rather also point to a strong need to include its victims under this type of elevated protection. At the same time, differences between existing international regulatory and policy frameworks relating to trafficking and smuggling and the rationale underlying them also show how it may be more difficult for the ECrtHR to include the latter crime phenomenon and its victims - at least as a general, broad, category - under the same type of stringent protection it is able to require in the context of other (high priority) crimes types. However, given the current critical situation of smuggled persons within the global 'migration crises', as well as strong role of the ECrtHR as a human rights actor, the Court may be said to be uniquely placed to bring about a necessary paradigm shift with respect to the protection needs of smuggled persons.

To that end, this contribution discusses how the ECrtHR has built up and deploys positive obligations in the particular sphere of criminal justice, using particular interpretative devices and doctrines in doing so and how it substantively selects certain types of crimes as giving rise to strict(er) positive obligations in this regard (at section 2). Drawing subsequently from ECrtHR case law regarding criminal justice positive obligations in the context of human *trafficking*, notably focusing therein on the ECrtHR's landmark judgment in *Rantsev v. Cyrpus and Russia*[12] in that regard, the contribution further discusses what the bases could be for similar protection in the case of migrant smuggling, and what difficulties may arise in negotiating the same type of protection for victims of the smuggling as opposed to those of trafficking, given important differences between the two crime types, including in the manner in which they are approached in (international) regulatory and policy frameworks (at section 3). Conclusions (at section 4) will round off with some remarks with respect to the ability of national Constitutional Courts to pinpoint urgent human and constitutional rights issues and develop and incentivize their own national authorities to develop strong protective policies in domains which may otherwise remain under addressed by other national and international stakeholders. Constitutional Courts may do so to independently, at their own national levels, but also be particularly successful therein in collaborations with other national and international judicial counterparts, where shared or similar (regional) problematics may be better resolved through an exchange of ideas and policies. The ECrtHR model for criminal justice positive obligations may provide a useful source of inspiration in this regard, both in a substantive sense, as well as in the 'procedural' manner in which the Court forms law in a highly heterogeneous, multi-levelled and therewith complex legal domain.

2. Positive obligations in the domain of Criminal Justice, interpretative devices and doctrines, marking priority crimes

Positive obligations under the ECHR represent a broad and variable category of duties and standards, which are attached to

12 ECrtHR 7 January 2010, *Rantsev v. Cyprus and Russia*, Appl. nr.: 25965/04.

different (types of) human rights and can be operative in diverse domains of law, thus not only in the sphere of criminal justice.[13] In their most basic construct, positive obligations can be contrasted with negative obligations. Whereas in both cases the addressee of the obligations is the State,[14] in the case of the latter, the State is called to refrain, in the exercise of its powers, from rights violating actions. In the case of the former, the State is called to take particular action, in order to ensure that human rights standards are achieved. Whereas some Convention provisions are (in part) already designed as a duty to act and thus can be said to already be formulated 'positively',[15] the ECrtHR has taken an expansive approach to the Convention, also reading positive obligations into rights which textually are constructed only in a negative format.

Starting from their first appearance in case law in the late 1960's in the Belgian linguistics case,[16] '(f)rom the time of that remarkable decision, the European Court has constantly broadened (…) (the category of positive obligations: FPÖ) with the addition of new elements, to the point where virtually all the standard-setting provisions of the Convention now have a dual aspect in terms of their requirements, one negative and the other positive'.[17] As such, the concept of positive obligations under ECrtHR case law is 'an essentially judge-made opus or structure', and at the same time '(…)

13 See generally with regard to positive obligations in the case law of the ECrtHR, Jean-François Akandji-Kombe, Positive obligations under the European Convention on Human Rights, *A guide to the implementation of the European Convention on Human Rights*, Human rights handbooks (hereafter: J.-F. Akandji-Kombe, Positive obligations under the ECHR), No. 7, Directorate General of Human Rights, Council of Europe, F-67075 Strasbourg Cedex, Council of Europe, 2007, 1st printing, January 2007, Printed in Belgium, last available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff4d, on 21 July 2018. See also ibid, p. 5 for Akandji-Kombe's reference to 'two important studies on the subject', namely Frédéric Sudre, Les obligations positives dans la jurisprudence européenne des droits de l'homme", *Revue trimestrielle des Droits de l'homme*, 1995, pp. 363 ff. and A.R. Mowbray, *The developmentof positive obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, Oxford – Portland Oregon, 2004.

14 See with respect to the issue of the (non-) accountability of non-State actors under human rights law and the need for re-examination of that position, Tom Obokata, Smuggling of Human Beings from a Human Rights Perspective, *inter alia*, p. 403-405.

15 J.-F. Akandji-Kombe, Positive obligations under the ECHR, p. 5.

16 Ibid, p. 5, referring to ECrtHR 23 July 1968, *Case 'Relating to certain aspects of the laws on the use of languages in education in Belgium' v. Belgium*, Appl. nrs.: 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; and 2126/64.

17 J.-F. Akandji-Kombe, Positive obligations under the ECHR, p. 5-6.

a major work which has been seen, and rightly so, as a 'decisive weapon' serving to give effect to the Convention rights'.[18]

Both of these features render the device of positive obligations at least sensitive in terms of legality. Thus, according to Akandji-Kombe, '(b)earing in mind that in most cases positive obligations have the effect of extending the requirements which states have to satisfy, the question of their legal basis is of major importance'.[19] Bound by the 'the general principle of attribution, which means that the Court is not competent to protect rights which do not have their basis in the Convention', the ECrtHR has therefore 'endeavoured to link every positive obligation to a clause of the Convention'.[20] With the legal construct of positive obligations having undergone evolutions,[21] the ECrtHR seemed to have settled on one format, 'systematically' basing positive obligations 'on a combination of the standard-setting provisions of the European text and Article 1 of that text'.[22]

That construct is important. According to Akandji-Kombe, in the first place, art. 1 ECHR (the text of which reads that '(t)he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention'), 'is seen more than ever as the cornerstone of the Convention system, to the point that it constitutes an independent source of general obligations - which are also positive obligations - on states'.[23] In the second place however, such 'general obligations' are only 'quasi-autonomous': they can be seen as autonomous in that 'they arise solely by virtue of Article 1 of the Convention', but 'their observance can be tested only on the occasion of an application alleging violation of one of the substantive rights secured by the European Convention', making them 'appear context-dependent, since they will necessarily have to be examined through the lens of a particular standard'.[24]

18 Ibid, p. 6.
19 Ibid, p, 7.
20 Ibid, p. 7-8.
21 Ibid, p. 8.
22 Ibid.
23 Ibid, p. 9.
24 Ibid.

Akandji-Kombe however also points to an 'even more recent' tendency on the part of the Court 'to infer positive obligations from a combination of standard-setting provisions and the general principle of the 'rule of law' or 'state governed by the rule of law', which the Court regards as 'one of the fundamental principles of a democratic society' and as 'inherent in all the articles of the Convention'.[25] According to him, '(i)n view of this affirmation of the inherent nature of this principle, one may wonder whether we are not moving towards the autonomy of each provision as regards the conditions of its internal guarantee'.[26]

Thus, by constructing a strong and broad basis for positive obligations in the ECHR, the Court gives itself substantial leeway to not only multiply member States' Convention duties (vis-à-vis those which would appear form the explicit text thereof), but also to manage and direct the substance of duties in this regard, by including a wide range of diverse and specific types of obligations under the heading of the positive. The willingness of the Court to take such bold steps, within a stance of judicial activism, represents a first important ingredient in the formula of expansive human rights protection which positive obligations entail. Not only is the Court prepared to extensively interpret individual rights so that they provide broad and varied coverage for (new) human rights issues (as they arise, as will be discussed below, including in the sphere of human trafficking), by relying on autonomous principles underlying the Convention, the Court is able to incorporate innovative concepts such as that of positive obligations, therewith adding new dimensions to the human rights guaranteed in the Convention across the board.

Indeed, the catalogue of positive obligations in ECrtHR case law, particularly the 'sum' thereof as they relate to all domains of law which can be brought under the scope of the Convention, is extensive and highly varied. At the same time, as a result of the Court's active and expansive policies in this field, the terrain of positive obligations can be difficult to navigate, also because

25 Ibid.
26 Ibid.

distinctions between various types of positive (as well as negative) obligations can be blurry (and overlap).

Typologies of negative and positive obligations may however be held to be relatively clear(er) in the specific sphere of criminal justice. An important distinguishing marker in that domain regards the object of protection, thus the rights bearer. In the 'classical' arrangement of roles in the criminal justice human rights relationship between States and rights bearers, the latter are persons who may be or are made the subject of criminal law enforcement by the State. In this relational arrangement, the Convention directs States to respect both 'substantive' and 'procedural' parameters.

In this context, substantive obligations in the Convention text can (mainly) be easily framed as negative, in this sense that they represent prohibitions and restrictions imposed on the State in their efforts to enforce the criminal law. Such substantive parameters may relate to (i) behaviours which may (or may not) be criminalized by a State, (ii) the manner in which criminalizations must be constructed and (iii) restrictive measures, including the imposition of sanctions following convictions, which may be imposed. Thus - looking just at the Convention text, excluding other relevant provisions added later in Protocols - the State may be restricted from criminalizing certain behavior as that behavior may fall under a sphere of freedom protected under the right to respect for private life under art. 8 ECHR or the freedoms such as those related to expression, thought, conscience or religion and assembly as guaranteed under articles 9, 10 and 11 ECHR. The substantive principle of legality in criminal law, as guaranteed in the non-derogable art. 7 ECHR may be a little more difficult to classify as giving rise to 'negative' or 'positive' obligations, in that it also entails quality standards for legal bases for criminalizations, but the prescripts thereof are traditionally formulated in a negative sense, in that there can be no crime or punishment without prior, clear prohibition by law, while judges are directed to not overstep via over-extensive interpretation. Articles such as 3 (prohibiting ill-treatment and torture) and 8 ECHR likewise negatively direct to refrain from acts violating the rights protected by those provisions in the course of

the application of criminal procedural investigative methods, as art. 5 ECHR (guaranteeing the right to liberty and security) prohibits the application of measures entailing deprivations of liberty unless under substantive conditions prescribed in that provision. Art. 3 and art. 4 ECHR (protecting against slavery and servitude), prohibit the application of sanctions offensive to the rights contained therein, while art. 2 ECHR restricts States in terms of the construct of absolute life sentences and, in combination with the pertinent provisions in later Protocols to the Convention, excludes the death penalty as a possible sanction.

Procedural obligations pertinent to criminal justice can be more difficult to classify in terms of the positive/negative dichotomy, as (aspects thereof) thereof may be construed as representing both types. Thus, in the context of art. 5 ECHR, in deprivations of liberty relating to criminal law enforcement, States must comply with certain procedural standards which may be equated with directives to refrain from applying such measures unless those standards are met, but may also be understood as duties of diligence imposed upon States to - within minimum guarantees, but in as far as possible - to achieve procedural integrity in the process of application. In the same manner, obligations flowing forth from the right to a fair trial in art. 6 ECHR, may be depicted in both a negative and positive light. While the unqualified right to a fair trial can be understood as a dictate to not conduct criminal proceedings in an unfair manner, the (many) diverse obligations contained in that provision may also be read as relative quality standards, which have no absolute ceilings, but must be evaluated together in light of the 'fairness as a whole' standard, meaning that States must actively aspire to comply with diverse fairness dictates, without clear negative boundaries always being set in that regard.

Turning then to the 'victim-centric' positive obligations case law meant here, the rights bearer is not the object of criminal law enforcement, but is the victim of a crime, which may correspond to a human rights violation. The relationship between the State and the rights bearer is thus entirely different in this context: here the State does not seek to impose the criminal law against the rights bearer,

but is obliged to enforce the criminal law for the purpose of his or her protection. A further innovative aspect of such positive obligations - and second important distinguishing marker - relates to the fact that the crime at issue need not be committed ('vertically') by or on behalf of the State, but may also be committed 'horizontally', thus by a non-State actor. As the norm addressee of the ECHR is the State, horizontal violations require a further construct to engage responsibility of the State, and victim-centric positive obligations fill that 'attribution void'.

A second important step in the development of victim-centric positive obligations was thus the recognition on the part of the Court that States have obligations not only with respect to acts or omissions of their own agents, but also with respect to those of others. While such positive obligations are attached to (and are coloured by) diverse rights (including via their 'gravity'), the Court maintains a general framework when it comes to the context of criminal justice. Thus, with respect to all Convention rights to which positive obligations have been attached in case law (such as the right to life in art. 2 ECHR, the prohibition of ill treatment and torture in art. 3 ECHR, the right to respect for private life in art. 8 ECHR, the freedoms of expression and assembly in respectively articles 10 and 11 ECHR, (in conjunction with other provisions), the prohibition of discrimination in art. 14 ECHR, and of course, the prohibition against slavery and servitude in art. 4 ECHR), a set of the same basic principles apply.

In over-arching form, these are that: 'although the essential object of many provisions of the Convention is to protect the individual against arbitrary interference by public authorities, there may in addition be positive obligations inherent in an effective respect of the rights concerned'.[27] Thus, in relation to diverse Convention rights, the Court holds that 'the genuine and effective exercise' thereof 'does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of relations between individuals',[28] so that '(i)n certain cases, the State

27 ECrtHR 18 June 2002, *Öneryıldız v. Turkey*, Appl. nr.: 48939/99, par. 144.

28 ECrtHR 12 September 2011, *Palomo Sánchez e.a. v. Spain*, Appl. nrs.: 28955/06, 28957/06,

has a positive obligation to protect (…), even against interference by private persons (…)'.[29]

As for the content of victim-centric positive obligations, these are divided by the Court in two types, namely the substantive and the procedural. In their substantive aspect, positive obligations can be further distinguished in two types of duties. In the first place, under their duty to safeguard the rights of those within their jurisdiction, States are required to put in place 'effective criminal law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and punishment of breaches of such provisions',[30] thus also to have adequate operational, organic and institutional abilities available. In the second place, this duty can also imply 'in appropriate circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual (…) from the criminal acts of another individual'.[31] In the first variant, a substantive violation may occur where a State has not guaranteed adequate protection in that certain behavior is not adequately criminalized or enforcement thereof is not guaranteed in the abstract. In the second variant, the substantive obligation is to actually to prevent a concrete crime from occurring.

In their procedural aspect, positive obligations entail the duty to effectively respond to horizontal human rights violations through the provision of remedies. This duty does not necessarily have to constitute a criminal justice response for all types of horizontal violations, as other types of remedies, such as administrative, civil or disciplinary may be adequate.[32] For some types of horizontal

28959/06, 28964/06, 28389/06 and 28961/06, par. 59 (this judgment concerns a civil case relating to dismissal by way of reprisal for belonging to a trade union and publications in the union's newsletter, thus in relation to articles 10 and 11 ECHR, ibid, par. 3).

29 Ibid.

30 *Rantsev v. Cyprus and Russia*, par. 218.

31 Ibid.

32 In the context of medical malpractice, the Court has held that '(…) if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case' and that '(i) n the specific sphere of medical negligence, 'the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling

violations however, only a criminal justice response will suffice. Where a criminal response is required, effectiveness requirements can apply to the entire chain of enforcement. As such, shortcomings may lie in the investigation of a crime, which may have been flawed in that insufficient efforts were factually made or could not lead to adequate results because of legal issues, such as the unavailability of investigative competencies.[33] Shortcomings may also relate to (the quality) of a prosecutorial decision.[34] In both cases, thus with respect to the effectiveness of investigations and prosecutorial decisions, in the event of cross-border cases, more than one member state can be called to exercise (extra-territorial) jurisdiction, including the obligation to co-operate and provide mutual legal assistance.[35]

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any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged' (…)', ECrtHR 8 July 2004, *Vo. v. France*, Appl. nr.: 53924/00, par. 90. See however more recent judgments in the medical field, in which the Court has found violations due to the inadequacy of a criminal justice response, ECrtHR 9 April 2013, *Şentürk and Şentürk v. Turkey*, Appl. nr.: 13423/09 and ECrtHR 30 August 2016, *Aydoğdu v. Turkey*, Appl. nr. 40448/06.

33 See ECrtHR 12 December 2008, *K.U. v. Finland*, Appl. nr.: 2872/02, in which the applicant complained that at the time of an invasion of his private life, no effective remedy existed under Finnish law to 'reveal the identity of the person who had put a defamatory advertisement on the Internet in his name' (ibid, par. 35). In that case, 'at the time, the operator of the Internet server could not be ordered to provide information identifying the offender' (ibid, par. 46), because no such investigative power existed. The Court found in this case that '(a)n effective investigation could never be launched because of an overriding requirement of confidentiality', ibid, par. 49. While the Court considered that 'freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected', it also held that such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others', finding that it had been 'the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context', ibid. As such a framework was not in place at the material time, Finland had not been able to discharge its positive obligations with respect to the applicant, ibid.

34 See for an illustration, ECrtHR 10 January 2012, *Biser Kostov v. Bulgaria*, Appl. nr.: 32662/06, in which the Court, 'while acknowledging the fact that the prosecutor has a certain discretion when assessing the evidence and deciding whether to bring an accused to trial', considered that 'in the particular circumstances of the instant case, by discontinuing the criminal proceedings on four occasions with identical reasons despite court findings which disproved the prosecutor's position and even explicitly stated that there was sufficient evidence to bring the accused to trial, the prosecution authorities failed to act diligently and also unjustifiably delayed the proceedings', ibid, par. 83. See also, with respect to prosecutorial decisions in criminal proceedings in multiple states and the effect of decisions of authorities of one state on prosecutorial possibilities in another: ECrtHR 22 May 2014, *Gray v. Germany*, Appl. nr.: 49278/09.

35 See in that regard *Rantsev and Cyprus v. Russia*, to be discussed below and the pending judgment of the Grand Chamber in *Güzelyurtlu e.a. v. Cyprus and Turkey*, Appl. nr. 36925/07. See for the chamber judgment in that last case: ECrtHR 4 April 2017, *Güzelyurtlu e.a. v. Cyprus and Turkey*, Appl. nr.: 36925/07.

An effective response under procedural positive obligations may finally also extend to the duty to select sufficiently serious charges in prosecution and conviction and to impose adequate sanctions, properly reflecting the gravity of the human rights violation.[36]

Both in their substantive and procedural aspects, positive obligations clearly can pose high standards and present member starts with great difficulties, if unchecked. In that light, while maintaining a protective approach, the Court at the same time recognizes their expansive nature and the difficulties their open-ended structure can bring with them. As such, the Court also holds generally that 'the scope of any positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources'.[37] Thus, in the context of the right to life, '(n)ot every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materializing. For the Court to find a violation of the positive obligation to protect life, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.[38]

Furthermore, the duty to enforce the criminal law from the viewpoint of the protection of victims of crime must be balanced against the obligations (both negative and positive), such as those enumerated above, relating to the rights of persons against whom the criminal law is enforced (thus the suspects or perpetrators of the crimes). As such, in the delineation and evaluation of positive obligations, '(a)nother relevant consideration is the need to ensure

36 See in that light, ECrtHR 30 November 2004, *Öneryıldız v. Turkey*, Appl. nr.: 48939/99 and ECrtHR 1 June 2010, Gäfgen v. Germany, Appl. nr.: 22978/05.

37 *Rantsev v. Cyprus and Russia*, par. 219.

38 Ibid.

that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention'.[39]

It may be evident further that a duty to act is intrinsically less easy to clearly circumscribe than a duty to refrain from certain behavior. As a result, positive obligations indeed necessarily represent more 'open-ended' and therewith broader norms than negative variants. Thus, the 'casuistic' character of ECrtHR case law generally, which results from the strong influence exercised by the concrete legal and factual context of individual cases, can be further compounded in the context of positive obligations, in the appraisal of which a great number of variables may be operative. Testing in the sphere of positive obligations can therewith be intricate, the Court in this regard decidedly maintaining an open framework: '(i)n determining whether or not a positive obligation exists, regard must be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which is inherent throughout the Convention'.[40] Importantly, the Court also refers in this context to the connection between the scope of positive obligations (and the evaluation of national performance) and domestic circumstance, holding that scope 'will inevitably vary, having regard to the diversity of situations obtaining in Contracting States, the difficulties involved in policing modern societies and the choices which must be made in terms of priorities and resources'.[41]

A third important aspect of positive obligations case law reveals itself here, namely the sensitivity of the Court to diversity and variability, not only in the concrete scenario of a certain case, but also within the highly heterogeneous landscape of the forty-seven member states which fall under its supervisory jurisdiction. The Court's reference to diversity in the sphere of positive obligations

39 ECrtHR 28 October 1998, *Osman v. The United Kingdom*, Appl. nr.: 23452/94, par. 116.

40 ECrtHR 16 March 2000, *Özgür Gündem v. Turkey*, Appl. nr.: 23144/93, par. 43 (this judgment also relates to the freedom of expression, ibid, par. 1).

41 *Özgür Gündem v. Turkey*, par. 43.

reflects a broader interpretative stance it takes at large in its case law, which in turn represents a fourth important aspect of positive obligations case law, namely that in this context, the Court also deploys particular (self-developed) interpretative devices and mechanisms it utilizes more generally to navigate open and complex terrains.

Such instruments include the devices as the principle of subsidiarity and the margin of appreciation and 'best' or 'better-placed' doctrines, which generally allow the Court to take local circumstances in due consideration and or defer to choices of national authorities. While these devices are particular mirrored in the Court's nod to diversity in the context of its general principles on positive obligations, other interpretative tools in the ECrtHR's arsenal also play a fundamental role in manner in which the Court is able to manage its case law in this regard. Amongst those is the interpretative maxim that '(t) he Convention (…) cannot be interpreted in a vacuum and should as far as possible be interpreted in harmony with other rules of international law concerning the international protection of human rights (…)' and that '(i)ndeed, as follows from Article 31 § 3 (c) of the 1969 Vienna Convention on the Law of Treaties, the Convention should as far as possible be interpreted in harmony with other rules of international law of which it forms part, including those relating to the international protection of human rights'.[42] In the context of positive obligations, particularly where the Court seeks to take (bold) new steps, either to expand the scope of an individual right to include a new situation under human rights protection, or more generally to extend the reach of a positive obligation, support from other international (and sometimes national) sources may work to fortify and legitimize the Court's choices. The Court's readiness further to consider evidence from a variety of (international, governmental and non-governmental sources), particularly with respect to the realities of (crime) issues and broader patterns which may exist in the systems of member states, increases its ability to appraise potential shortcomings more concretely. Likewise, other general interpretative devices, such as the 'consensus method',

42 ECrtHR 4 April 2018, *Correia de Matos v. Portugal*, Appl.nr: 56402/12, par. 134.

use of comparative analysis, and its methodology of 'practical and effective (thus not theoretical and illusory)' and 'dynamic and evolutive' interpretation of the Convention as a 'living instrument', allow the Court an eye for detail (and diversity) necessary to track the realities of current situations, establish common European opinion thereupon and assess the capabilities of member states at particular times, so that it may determine the proper parameters for and reasonableness of standards to be set.

Finally, a fifth important aspect of the general anatomy of criminal justice positive obligations lies in another interpretative framework which the Court utilizes in their application, namely that of variance in accordance with the gravity of the human rights violation (equating to the gravity of the crime) and or the features of the victim rights bearer. This mechanism is deployed by the Court in a general sense, in the course of 'normal' appraisals of the extent of positive obligations in concrete cases, given the horizontal violation at issue and the type of victim involved. In doing so, the Court concretely determines the scope of duties in areas where the existence of positive obligations has already been recognized in the abstract. Evaluations in this sense can lead to the outcome in certain cases, that - as mentioned above - a criminal justice response was not required and that another type of remedy was sufficient. In other cases, variance can bring with it that, although a criminal justice response would generally be required, a State *in concreto* cannot be held to not have complied with its positive obligations, in light of the specific horizontal violation at issue.[43] Contrarily, the 'variance tool' can also lead to the outcome that positive obligations may be particularly stringent. It is in this manner that the ECrtHR can, as mentioned in the introduction, identify certain types of crimes or types as particularly grievous and therewith require protection, which can be held to be *elevated*, even under the 'normal' framework of victim-centric positive obligations.

Generally speaking, thus in case law at large, regarding both positive and negative obligations, as well as persons who are the

43 See for illustrations in which the Court has applied a framework of variance in this regard, ECrtHR 12 November 2013, *Söderman v. Sweden*, Appl. nr.: 5786/08 and ECrtHR 31 March 2016, *A. B. and C. v. Latvia*, Appl. nr.: 30808/11.

victims of crime or those against whom criminal law enforcement takes place, minors represent an important category who are structurally identified as rights bearers to be provided with increased protection. Victim-centric positive obligations case law clearly shows the set inclination of the Court in this regard. Thus, elevated protection in the sense meant here will be at issue generally where crimes against children are concerned. Duties can become more stringent with respect to all variants of positive obligations. Thus, in *K.U. v. Finland* mentioned above, the Court held that '(w)here the physical and moral welfare of a child is threatened, such injunction assumes even greater importance. The Court notes in this connection that sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives (…)'.[44] In *Söderman v. Sweden*, in which the applicant complained that her stepfather had been acquitted of sexual molestation because of the construct of the pertinent provision under Swedish law,[45] the Court held that '(i)n respect of children, who are particularly vulnerable, the measures applied by the State to protect them against acts of violence falling within the scope of Articles 3 and 8 should be effective and include reasonable steps to prevent ill-treatment of which the authorities had, or ought to have had, knowledge and effective deterrence against such serious breaches of personal integrity (…)', that '(s)uch measures must be aimed at ensuring respect for human dignity and protecting the best interests of the child (…).'[46] Here again, the gravity of the horizontal violation at issue will create variance in the strictness of the positive obligation: 'regarding (…) serious acts such as rape and sexual abuse of children, where fundamental values and essential aspects of private life are at stake, it falls upon the member States to ensure that efficient criminal-law provisions are in place (…)'.[47]

44 *K.U. v. Finland*, par. 46.
45 *Söderman v. Sweden*, par. 60.
46 Ibid, par. 81.
47 Ibid, par. 82.

Outside the sphere of minors, the Court can however also 'mark' certain types of crime as particularly serious and, demanding strict protection in such spheres, can create a momentum in Europe to regard them as high priorities and increase law enforcement efforts. Clear examples of crime phenomena with regards to which the Court has emphasized duties are to be found in the context of not only (sexual) offences against children, but also with respect to domestic violence (and discrimination) against women[48] and human trafficking.

The question then is, how does the Court select particular types of crimes for this type of strict scrutiny? In his concurring opinion attached to the Court's judgment in *Söderman v. Sweden*, Judge Pinto de Albuquerque provides a basis for an answer. Remarking in that opinion that '(o)bligations to criminalise are not new under the Convention', that the Court 'has already considered that rape, forced labour, wilful attack on the physical integrity of a person, human trafficking and the disclosure of certain confidential items of information must be criminalised, but negligent violations of the right to life and physical integrity must not', and that '(w)ith regard to children, the Court has established the principle that any wilful offence against the physical and moral welfare of children should be criminalized and punished with a deterrent penalty', he marks the offence of child pornography as 'certainly' being among those, 'having regard to its serious ethical censurability and to its reprehensibility under international customary and treaty law'. In that regard, he refers to the prolific activity on the part of the international and national legislative community in this context, citing such sources which create an obligation to criminalize this offence, including instruments of the United Nations, the International Labour Organisation, the Council of Europe, the European Union, as well as to the fact that in Europe, forty-one countries have criminalized child pornography, while in the United States, a pertinent criminalization exists both at the federal level as well in all fifty States.

48 See the Court's landmark judgment in that regard in ECrtHR 9 June 2009, *Opuz v. Turkey*, Appl. nr.: 33401/02 and more recently, ECrtHR 23 May 2017, *Bălşan v. Romania*, Appl. nr.: 49645/09.

As such, he concludes that '(i)n view of this broad consensus and constant practice, the criminalization of child pornography, namely, any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes, is now part of international customary law, binding on all States'.

Thus, the explanation which Judge Pinto de Albuquerque offers as to which crimes can rank high on stringent protection lists is are those which intrinsically represent grievous human rights violations, particularly if a strong (international) consensus already exists with respect to increased action. If such a basis is already in place, the ECrtHR can propel and catalyze protection incentives further, by binding member states to further to such consensus through the status and force of its case law.

As for the manner in which the ECrtHR can clearly communicate to member states that a particular crime phenomenon is to be brought under elevated protection, besides seeking reinforcement in other (international) sources, the Court can use various further devices in this regard, next to its foremost instrument of establishing violations in certain scenario's, therewith rejecting the performance of a member state in a particular case as insufficient. Amongst these is the reasoning it uses in judgments in which it (first) identifies a particular crime as requiring increased criminal law enforcement efforts. While strong reasoning in the context of operational outcome can send a clear message by itself, the Court can also underscore its message with further particularly powerful missives. In *Opuz v. Turkey*, the ECrtHR clearly framed its policy with respect to domestic violence and discrimination against women by remarking that, 'before embarking upon' the concrete issues in that case, it wished to 'stress that the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present case', that '(i)t is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected' and that

'(a)ccordingly', it would 'bear in mind the gravity of the problem at issue when examining the present case'.[49] Addressing not only the respondent, but also all other Council of Europe member states in this manner, the Court made clear that the *Opuz* judgment should be regarded by all as a basis for a shift in both policy and action. In *Bălşan v. Romania*, the Court underlined its judgment in that case through reference to a formula it commonly deploys when electing to make a strong human rights decision, namely that 'under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a State's obligation to protect the rights of those under its jurisdiction is adequately discharged (…)'.[50]

Again, as mentioned above, the Court's willingness to accept evidence of broader patterns of shortcomings in the systems of diverse member states, provided by various types of actors, can also demonstrate the gravity of its message. In *A. v. Croatia*, the Court reflected how it had held in *Opuz v. Turkey*, that '(w)here an applicant produces prima facie evidence that the effect of a measure or practice discriminatory, the burden of proof will shift on to the respondent State, to whom it falls to show that the difference in treatment is not discriminatory'.[51] As such, in that case, 'on the basis of reports submitted by the applicants and prepared by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, the Diyarbakır Bar Association and Amnesty International', the Court found 'that general and discriminatory judicial passivity in Turkey, albeit unintentional, had mainly affected women' and considered that the violence suffered by the applicant and her mother could be regarded as gender-based discriminatory violence.[52] The Court also held in that case that, '(d)espite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and the impunity enjoyed by the aggressors, as found in that case, indicated that

49 *Opuz v. Turkey*, par. 132.
50 *Bălşan v. Romania*, par. 58.
51 ECrtHR 14 October 2010, *A. v. Croatia*, Appl. nr.: 55164/08, par. 94.
52 Ibid, par. 95.

there had been insufficient commitment to take appropriate action to address domestic violence (…)'.[53] Furthermore, '(i)n support of these findings the Court relied on the Turkish Government's recognition of the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence, and judicial passivity in providing effective protection to victims (…)'.[54] In that regard, '(r)eports submitted indicated that when victims reported domestic violence to police stations, police officers did not investigate their complaints but sought to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this connection, police officers considered the problem as a family matter with which they could not interfere (…)' and 'also showed that there were unreasonable delays in issuing injunctions and in serving injunctions on the aggressors, given the negative attitude of the police officers. Moreover, the perpetrators of domestic violence did not seem to receive dissuasive punishments, because the courts mitigated sentences on the grounds of custom, tradition or honour (…)'.[55]

At the same time, the absence of such evidence can lead to the reverse outcome, that the Court finds it not to be proven that protection levels are generally deficient, which indeed was the end result in *A. v. Croatia*. In that case, the Court noted 'at the outset that (…) the applicant has not submitted any reports in respect of Croatia of the kind concerning Turkey in the Opuz case' and held that '(t)here is not sufficient statistical or other information disclosing an appearance of discriminatory treatment of women who are victims of domestic violence on the part of the Croatian authorities such as the police, law-enforcement or health-care personnel, social services, prosecutors or judges of the courts of law'.[56] As for 'the national strategies for protection against domestic violence adopted in 2008 and 2010', the Court held likewise that 'the applicant's allegation that the training of relevant experts had been insufficient

53 Ibid.
54 Ibid, par. 96.
55 Ibid.
56 Ibid, par. 97.

is unsupported by any relevant examples, data or reports and cannot in itself lead to a conclusion of gender discrimination in the treatment of incidents of domestic violence in Croatia.'[57] The Court also found the information submitted with regards to 'the statistics concerning the implementation of protective measures' to be 'incomplete and unsupported by relevant analysis and thus not capable of leading the Court to draw any conclusions on that basis',[58] bringing it to the conclusion that the applicant had not 'produced sufficient prima facie evidence that the measures or practices adopted in Croatia in the context of domestic violence, or the effects of such measures or practices, are discriminatory'.[59]

Further illustrations of how the Court goes about conveying messages that it wishes to elevate protection in the context of certain types of crimes may be prolific. What is important is that the Court does do so and that there are certain algorithms within that process, both in terms of which crime phenomena are to be selected as 'prioritized', as well as how that is communicated by the ECrtHR. Taking that as a point of departure, the question then may be asked if the requisite elements for 'priority selection' can also be found in the context of the crime of human and migrant smuggling. To that end, it is useful to turn to context of the 'related' crime of human trafficking, which in ECrtHR case law has already gained momentum as a phenomenon requiring increased criminal law enforcement efforts. Positive obligations case law of the ECrtHR with respect to human trafficking will be discussed below, with an eye on determining whether or not a basis can be found therein for the elevated protection also in the sphere of the crime of human or migrant smuggling.

3. Positive obligations with respect to human trafficking

The ECrtHR first recognized the existence of victim-centric positive obligations in relation to human trafficking in its 2005 judgment in *Siliadin v. France*,[60] when it importantly brought this

57 Ibid, par. 102.
58 Ibid, par. 103.
59 Ibid, par. 104.
60 ECrtHR 26 July 2005, *Siliadin v. France*, Appl.nr.: 73316/01. See for an overview of ECrtHR

crime under the scope of art. 4 ECHR. In that case, the applicant, a Togolese national, had been brought to France as a minor by a relative and forced, as an illegal immigrant without residence papers, to work, eventually for several years against her will, as an unpaid servant in the household of a Mr. and Mrs. B..[61] After authorities were alerted to the situation of the applicant by a neighbour, criminal proceedings were brought against Mr. and Mrs. B. under pertinent provisions of French law for 'having obtained (…) the performance of services without payment or in exchange for payment that was manifestly disproportionate to the work carried out, by taking advantage of that person's vulnerability or state of dependence; with having subjected an individual to working and living conditions that were incompatible with human dignity by taking advantage of her vulnerability or state of dependence; and with having employed and maintained in their service an alien who was not in possession of a work permit'.[62] While in the course of domestic proceedings, the first instance the court found some of the charges to have been made out and convicted Mr. and Mrs. B., sentencing them *inter alia* to twelve months' imprisonment (seven months of which were suspended) and ordering them to pay a fine and damages to the applicant,[63] they were acquitted of all charges in appeal.[64] That judgment was quashed in cassation, but 'only in respect of the provisions dismissing the civil party's requests for compensation in respect of the offences provided for in Articles 225-13 and 225-14 of the Criminal Code, all other provisions being expressly maintained'.[65] Following remittal, the Versailles Court of Appeal made an award of compensation to the applicant.[66]

judgments relating to human trafficking, the Factsheet 'Trafficking in human beings', of the Court's Press Unit, and the Factsheet 'Slavery, servitude, and forced labour' last available at: https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=#n1347890855564_pointer, on 3 August 2018 and the Guide on Article 4 of the European Convention on Human Rights. Prohibition of slavery and forced labour, prepared by the Directorate of the Jurisconsult and last updated on 30 April 2018, last available at: https://www.echr.coe.int/Pages/home.aspx?p=caselaw/analysis/guides&c=#, on 3 August 2018.

61 See for the facts in *Siliadin v. France*, ibid, pars. 9-19.

62 Ibid, par. 20.

63 Ibid, pars. 21-28.

64 Ibid, pars. 29-40.

65 Ibid, par. 43.

66 Ibid, par. 44.

At the ECrtHR, the applicant complained that 'the national authorities had never acknowledged, expressly or in substance, her complaint that the State had failed to comply with its positive obligation, inherent in Article 4, to secure tangible and effective protection against the practices prohibited by this Article and to which she had been subjected by Mr and Mrs B', that '(o)nly a civil remedy had been provided'[67] and that the pertinent provisions in the French Criminal Code 'were too open and elusive, and in such divergence with the European and international criteria for defining servitude and forced or compulsory labour that she had not been secured effective and sufficient protection against the practices to which she had been subjected'.[68]

Pointing out that it had already established that 'with regard to certain Convention provisions, the fact that a State refrains from infringing the guaranteed rights does not suffice to conclude that it has complied with its obligations under Article 1 of the Convention',[69] referring to its case law on art. 8 and 3 ECHR in that regard,[70] the Court considered that 'together with Articles 2 and 3, Article 4 of the Convention enshrines one of the basic values of the democratic societies making up the Council of Europe'.[71] Referring further to the decision of the European Commission in *X. and Y. the Netherlands*,[72] in which the Commission had 'proposed (…) that it could be argued that a Government's responsibility was engaged to the extent that it was their duty to ensure that the rules adopted by a private association did not run contrary to the provisions of the Convention, in particular where the domestic courts had jurisdiction to examine their application'[73] and the fact that, in referring to that case, the French Government 'accepted (…) that positive obligations did appear to exist in respect of Article 4',[74] the Court then conducted an analysis of diverse international instruments.

67 Ibid, par. 58.
68 Ibid, par. 59.
69 Ibid, par. 77.
70 Ibid, pars. 78-81.
71 Ibid, par. 82.
72 ECommHR 3 May 1983, *X. and Y. v. The Netherlands*, Appl. nr.: 9327/81.
73 Ibid, par. 83.
74 Ibid, par. 84.

Referring in that regard to art. 4 § 1 of the Forced Labour Convention, adopted by the International Labour Organisation (ILO) on 28 June 1930 and ratified by France on 24 June 1937, art. 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 30 April 1956, which came into force in respect of France on 26 May 1964, 'with particular regard to children',[75] articles 19 § 1 and 32 of the International Convention on the Rights of the Child of 20 November 1989, which came into force in respect of France on 6 September 1990 and findings of the Parliamentary Assembly of the Council of Europe,[76] that 'today's slaves are predominantly female and usually work in private households, starting out as migrant domestic workers (…)',[77] the Court considered that '(i) n those circumstances, (…) limiting compliance with Article 4 of the Convention only to direct action by the State authorities would be inconsistent with the international instruments specifically concerned with this issue and would amount to rendering it ineffective'.[78] Thus, the Court found that '(…) it necessarily follows from this provision that States have positive obligations, in the same way as under Article 3 for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice'.[79]

Having established the existence of positive obligations in art. 4 ECHR in this respect, the Court further found that the applicant, who had been 'at the least, subjected to forced labour within the meaning of Article 4 of the Convention at a time when she was a minor',[80] and determined that, while the evidence did 'not suggest that she was held in slavery in the proper sense, in other words that Mr and Mrs B. exercised a genuine right of legal ownership over her, thus reducing her to the status of an "object"',[81] that, as a minor, the applicant had been held in servitude within the meaning

75 Ibid, par. 87.
76 Ibid, pars. 83-88, see also pars. 46-51 for 'relevant law' cited by the Court in this case under that heading.
77 Ibid, par. 88.
78 Ibid, par. 89.
79 Ibid.
80 Ibid, par. 120.
81 Ibid, par. 122.

of Article 4 ECHR.[82] As for the question whether French law and its application at the time 'had such significant flaws as to amount to a breach of Article 4 by the respondent State',[83] the Court held that 'slavery and servitude are not as such classified as offences under French criminal law'[84] and that the provisions cited by the French Government in that regard 'do not deal specifically with the rights guaranteed under Article 4 of the Convention, but concern, in a much more restrictive way, exploitation through labour and subjection to working and living conditions that are incompatible with human dignity'.[85] As for whether these provisions nevertheless 'provided effective penalties for the conduct to which the applicant had been subjected',[86] the Court, referred to its own case law with respect to the fact that 'children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity'.[87] Considering that in cases where 'fundamental values and essential aspects of private life are at stake', '(e)ffective deterrence' is also 'indispensable' and 'can be achieved only by criminal-law provisions',[88] as well as the fact that it had been recognized at the national level that the pertinent provisions under French law 'were open to very differing interpretations from one court to the next, as demonstrated by this case',[89] the Court held that '(i)n those circumstances, (…) the criminal-law legislation in force at the material time did not afford the applicant, a minor, practical and effective protection against the actions of which she was a victim', emphasizing that 'the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies (…).'[90]

82 Ibid, par. 129.
83 Ibid, par. 130.
84 Ibid, par. 142,
85 Ibid, par. 142.
86 Ibid.
87 Ibid, par. 143.
88 Ibid, par. 144.
89 Ibid, par. 147.
90 Ibid, par. 148.

Having already established a strong basis for elevated protection by finding a violation of art. 4 ECHR in *Siliadin*[91] - using diverse interpretative maxims and devices mentioned above to that end - the ECrtHR would further emphasize its strong policy with respect to human trafficking in its landmark judgment in *Rantsev v. Cyprus and Russia*, of 2010. In that case, the applicant's daughter had travelled from Russia to Cyprus on a so-called 'artise visa', which had been applied for by X.A., the owner of a cabaret in Limassol and her prospective employer. The visa application was accompanied by documentation, including X.A.'s bond pledging that as an immigrant, Ms. Rantseva would not become in of relief for a period of five years and that any costs incurred by the State in that regard would be repaid by him.[92] After Ms. Rantseva was granted a temporary residence permit and subsequently a work permit (until 8 June 2001), she began to work in a cabaret owned by X.A. and managed by his brother, M.A., living in an apartment with other young women working in X.A's cabaret.[93] However, a few days after she started working, Ms. Rantseva left the apartment, taking all her belongings, according to her flat mates having left a note stating that she was tired and wished to return to Russia.[94] Having received this information, M.A. informed the Immigration Office in Limassol that Ms. Rantseva had abandoned her place of work and residence, as he stated, so that she would be arrested and expelled from Cyprus so that he could bring another girl to work in the cabaret. This report did not however lead to Ms. Rantseva's name being entered on the list of persons wanted by the police'.[95]

On 28 March 2001, having been informed that Ms. Rantseva had been seen in a discotheque, M.A. first called the police, asking for her arrest, but subsequently went to the discotheque together with a security guard from his cabaret and took her to Limassol Central Police Station, where two police officers were on duty.[96] There, '(h)e

91 Ibid, par. 149.
92 Ibid, par. 15.
93 Ibid, par. 16.
94 Ibid, par. 17.
95 Ibid.
96 Ibid, pars. 18-19.

made a brief statement in which he set out the circumstances of Ms. Rantseva's arrival in Cyprus, her employment and her subsequent disappearance from the apartment on 19 March 2001'.[97] After determining that Ms. Rantseva could not be regarded as 'illegal' and having made contact with and received instructions from the AIS (Police Aliens and Immigration Service), (to not detain her and to have her employer bring her back for investigation the next day), the police officers contacted M.A. who, under protest, took her to stay at the home of another employee.[98] In their statement, the police officers said that Ms. Rantseva did not appear drunk at the police station, while the officer in charge stated that '(…) she was applying her make-up'.[99] After M.A. took Ms. Rantseva to the home of another employee, M.P., where the latter lived with his wife in a split-level apartment with an entrance located on the fifth floor of a block of flats, she was placed in a room on the second floor of the apartment, while M.P., his wife and M.A. went to sleep, the latter in the living room (through which it was necessary to pass through to reach the front door).[100] According to M.A., Ms. Rantseva '(…) just looked drunk and did not seem to have any intention to do anything' while he 'did not do anything to prevent her from leaving the room (…)'.[101]

Early the next morning, Ms. Rantseva was found dead in the street below the apartment, with a bedspread looped through the railing of a balcony adjoining the room Ms. Rantseva had been staying in.[102] Following a criminal investigation, including an autopsy (which concluded that Ms. Rantseva had sustained injuries from her fall and that the fall was the cause of her death),[103] the Limassol District court decided by inquest that Ms. Rantseva had 'in an attempt to escape from the afore-mentioned apartment and in strange circumstances, jumped into the void as a result of which

97 Ibid, par. 19.
98 Ibid, pars. 19-20.
99 Ibid, par. 20.
100 Ibid, pars. 21-22.
101 Ibid, par. 21.
102 Ibid, par. 25.
103 Ibid, par. 35.

she was fatally injured (…)' and that she died 'in circumstances resembling an accident, in an attempt to escape from the apartment in which she was a guest (…),' concluding that there was no evidence to suggest criminal liability of a third person for her death.[104] Having attempted to participate in proceedings in Cyprus and following numerous requests for further investigation, both through his own efforts and through the assistance of Russian authorities,[105] the applicant eventually turned to the ECrtHR.

At the Court, with respect to Cyprus, the applicant complained under articles 2, 3, 4, 5 and 8 ECHR about 'the lack of sufficient investigation into the circumstances of the death of his daughter, the lack of adequate protection of his daughter by the Cypriot police while she was still alive and the failure of the Cypriot authorities to take steps to punish those responsible for his daughter's death and ill-treatment'.[106] With respect to Russia, he complained under articles 2 and 4 ECHR that the Russian authorities had failed 'to investigate his daughter's alleged trafficking and subsequent death and to take steps to protect her from the risk of trafficking'.[107]

The Court found multiple violations in this case. As for the complaints concerning Cyprus, the Court found a violation of art. 2 ECHR, in its procedural aspect, due to the failure to conduct an effective investigation into Ms. Rantseva's death. In that regard, the Court determined shortcomings in that (i) the broader context of her arrival and stay in Cyprus had not been adequately investigated, in order to assess whether there was a link between the allegations of trafficking and her death; (ii) conflicting witness testimonies had not been resolved; (iii) the actions of the police had not been investigated; (iv) the applicant's participation in the proceedings had not been ensured and (v) legal assistance had not been sought from the Russian authorities. The Court also found a violation a violation of art. 5 § 1 ECHR due to the arbitrary and unlawful

104 Ibid, par. 41.

105 See for a description of the applicant's efforts and the responses of the authorities in Both Cyprus and Russia in that regard, pars. 31-41 and 42-79.

106 *Rantsev v. Cyprus and Russia*, par. 3.

107 Ibid. The applicant also complained of violation of art. 6 ECHR in relation to the inquest proceedings and an alleged lack of access to court in Cyprus, ibid.

detention of the applicant's daughter by the Cypriot police and acquiescence in her subsequent confinement in a private apartment.

Most importantly, the Court determined that the positive obligations inherent in art. 4 ECHR, to set up an appropriate legislative and administrative framework to combat trafficking and exploitation and to take measures to protect the applicant's daughter had also been violated, in this case, not only by the Cypriot, but also the Russian authorities, in the latter case, because of their failure to conduct an effective investigation into the recruitment of the applicant's daughter in the Russian Federation (in the procedural aspect of art. 4 ECHR).[108]

With the power of *Rantsev* residing foremost in its far-reaching outcome, the judgment is also replete with other illustrations of the Court's intention to solidly frame strict obligations in the sphere of protection against human trafficking. Among the diverse elements signaling that the judgment is also to be understood as a 'policy' announcement, are the Court's recourse to evidence on the existence of structural issues with respect to human trafficking in Cyprus (and from Russia to Cyprus), notably with respect to the system of the 'artiste visa',[109] its detailed references to 'reinforcing' 'relevant international law treaties and other materials',[110] and, in light of gaps found therein, its utilization of own interpretative devices to fill those in. Thus, in that last regard, finding '(t)he absence of an express reference to trafficking in the Convention (…) unsurprising', as it was 'inspired by the Universal Declaration of Human Rights, proclaimed by the General Assembly of the United Nations in 1948, which itself made no express mention of trafficking', the Court held that 'in assessing the scope of Article 4 of the Convention, sight should not be lost of the Convention's special features or of the fact that it is a living instrument which must be interpreted in the light of present-day conditions'.[111] Holding that '(t)he increasingly high

108 Ibid, pars. 213-325. See also the legal summary of this case for an overview of the Court's findings, last available at: https://hudoc.echr.coe.int/eng#{"itemid":["002-1142"]}, on 3 August 2018.

109 Ibid, pars. 80-107.

110 Ibid, pars. 137-185.

111 Ibid, par. 277.

standards required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic societies (…),'[112] the Court saw strong cause to include trafficking under stringent protection, noting that 'trafficking in human beings as a global phenomenon has increased significantly in recent years (…)', adding that '(i)n Europe, its growth has been facilitated in part by the collapse of former Communist blocs. The conclusion of the Palermo Protocol in 2000 and the Anti-Trafficking Convention in 2005 demonstrate the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it'.[113]

The Court further delivered a strong message where it declined the request of the Cypriot government to strike the application out of its list, in light of the unilateral declaration of the government, in which it had already recognized a substantial number of violations on its part,[114] therewith emphasizing 'the serious nature of the allegations of trafficking in human beings made in the present case, which raise issues under Articles 2, 3, 4 and 5 of the Convention'.[115] The Court further noted in that regard that 'awareness of the problem of trafficking of human beings and the need to take action to combat it has grown in recent years, as demonstrated by the adoption of measures at international level as well as the introduction of relevant domestic legislation in a number of States (…)',[116] establishing that a strong consensus exists on the issue. Moreover, the Court also took into account evidence made available on the realities of the situation, pointing to the fact that '(t)he reports of the Council of Europe's Commissioner for Human Rights and the report of the Cypriot Ombudsman highlight the acute nature of the problem in Cyprus, where it is widely acknowledged that trafficking and sexual exploitation of cabaret artistes is of particular concern

112 Ibid.
113 Ibid, par. 278.
114 Ibid, pars. 186-202.
115 Ibid, par. 199.
116 Ibid.

(…)'.[117] Drawing attention further to 'the paucity of case-law on the interpretation and application of Article 4 of the Convention in the context of trafficking cases', holding it to be 'particularly significant that the Court has yet to rule on whether, and if so to what extent, Article 4 requires member States to take positive steps to protect potential victims of trafficking outside the framework of criminal investigations and prosecutions',[118] and underlining its 'duty to elucidate, safeguard and develop the rules instituted by the Convention', the Court held that the government's efforts were 'insufficient to allow the Court to conclude that it is no longer justified to continue the examination of the application', as 'there is a need for continued examination of cases which raise trafficking issues'.[119]

In a similar vein, the Court also took an expansive stance in relation to the Russian government's objection *ratione loci* as to the admissibility of the complaints brought against it, as the events of the case had taken place outside of its territory, in Cyprus, where the Russian government had 'no actual authority'.[120] In this regard, the Court held that 'from the standpoint of public international law, the jurisdictional competence of a State is primarily territorial', that '(a)ccordingly, a State's competence to exercise jurisdiction over its own nationals abroad is subordinate to the other State's territorial competence and a State may not generally exercise jurisdiction on the territory of another State without the latter's consent, invitation or acquiescence' and that '(a)rticle 1 of the Convention must be considered to reflect this ordinary and essentially territorial notion of jurisdiction (…).'[121] The Court nevertheless found itself competent to examine the complaints against Russia in this case,[122] given the construction of the applicant's complaints.

These namely concerned the failure of Russian authorities 'to take the necessary measures to protect Ms Rantseva from the risk

117 Ibid.
118 Ibid, par. 200.
119 Ibid, par. 201.
120 Ibid, par. 203.
121 Ibid, par. 206.
122 Ibid, par. 208.

of trafficking and exploitation and to conduct an investigation into the circumstances of her arrival in Cyprus, her employment there and her subsequent death'.[123] The Court observed in this regard that 'such complaints are not predicated on the assertion that Russia was responsible for acts committed in Cyprus or by the Cypriot authorities'.[124] Thus '(i)n light of the fact that the alleged trafficking commenced in Russia and in view of the obligations undertaken by Russia to combat trafficking', the Court found that it was 'not outside' (…) (its) Court's competence to examine whether Russia complied with any obligation it may have had to take measures within the limits of its own jurisdiction and powers to protect Ms Rantseva from trafficking and to investigate the possibility that she had been trafficked'.[125] Further, the Court found that '(s)imilarly, the applicant's Article 2 complaint against the Russian authorities concerns their failure to take investigative measures, including securing evidence from witnesses resident in Russia', so that it was 'for the Court to assess in its examination of the merits of the applicant's Article 2 complaint the extent of any procedural obligation incumbent on the Russian authorities and whether any such obligation was discharged in the circumstances of the present case'.[126] With that, the Court strongly secured a basis for obligations of member states in the sphere of intrinsically cross-border crimes, by engaging the responsibility of all States' involved, both of origin and destination.[127]

Most importantly however, looking just at its judgment with respect to art. 4 ECHR, the Court elevated protection requirements

123 Ibid, par. 207.

124 Ibid.

125 Ibid.

126 Ibid. See also the Court's rejection of the Russian government's objection *ratione materiae* under art. 4 ECHR, arguing that there was no slavery, servitude or forced or compulsory labour in the present case, as Ms. Rantseva had travelled to Cyprus to work on her own volition, ibid, pars. 209-211 and par. 282.

127 See however in this regard, ECrtHR 17 January 2017, *J. e.a. v. Austria*, Appl. nr.: 58216/12, in which the Court found no violation against Austria for the absence of more active efforts on their part to investigate and criminally prosecute the employers of the applicants for human trafficking, which was not found to have taken place during the short period of time that the applicants were in Austria, while that offence had been potentially committed in the United Arab Emirates and the prospects of success in requesting legal assistance were low. The Court underlined in this case that human trafficking did not require the establishment of universal jurisdiction.

in the sphere of human trafficking through its recognition of its grievous nature, including by using forceful wording to describe it:

> '(t)he Court considers that trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere (…). It implies close surveillance of the activities of victims, whose movements are often circumscribed (…). It involves the use of violence and threats against victims, who live and work under poor conditions (…). It is described by Interights and in the explanatory report accompanying the Anti-Trafficking Convention as the modern form of the old worldwide slave trade (…). The Cypriot Ombudsman referred to sexual exploitation and trafficking taking place "under a regime of modern slavery" (…). There can be no doubt that trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considers it unnecessary to identify whether the treatment about which the applicant complains constitutes "slavery", "servitude" or "forced and compulsory labour". Instead, the Court concludes that trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, falls within the scope of Article 4 of the Convention'.[128]

Clearly, the Court has adopted a robust protective stance with respect to human trafficking, as also recently evidenced by its recent further extension of the scope of protection of art. 4 ECHR in this light to include exploitation for the purposes of prostitution, in the absence of a cross-border element, thus were the trafficking occurred in one country.[129] As such, the Court is willing and able

128 Ibid, pars. 281-282.

129 See ECrtHR 19 July 2018, *S.M. v. Croatia*, Appl. nr.: 60561/14. See also for an expansive stance

to establish a momentum in which it can evolutively understand the phenomenon, as it occurs and changes through the Council of Europe jurisdiction, basing its choices on existing common ground as well as evidence of (structural) issues which may exist in regional realities.

The question then is whether a similar development may be conceivable in the sphere of human or migrant smuggling and if the same elements which drive strengthened protection in the context of trafficking can also be identified in the former context. Two aspects of human or migrant smuggling (as opposed to human trafficking), seem of particular import in this regard, namely (i) the differences in the manner in which this phenomenon is approached in (international) regulatory and policy frameworks and (i) the nature of human rights issues attached to human or migrant smuggling.

As for the first aspect, this is of particular significance, as a difference in the national and international consensus with respect to the type and degree of protection which should be provided to victims of smuggling (as opposed those of trafficking), can mean that the Court may not be able to find adequate basis in other sources (outside of the ECHR), to reinforce a potential choice on its part for elevation of protective standards. Looking at one major framework regulating both human trafficking and smuggling at the international level, namely the respective Trafficking and Smuggling Protocols attached to the Convention Against Transnational Organized Crime,[130] whereas both are the subject of criticism with respect to

in relation to trafficking, ECrtHR 24 January 2017, *Paradiso and Campanelli v. Italy*, Appl. nr.: 25358/12, in which case the Court did not find a violation against Italy because the baby who had been removed from the custody of the applicants had been irregularly adopted by them and brought to Italy from the Russian Federation. The Court accepted that 'by prohibiting private adoption based on a contractual relationship between individuals and restricting the right of adoptive parents to introduce foreign minors into Italy to cases in which the rules on international adoption have been respected, the Italian legislature is seeking to protect children against illicit practices, some of which may amount to human trafficking', ibid, par. 202.

130 See the United Nations Convention Against Transnational Organized Crime and the pertinent two Protocols, namely the Protocol Against the Smuggling of Migrants by Land, Sea and Air and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children: https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_

the adequacy of protection standards contained therein (thus such criticism exists with respect to both types of crimes),[131] it is indeed apparent that the protection provided in the Smuggling Protocol is rather less substantial than that provided in its counterpart regulating trafficking.[132]

According to Gallagher, the selection of trafficking and migrant smuggling as the subjects of additional agreements to be attached to the United Nations Convention Against Transnational Organized Crime can be related to the fact that both issues were - already at the time of the development of that framework - 'high on the international political agenda'.[133] Nonetheless, '(w)hile human rights concerns may have provided some impetus (or cover) for collective action', it was 'the sovereignty/security issues surrounding trafficking and migrant smuggling' which were the 'true driving force behind such efforts'.[134] In the development of this framework, '(w)ealthy states' were 'increasingly concerned that the actions of traffickers and migrant smugglers (would) interfere with orderly migration and facilitate the circumvention of national immigration restrictions', while '(o)pportunities for lawful migration to the preferred destinations (…) (had) dramatically diminished at the same time as individuals (…) (were) moving further, faster, and in far greater numbers than ever before'.[135] Thus, '(a) growing demand for third-party assistance in the migration process' became 'a direct consequence of this reality', as '(e)vidence of organized criminal involvement in trafficking and migrant smuggling operations (…) provided affected states with additional incentives to lobby for a stronger international response'.[136]

ORGANIZED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf, last available on 5 August 2018.

131 See in that regard generally, Anne T. Gallagher, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling - a Preliminary Analysis (hereafter: Anne T. Gallagher, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling), Human Rights Quarterly, Vol. 23, pp. 975-1004, 2001, last available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1409831, on 8 August 2018.

132 Ibid, p. 995-999, particularly p. 997.

133 Ibid, p. 975-976.

134 Ibid.

135 Ibid, p. 976-977.

136 Ibid, p. 977.

Nonetheless, where 'sovereignty/security' issues may have been the dominating driving force (over a human rights perspective), with respect to *both* trafficking and smuggling, differences betweeen the two frameworks easily show that while the vulnerability of trafficked persons was better recognized, concerns relating to containing irregular migration led to substantially less protection in the context of smuggled persons.[137]

Reasons for existing distinctions may be readily explained by differences between the two phenomena. Comparing the definitions of trafficking versus smuggling in the respective Protocols,[138] Obokata identifies four important elements. In the first place, 'trafficking is carried out with the use of coercion and/or deception, whereas smuggling is not, indicating that it can be a voluntary act on the part of those smuggled'.[139] In the second place, 'trafficking entails subsequent exploitation of people, while the services of smugglers end when people reach their destination'.[140] In the third place, 'trafficking can take place both within and across national frontiers, although international movement is required for smuggling'.[141] In the fourth place, 'entry into a State can both be legal and illegal in the case of trafficking, and smuggling is characterised by illegal entry. Smuggling, therefore, can be summarised as facilitation of illegal entry, and those smuggled will inevitably be regarded as illegal migrants'.[142]

137 See for an overview of the Trafficking and Smuggling Protocol and differences in protection between them, ibid, p. 983-999.

138 Article 3 of the Trafficking Protocol defines trafficking as follows: the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at the minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs. Art. 3 of the Smuggling Protocol defines smuggling as: the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or permanent resident.

139 Tom Obokata, Smuggling of Human Beings from a Human Rights Perspective, p. 396.

140 Ibid, p. 396-397.

141 Ibid, p. 397.

142 Ibid.

Because of these distinctions between the two phenomena, policy implications also differ.[143] While '(t)he use of coercion or deception by traffickers as well as subsequent exploitation have the effect of portraying those trafficked as victims of human rights abuses', which 'reinforces a case for their protection even when they enter into a State and/or stay illegally', according to Obokata, 'the definition of smuggling can be interpreted to suggest that those smuggled are willing participants who violate national immigration laws and regulations'.[144] As a result, smuggled persons may be subjected to enforcement measures such as arrest, detention and deportation.[145] The differences in definition have substantial impact within the Protocols: '(t)he Trafficking Protocol contains provisions which require States to adopt measures for protection, such as assistance in criminal investigations and proceedings, provision of accommodation, physical and psychological assistance, employment and educational opportunities, and temporary or permanent residence permits'.[146] In the case of the Smuggling Protocol, 'protection measures' are not as extensive.[147] The latter Protocol 'speaks of protection of smuggled migrants, in referring to the right to life and prohibition of torture' and 'also requires States not to hold people criminally liable for the fact of having been smuggled'.[148] Nonetheless, 'protection of smuggled people is likely to be limited, as the Smuggling Protocol simultaneously affirms the right of States to prosecute people for violating national immigration laws and policies',[149] while the right of States to 'implement enforcement measures against smuggled migrant' is also acknowledged in diverse human rights instruments.[150]

That is not to say that a strong fundament is entirely lacking in terms of international support in the context of migrants. Indeed, Obokata points to 'a wide variety of legal duties imposed upon

143 Ibid.
144 Ibid.
145 Ibid.
146 Ibid.
147 Ibid.
148 Ibid, p. 398.
149 Ibid.
150 Ibid.

States under international human rights law'[151] to protect victims of smuggling which apply to all States, 'regardless of their status as States of origin, transit or destination',[152] emphasizing particularly positive obligations under international human rights law to protect against horizontal human rights violations.[153]

Nonetheless, the question may still be if the differences in policy approach reflect that the international community is structurally and fundamentally unwilling to go any further than it already has done with respect to the protection of smuggled persons. That could mean that any steps taken by the Court to advance protection of smuggled persons further may not be well-aligned, or even be seriously at odds with international consensus. Migrant Smuggling disrupts the abilities of national and international entities to manage their decision making and operational responses in response to migration flows and for that reason, States will certainly not likely reject any notion that they should elevate their criminal law enforcement efforts against smugglers. However, if, departing from a 'victim-centric' positive obligations framework, the Court were to determine that duties in this regard also include obligations such as those to not prosecute victims of smuggling for any crime related to the smuggling, that smuggling victims should, like those of trafficking, be provided with residence permits, either with or without the condition that they collaborate with authorities in the prosecution of their smugglers,[154] as well as with other forms of victim protection associated with criminal justice,[155] that may entail a substantial challenge to national and international policy and not sit well with Council of Europe member states.

151 Ibid, p. 408.

152 Ibid, p. 407-408.

153 Ibid, p. 408. See his references to case law of the Inter-American Court of Human Rights in that regard, as well as other international sources establishing a general duty to protect, including the ECHR and art. 6 par. 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (Migrant Workers Convention), which may also be applicable according to him in this regard, ibid.

154 See in that regard, ibid, p. 410-411.

155 See generally Obokata's analysis with respect to different types of Human rights obligations in relation to smuggling, both with respect to non-State actors and States, p. 403-414 and with regards to concrete measures which may be taken with respect to victims of smuggling in that regard, ibid, p. 409-414.

Certainly, imposing such obligations categorically with respect to all smuggled persons, would, given the vast differences which can exist between scenario's of smuggling, seem unreasonable. However, regardless of international policy consensus which may point in another direction, if there is cause to do so, because of its position of authority, the ECrtHR is uniquely placed to challenge existing common ground. If not *all* smuggled persons, certain groups of victims therein could be identified as being particularly vulnerable and this may give rise to a stronger basis to argue for greater protection for those categories.

The second aspect of migrant smuggling mentioned above, namely the nature of human rights issues attached to human or migrant smuggling, then takes on particular import. From that perspective, it may be held that even if there is currently no common ground to provide more protection to (all) victims of smuggling, including by fortifying their position in the context of criminal law enforcement against smugglers, the grievous nature of the human rights violations some groups of smuggled persons can be subjected to, does call for a change of policy.

Diverse arguments can be - and are - put forward in that regard. In the first place, it is argued that issues exist with respect to the manner in which '(irregular) migrants', 'trafficked persons', but also 'refugees and asylum seekers' are defined. Such definitional issues can be problematic in different respects, but have in common that non-recognition of the true 'status' or profile of a person can result incorrect determinations of their needs and rights and corresponding States' obligations.

Gallagher points out that in the context of the central issue of border control arrangements in the Trafficking Protocol (which are almost identical to those in the Smuggling Protocol),[156] concerns resulted in the modification of some draft provisions 'to ensure that measures taken under this part did not prejudice the free movement of persons or compromise other internationally recognized human

156 Anne T. Gallagher, Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling, p. 993.

rights', but still led to a 'far from ideal' 'end-result', as '(t)he principle emphasis of the protocol remains firmly on the interception of traffickers rather than the identification and protection of victims'.[157] She describes as '(e)ven more serious perhaps', the fact that there is a 'potential for the protocol's border control measures to limit further the rights and opportunities of individuals to seek and enjoy asylum from persecution in other countries'.[158] Debate on this issue led to the inclusion of 'a broad savings clause to the effect that nothing in the protocol is to affect the rights, obligations, and responsibilities of states under international law, including international humanitarian law, international human rights law, and in particular, refugee law and the principle of non-refoulement'.[159] Even with this clause however, there is a degree of inherent tension between efforts to combat trafficking and international obligations with respect to refugees, making it important that profiles are not blurred.

The same issue can be discerned with respect to smuggled persons, in so far as they may claim status as refugees and aslyum seekers, again making it crucial that there are adequate means of appreciating that smuggled persons fall under that category.[160]

In terms of the victim-centric positive obligations with respect to criminal law enforcement agianst smugglers, the ability to make such a distinction may be important if a variance-based protective system were to be adopted. Thus, if it were to be argued that not all, but particularly vulnerable smuggled persons should be able to claim greater protection in this regard, refugeeship could be an important factor. Thus, a horizontal violation in the course of smuggling could be regarded as more serious, because of the particularly vulnerable status of the victim in that sense.

Another 'blurry' defintional issue lies in the distinction between trafficked and smuggled persons. In this regard, Gallagher points to

157 Ibid, p. 994.

158 Ibid.

159 Ibid.

160 See in that respect, as well as with regards to the pertinent arrangement in the Smuggling Protocol, ibid, p. 998.

a 'major weakness of the law enforcement/border control provisions of the protocol', namely 'their failure to address the issue of how victims of trafficking are to be identified'.[161] In this light, '(t)he obvious question has been asked by the Canadian Refugee Council: 'If authorities have no means of determining among the intercepted or arrested who is being trafficked, how do they propose to grant them the measures of protection they are committing themselves to?''[162] According to Gallagher, '(t)he regime created by the convention and its protocols, (whereby trafficked persons are accorded greater protection and therefore impose a greater financial and administrative burden than smuggled migrants) creates a clear incentive for national authorities to identify irregular migrants as smuggled rather than trafficked'.[163] Nonethless, the issue of incorrect identification remained unadressed in the development of the framework, this leading to a missed 'opportunity to include some kind of counter-incentive in the form of detailed guidance on the identification process' and leaving a 'lacuna (…) likely to seriously compromise the practical value of the protocol's protection provisions'.[164]

With this 'weakness', 'potential problems' which arise are that: '(u)nder the terms of the two protocols, dealing with trafficked persons will be more costly and impose a greater administrative burden on states than dealing with smuggled migrants. States therefore have an incentive to ratify one and not both protocols. For the same reasons, border authorities and immigration officials responsible for identifying and categorizing irregular migrants also have an incentive to identify such persons as being smuggled rather than as trafficked'.[165] As the definition of migrant smuggling is very broad, referring as it does to the 'illegal movement of persons across borders for profit', only 'the small number of trafficked persons who enter the destination country legally who would not

161 Ibid, p. 994.
162 Ibid.
163 Ibid, p. 994-995.
164 Ibid, p. 995.
165 Ibid, p. 1000.

be considered, prima facie, smuggled migrants'.[166] While sometimes other distinctive features, such as the use of force or coercion 'for the purposes of exploitation' may make it obvious that a person is a victim of trafficking, 'in many cases, they will be difficult to prove without active investigation', while '(b)oth protocols appear to place the burden of proof squarely on the individual seeking protection'.[167]

This is a substantial concern, particulary because of the 'operational link between smuggling and trafficking', which lies in the fact that '(i)t is increasingly common for an individual to begin his or her journey as a smuggled migrant - only to be forced, at journey's end, into an exploitative situation falling squarely within the definition of trafficking as set out above. Nothing in either protocol acknowledges this operational link between smuggling and trafficking'.[168] Here again, according to Gallagher, the absence of discussion of such issues in the preparation of the Protocols, clearly shows 'an unwillingness, on the part of states, to relinquish any measure of control over the migrant identification process', as a consequence of which '(t)rafficked persons will indeed be accorded a greater level of protection than their smuggled counterparts under the new regime - but only if the destination country is able to decide who has been trafficked and who has been smuggled. While states parties retain full capacity to decide who is a smuggled migrant and who is a trafficked person, the additional protections granted to the latter group are likely to be of limited practical utility'.[169]

In light of this definitional issue, it may be argued that a resolution could be found which could alleviate the problem of non-recognition of trafficked persons and at the same time create possibilities to identify categories of smuggled persons as also requiring greater protection. By utilizing - instead of avoiding - the blurriness which can exist between those who are trafficked versus those who are smuggled, a greater circle of stricter protection could

166 Ibid, p. 1000-1001.
167 Ibid, p. 1001.
168 Ibid.
169 Ibid.

be drawn around (certain types of) victims who cannot be placed clearly in one or the other category.

Two cases which have recently been communicated to the United Kingdom government by the ECrtHR, namely *V.C.L. v. The United Kingdom* and *A.N. v. The United Kingdom*,[170] are interesting in this regard. In both cases, the applicants, who, at least initially, were viewed as smuggled migrants, were prosecuted for narcotics related offences. During the course of the proceedings, it was recognized by certain authorities that they were victims of trafficking, rather than having been voluntarily smuggled to the United Kingdom. In *V.C.L. v. The United Kingdom*, the applicant has complained under art. 4 ECHR that prosecutorial and police authorities breached their positive obligation to investigate the claim that he had been trafficked and that as a result of this, he was denied a fair trial in the sense of art. 6 ECHR. In *A.N. v. The United Kingdom*, the applicant has *inter alia* complained under Art. 4 ECHR that the United Kingdom violated its duty to investigate his traffickers, failed to identify him as a victim of trafficking when he first came to the attention of the authorities and failing to apply the appropriate test to identify a child victim of trafficking, rather applied a test of compulsion which was prohibited by law. The latter applicant also complains that the authorities did not honour the non-criminalisation of victims of trafficking for status-related offences.

These two cases demonstrate well how difficult it can be to distinguish narratives of trafficking from those of 'just' smuggling. Indeed, in both cases, when they first came to the attention of the authorities - through their arrest - neither of the applicants seemed to consider themselves victims of traffciking, having been 'voluntarily' 'smuggled' via their families. Their recognition as such, by some authorities in the United Kingdom, relied on analysis of their circumstances, particularly after their arrival, including those surrounding the (illegal) labour they became involved in. Showing that victims of trafficking may not even be able to appreciate their own situation properly, these two cases provide an opportunity

170 *V.C.L. v. The United Kingdom*, Appl. nr.: 77587/12, communicated on 5 March 2018 *A.N. v. The United Kingdom*, Appl. nr.: 74603/12, communicated on 19 June 2018.

for the ECrtHR to break through definitional barriers as they exist. Thus, if the Court were to find that it is not clear whether the applicants should have been considered to be victims of trafficking as opposed to smuggling, it could hold nonetheless hold that, given the circumstances of applicants' narratives, they qualify for stricter protection, regardless of the qualification to be attached to their cases.

Moreover, both cases are also particularly interesting from the perspective of the issue of non-prosecution of both trafficked and smuggled persons. The Court has particularly asked the parties in these cases what that stricter protection should entail, by putting to them the question '(t)o what extent the postive obligations under art. 4 ECHR' 'can - and should - (…) extend to the criminal prosecution of victims of trafficking, where there is a nexus between the offence and the trafficking?' Thus, the question put is whether or not narcotics offences committed by victims of trafficking should also fall under the scope of non-prosecution, if those offences were committed by the applicants because they were were trafficked. While that question is important in and of itself in the context of (clear) trafficking cases, such a factor, namely that offences committed by a smuggled person may stand in a causal relationship to the fact that he or she was smuggled, could again be utilized as an identifying feature, showing the particular vulnerability of a smuggeld person. That is to say, if it were to be determined that a smuggled person committed certain offences because he or she was smuggled, that could provide an argument that, even if the smuggling started off on a consensual basis, it developed into a situation of further vulnerability.

In any event, one argument to extend and enhance protection of smuggled persons lies in the hazard that defintional boundaries - relating to refugees and asylum seekers, trafficked and smuggled persons - leads to inadequate protection because of incorrect qualification of profile and corresponding legal status. Rather than erring by not providing adequate protection where it should have been available, the better option may draw protection broadly, covering potential blurry areas in the abstract, so that situations

which indeed require more stringent standards can be filtered through *in concreto*.

A further argument which may be adduced however is that, particularly given the current plight of (certain groups of) smuggled migrants, even where there is no definitional blurriness (so the status of a person as a smuggled human or migrant is unambiguous), there may still be call to alter perspectives with respect to the degree and nature of victimization involved. As such, it may be held that - again for particular categories of smuggled persons - the notion that the crime of trafficking *categorically* represents a more grievous human rights violation than smuggling, may be arguable and that even if that were generally to be true, that should not mean that the crime of smuggling should not attract more protection than it currently does. While it may or not be possible to further (conceptually) extend the scope of art. 4 ECHR to also include certain situations of smuggling, victim-centric positive obligations could also be based on other Convention provisions such as articles 2, 3, 5, 8 and 14 ECHR, as well as the right to eaceful enjoyment of possesions under art. 1 Protocol 1 ECHR. As to what criteria should be deployed to distinguish between those victims of smuggling who should and should not be regarded as requiring stricter protection, the fact that rights such as those guaranteed in these provisions, could be a further point of reference.

Indeed, exactly such rights are invoked in the context of arguments put forward that the victimization of smuggled persons should be reconsidered. As depicted by Baird,

> '(f)irst, interactions between smugglers and migrants are often based on threats and physical abuse. Intimidation, coercion, physical force and fraud can be used to take advantage of migrants using the services of smugglers. Violence is used during operations to assert control, to discipline the group, to enforce ad hoc rules, to coerce those who may be unwilling to cooperate with smuggler demands, or to collect payment. Abuse and rape of women has also been reported. Violence maintains group boundaries between the organisers of smuggling and the

> clients. The scale of violence experienced by migrants is unknown, but is thought to be increasing as unscrupulous groups enter into the business of smuggling and as states increase the conditions of entry, barring many from gaining protection. The entrance of violent groups into the smuggling businesses in areas such as Mexico, Egypt, Israel, Turkey and the Horn of Africa are only a few examples of world regions where violence and exploitation have come to the foreground in human smuggling. Second, knowledge about unaccompanied minors using human smuggling is relatively limited. Minors (itself a culturally specific term, often used to designate those 18 years old or younger) constitute a growing population among migrants using smugglers to reach other countries. The smuggling of minors raises serious questions concerning protection, victimisation and human rights. Minors may be more vulnerable to exploitation and forms of human trafficking. Minors travelling alone are particularly at risk. Furthermore, minors and adolescents are at risk of developing emotional problems related to past traumatic events, and the smuggling journey may magnify the risks to their emotional and physical well-being'.[171]

Moreover, the scale of irregular migration experienced in the world today, the level of danger often involved and assessment of the circumstances from which those who make desperate choices to risk life and limb to seek better destinies, could urge the ECrtHR to reconceptualize migration under a stronger human rights paradigm, even if it would therewith break open and reorder legal structures now in place, such as those laid down in the Trafficking and Smuggling Protocols. The Court could expand protection generally, but also in the specific context of the victim-centric postive obligations to enforce the criminal law against smugglers, therewith providing strong arena's where smuggling victims can claim justice and relevant protection. Indeed, deploying devices such as those it has used in other spheres in which it has marked crimes

171 Theodore Baird, Understanding human smuggling as a human rights issue, p. 3-4. See with respect to the human rights issues attached to smuggling in this sense also generally Obokata's depiction thereof depiction thereof, framed by him as relating to the 'causes', 'process' and 'consequences' of smuggling, Tom Obokata, Smuggling of Human Beings from a Human Rights Perspective, p. 399-402.

and victims thereof as requiring particularly stringent protection, the ECrtHR could well argue that, again for certain groups of smuggled persons, practical and effective protection is required and that as a living instrument, the ECHR should be interpreted to evolutively respond to current realities of smuggling.[172] Thus, as it did in *K.U. v. Finland*, in which case the Court expressed that it was 'sensitive to the Government's argument that any legislative shortcoming should be seen in its social context at the time', yet still held that the government should have been aware of the dangers for criminal activity on the internet as well as of the development of 'the widespread problem of child sexual abuse', so that it could not be said the Finnish government 'did not have the opportunity to put in place a system to protect child victims from being exposed as targets for paedophiliac approaches via the Internet',[173] the ECrtHR could determine in the sphere of human or migrant smuggling that altered circumstances require a different approach. To provide just one illustration thereof, the International Organization for Migration's 'Missing Migrants Project' provides statistics of 2,346 migrant fatalies, in 2018, up to August thereof, alone.[174]

While such categories of smuggled persons - those whose 'choice' to make life-threatening journeys by land or sea - may certainly stand at the fore in terms of specific groups of smuggling victims who may be identified as requiring greater protection, the Court's judgment in *Khailafia v. Italy*[175] would indicate that a shift in position would be required on the part of the ECrtHR for that to occur. In that case, the Court namely held that found that art. 3 ECHR had *not* been violated due to the conditions of detention of in which applicants, who were boat refugees, were held in a

172 See with regards to the distinct issue of extraterritorial obligations of European States in light of their 'external migration policies', outside of their own borders, Maarten den Heijer, Europe and Extraterritorial Asylum, Dissertation, Leiden, 2011. See also theSee the Factsheet 'Extra-territorial jurisdiction' of the Court's Press Unit, last available at https://www.echr.coe.int/Pages/home.aspx?p=press/factsheets&c=#n1347890855564_pointer, on 8 August 2018.

173 *K.U. v. Finland*, par. 48.

174 See for those and other statistics, the website of the project, last available at: https://missingmigrants.iom.int, on 8 August 2018. See for other sources, the Migration Data Portal, last available at: https://migrationdataportal.org/themes/smuggling-migrants#data-sources, on 8 August 2018.

175 ECrtHR 15 December 2016, Khlaifia v. Italy, Appl. Nr.: 16483/12.

reception centre, as those conditions did not amount to inhuman or degrading treatment, in part due to their particular profile. As discussed by Venturi, in this case, the Court determined that while an increasing influx of migrants cannot, per se, absolve a State of its obligations under Art. 3 ECHR, regard must still be had to the situation of the applicants versus the circumstances under which Italy found itself as a consequence of the 'migratory pressure' at the time of the Arab Spring, subsequent to which Italy had declared a state of emergency.[176] 'In fact, the Grand Chamber affirmed that 'it would certainly be artificial' not to consider that the undeniable hurdles faced by the applicants originated from a 'situation of extreme difficulty confronting the Italian authorities at the relevant time'.[177] Within that frame, the Grand Chamber determined that the applicants were not asylum seekers and, therefore, 'did not have the specific vulnerability inherent in that status'.[178] Recognizing that the applicants were vulnerable because they had undergone a 'dangerous journey on the high seas', a circumstance which had led the chamber in its judgment in this case to decide that art. 3 *had* been violated, the Grand Chamber however disagreed.[179] Even though the applicants were in a weakened physical and psychological condition because of the dangerous sea crossing, when held at the centre, they 'did not bear the burden of traumatic experiences that had justified the vulnerability approach adopted in *M.S.S. v Belgium and Greece*',[180] while '(f)urthermore, the Grand Chamber also pointed out that the applicants did not belong to any of the categories traditionally regarded as vulnerable (such as minors), but were simply young males without any particular health issue'.[181] According to Venturi, '(t)hese arguments seem to corroborate the ECtHR's nuanced approach to the notion of vulnerability, which on the one hand is inherent to all asylum seekers while, on the other hand, is attached

176 Denise Venturi, The Grand Chamber's ruling in Khlaifia and Others v Italy: one step forward, one step back?, 10 January 2017, Guest post at: https://strasbourgobservers.com/2017/01/10/the-grand-chambers-ruling-in-khlaifia-and-others-v-italy-one-step-forward-one-step-back/, last available on 8 August 2018.

177 Ibid.

178 Ibid.

179 Ibid.

180 Ibid, referring to ECrtHR 21 January 2011, *M.S.S. v. Belgium and Greece*, Appl. Nr.: 30696/09.

181 Ibid.

to certain individuals because of specific conditions that put them in a more disadvantaged position. According to her, the Grand Chamber's reasoning seems to give a hint on what vulnerability is not: being a healthy, young man, albeit with irregular status'.[182]

Drawing a broader circle of protection in areas where distictions between profiles, degrees and types of vulnerability will require adequate definition of that concept. Some variables have been mentioned above which may be utilized as anchoring-points to better assess the gravity of concete victims' own narratives, such amrkers should of course however be further developed. In any event, in the meantime, rather than erring by not providing adequate protection where it should have been available, the better option may be to prophylactically draw protection too broadly, so that situations which indeed require more stringent standards can be filtered through *in concreto*.

4. A role for national Constitutional Courts

Returning finally to a role which could be played in the development of protection for victims of human or migrant smuggling by national Constitutional Courts, autonomously and in regional collaborations - and in that last regard underlining the value of such forms of co-operation such as that undertaken by the AACC – one concluding remark may be that while human or migrant smuggling represents a global issue, the problematic involved can differ vastly from country to country and region to region. Co-operation between actors who are confronted with common problems may greatly enhance possibilities to design context-adequate responses or to rethink and reconceptualize in a manner better aligned with region-specific parameters, interests and possibilities. Nations and regions may stand, as locales of origin, transit or destination, at different points in smuggling or trafficking routes and for that reason be confronted with issues arising from the same chain of vulnerability. Regional social, economic and political circumstances can create inter-connected push and pull factors causing smuggling and trafficking routes to develop or intensify.

182 Ibid.

Practical resolutions could also arise out of collaborations: needs in one region for an influx of foreign labour may provide correspond to and resolve issues with respect to the irregular migration routes of another. Different opinions and ideas on the manner in and extent to which a region could be opened to flows of people may lead to alternative approaches and innovations, which could be shared with other regions and the global community at large. Asia and its Constitutional Courts, together with its counterparts in Europe, Africa and The Americas, could bring a great deal to the table by sharing ideas. Working together, Constitutional Courts may also play an important role in providing critical relief as well as in shaping regional policies. Particularly in terms of a quick response, national Constitutional Courts may be better placed than other (internationally co-operating) public stakeholders in discerning and responding to issues which are specific to particular regions or contexts, to deliver rapid protection and act as corrective guardians to policy and actions.

Discussions should thus take place on the role which may be played by national Constitutional Courts in securing and galvanizing human rights protection in urgent and sensitive domains such as that of the protection of victims of human or migrant smuggling, in good alignment with own national and regional needs and realities. Such discourse should also focus on how such roles can be substantively and procedurally realized. In the absence of a (well-developed) (formal) framework for it, the sharing and borrowing of ideas should be the subject of critical appraisal, both in terms of its potential for effectiveness as well as its substantive, procedural and institutional legitimacy. In policy domains such as migration and asylum, in which international and national interests are managed by a multitude of actors, 'collaborating' courts could meet with strong resistance.

Judicial activism in this sense may be regarded as an over-stepping of jurisdictional boundaries, not only in the sense of formal competencies, but also in that of the practical ability of courts, within the substantive, procedural and logistical limitations of judicial decision-making, to achieve effective integral policy frameworks.

The manner in which judicial co-operation may take place should therefore also be carefully and critically considered. While organic and responsive evolution lies in the nature of judicial law-forming and indeed represents a great merit of it, a resolve to co-operate between national courts should be preceded by clear consensus and design as to the parameters of collaborations. In a substantive, but particularly also a 'procedural sense', the case law of the ECrtHR can serve as a useful illustration in that regard. Thus, even if not standing in a formal relationship with this Court, Constitutional Courts may find it useful to maintain awareness of the ideas this highly active (and well-used) Court develops, as well as of the the manner in which it seeks to provide expansive protection, all the while negotiating the complexity of its particular jurisdiction.

The protection of smuggled humans or migrants is certainly a theme which requires due attention by all judicial bodies charged with the protection of fundamental rights. Like the ECrtHR, national Constitutional Courts could play an important role in designing and demanding further protection of the sort discussed in this contribution, thus via the vehicle of criminal justice, victim-centric, positive obligations. The positive obligations of States could however also could be made exponentially greater, by embedding them in ideas such as that all countries, regions and the international community at large, also have the duty to protect potential victims while they are still in the state of origin and are still suffering under the circumstances which they wish to or must escape. Such obligations could be to correct the circumstances which are causing mass migration and therewith victimization, so to act against war, conflict, hunger, poverty and discrimination.[183]

183 See in also in this regard, particularly with respect to the causes of migrant smuggling, again, Tom Obokata, Smuggling of Human Beings from a Human Rights Perspective, p. 399-402.

THE LAWS ON IMMIGRATION AND REFUGEES IN AFRICA: THE ROLE OF CONSTITUTIONAL COURTS

Moussa LARABA

ALGERIA

THE LAWS ON IMMIGRATION AND REFUGEES IN AFRICA: THE ROLE OF CONSTITUTIONAL COURTS

Moussa LARABA[*]

I. INTRODUCTION

A. Definition of Immigration

Movement of persons from one place to another, particularly from one country (emigration) to another (immigration) for political, social, economic or personal reasons, and which is the result of either an entire population or of individuals being integrated into a broader societal phenomenon

B. Definition of Refugee

A person who has left his or her country of origin for political, religious or racial reasons and who does not have the same status as indigenous peoples in the country in which he or she resides and has not acquired nationality.

Migration, both internal and international, is a major phenomenon in Africa. This note briefly reviews:

- The main characteristics of migration on the continent;
- The human rights situation of the three main categories of migrants: workers, refugees, and internally displaced persons.
- The main challenges facing the continent with regard to migration;
- The main conventions and remedies in the continent and its sub-regions;

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- The African Constitutions and the Refugees Question - Some examples
- The role constitutional courts in protecting refugees and migrants in Africa - Some examples

II. CHARACTERISTICS OF MIGRATION IN AFRICA

A. Multifaceted, Large-Scale, and Intra-Continent Migrations

Sub-Saharan African countries are experiencing large-scale displacement, regardless of the pattern of migration: workers, refugees, or displaced persons. The area includes countries from which large numbers of people migrate (Sahel countries, Zimbabwe) and countries receiving large numbers of migrants (South Africa, Nigeria, and the Democratic Republic of Congo).

African migrations are quantitatively very large both in terms of the ratio to the continent's population and in gross figures in relation to a global scale. Out of approximately 200 million migrants estimated in 2006 globally, about one third are said to be of African origin (including North Africa. In addition, Africa alone accounts for one-third of the refugees and half of the world's internally displaced persons.

These migrations are primarily internal ones. Thus, half of African migrants live in another country of the continent and nine-tenths of African exiles find refuge in a country bordering their country of origin. Thus, African countries are bearing the brunt of strong migratory pressures linked with conflict and natural disasters, which occur on the continent, and receive large numbers of migrant workers.

B. An Old Mobility That Is Developing and Taking on New Forms

Internal and international migrations are not new in Africa: caravan trade, nomadism, slave routes, movements of students and workers inside former colonial areas, etc.

Cross-border micro-displacement is common, particularly among communities living on both sides of national borders: Mozambique

- South Africa; Rwanda -Congo; Burkina Faso - Côte d'Ivoire, etc. These movements are continuing, and even intensifying, for social, economic, or crisis reasons, despite increasing restrictions imposed at borders. As a result, these migrants find themselves in irregular situations.

Today, migratory movements are developing and becoming more complex. There are more and more destinations, routes are extending (as evidenced by the growing presence of West Africans in South Africa), and migration often involves several stages: paying for travel, finding access routes to the country of destination, getting the desired job or status.

Some countries of departure have become receiving countries as well and it is not uncommon for some countries to be countries of departure and receiving countries for refugees (Sudan) or migrant workers (South Africa). Moreover, migration is becoming more feminine: today, women make up a substantial part of migrant workers and are among the main victims of internal displacement and trafficking in human beings.

Mobile phones and new communication technologies serving migrants

The explosion of the mobile phone is undoubtedly one of the keys to a regionalization of international migration increasingly articulated to globalization. All major emigration areas are covered by several mobile operators. The importance of the telephone as a means of communication between the migrant and his / her family or community of origin is well known.

The dissemination of the Global System Mobil (GSM) in some sparsely populated and hard-to-reach areas is reminiscent of migrants' routes and places of convergence, such as Arlit (Niger) or Gao (Mali) borrow the land routes leading to the gates of Europe via the Sahara. Thus, the implementation of GSM is now an essential element in the organization and management of smuggling networks. The mobile phone has become an indispensable tool both as a facilitator and an accelerator in the dissemination of information.

The mobile phone is also an incentive for candidates to emigrate, as Boubacar's account28, which left Casamance for the Canary Islands in 2006, illustrates: "It was in Mauritania when I was fishing only young people like me have gone to Spain. Their echoes came to us every time that they had returned to this country. [...] I tried to pass by twice and, each time, it was the Moroccan navy that made us return. I then returned to Senegal [...]. From there relatives and friends left by D. [village of Casamance] often telephoned me to ask me to try this way. I finally decided.

Thus, the mobile phone is emerging as one of the key elements in the organization of migratory networks that travel the roads of West Africa. The political space of free movement of persons is today stimulated by the dynamism of the intangible space of new information technologies.

III. THE THREE MAIN FORMS OF MIGRANTS: REFUGEES / ASYLUM SEEKERS, INTERNALLY DISPLACED PERSONS (IDPS), AND WORKERS

A. Refugees / Asylum Seekers

According to the High Commission for Refugees (UNHCR), there are 2.7 million refugees in Africa, 773,500 of whom are asylum-seekers. Refugees include not only individuals - political opponents, human rights defenders, journalists, etc., who flee a regime that threatens them - but also entire populations that flee fighting, raids, famines, and natural disasters.

African refugees are mainly from Sudan, Burundi, the Democratic Republic of Congo (DRC), Somalia, Liberia, Togo, the Central African Republic, and Rwanda. As already mentioned, nine-tenths of the refugees take refuge in a neighbouring country; when possible, they gather in an area close to their own, where the population speaks the same language.

In this regard, the DRC has received approximately 1.2 million Rwandan refugees since 1994. Cross-flows of refugees are not uncommon. Sudan accommodates 300,000 Eritreans, while 400,000 Sudanese take refuge in Uganda, Ethiopia, Kenya and the DRC.

B. Internally Displaced Persons

Sub-Saharan Africa has the highest number of IDPs in the world. Out of the 12 million IDPs in Africa, nearly half of them (5.3 million) are Sudanese. The other main countries affected by this phenomenon are: Uganda, with 2 million displaced persons; the DRC, with 1.6 million; Côte d'Ivoire, with 700,000; Zimbabwe, with 570,000; Somalia, with 400,000; and Kenya, with 381,000.

These displacements often results from violations of international humanitarian law during armed conflict.

Civilians, mostly women and children, are forced to flee their homes to protect themselves from violence or persecution without leaving their country. Natural disasters are another less frequent but major cause of internal displacement.

C. Migrant Workers

The vast majority of African migrants are workers, who travel to other African countries, or to other continents, including Europe. In Africa, the main receiving countries for African workers are: South Africa, Nigeria, Gabon, and until recently Côte d'Ivoire. Some of these migrants also visit Maghreb countries and the Middle East (Libya, Morocco, and Algeria). In Gabon, one fifth of the population is immigrant. Nevertheless, the receiving countries are closing their borders one after the other, which means that workers no longer have a regular situation or are pushed to look elsewhere, and often further, for new receiving countries.

IV. NEW TRENDS, NEW CHALLENGES

A. The Tragedies of Migration to Western Europe

Since the early 1990s, there has been a growing number of tragedies on the borders of Europe, which has become a fortress: many migrants from sub-Saharan Africa die in makeshift boats in the Mediterranean, in the holds of aircraft, or are chased by police and Coast Guards while they try cross the frontiers. Often, these migrants pay for their travel with savings from an entire social network or by going into debt.

They travel through several countries, take makeshift jobs along the way, pay smugglers, and try to escape the police. If they are caught and repatriated to their country of origin, they often start the same journey all over again.

B. Rise of Nationalism and Xenophobia

Over the past decade, there has been a rise in xenophobia and nationalism, often accompanied by outbreaks of violence, in several African countries with large numbers of migrants.

First example: Cote d'Ivoire

In Côte d'Ivoire, the concept of "ivoirianness" (*ivoirité*) was coined and used for political purposes to distinguish so-called "ethnic Ivorians" (of Ivorian origin for at least two generations) from so-called "foreign Ivorians". This concept establishes social and political hierarchy based on the origin of nationals and develops hostility against foreigners and Ivorian Muslims of northern Côte d'Ivoire. In 1998, a land law reserved the right of ownership of the land to "ethnic Ivorians" solely. As a result thousands of peasants of Burkinabe origin were expelled from the north of the country. This concept is one of the triggers of the Ivorian crisis.

Second Example: South Africa

At the end of June 2016, the government of South Africa published a draft law on international immigration that worries immigrants. The draft law makes a distinction between refugees - whose status has been clarified - and asylum seekers, whose files are being processed. In particular, refugees would not be allowed to work. According to the draft law proposed by the Home Affairs Department, they should even remain in dedicated centres, which could be managed by the Red Cross and the United Nations High Commissioner for Refugees.

The members of the Congolese organization *Congo for Peace Without Borders* handed over a memorandum to the UNHCR and the Home Affairs Department to express concerns and ask for better law enforcement.

V. PROTECTION OF MIGRANTS AND REFUGEES: AFRICAN CONVENTIONS AND REMEDIES

In Africa, the protection of migrants and refugees faces two major hurdles: the lack of a proactive and humanist policy on refugee asylum right, on the one hand, and limited capacities of humanitarian organizations to assist these countries in implementing international conventions, on the other hand.

A. United Nations

Almost all countries in sub-Saharan Africa are signatories to the 1951 United Nations Convention Relating to the Status of Refugees. Only some fifteen countries have ratified the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. They nevertheless represent almost half of the 35 States parties to the Convention. The UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families is a body responsible for ensuring compliance with the Convention. It is composed of independent experts, and met in 2004 for the first time to examine the reports of States. The Convention also provides for the possibility of lodging individual complaints and conducting investigations.

B. African Union

Article 12 of the African Charter on Human and Peoples' Rights of 1981 provides for freedom of movement and the right to seek and receive asylum in the event of persecution abroad, in accordance with national and international rules. It was supplemented by the adoption in 1969 by the OAU of the Convention Governing Specific Aspects of Refugee Problems in Africa, ratified by the majority of sub-Saharan African countries.

The African Commission on Human and Peoples' Rights is responsible for reviewing periodic reports of States, including compliance with Article 12 of the Charter and the 1969 OAU Convention on Refugees. It may also receive reports by States or other sources, including non-governmental organizations and

individuals, concerning violations by a State party of the rights provided for by the Charter. It then makes conclusions, which serve as recommendations for States.

In 2003, the African Commission on Human and Peoples' Rights appointed a special rapporteur on refugees, asylum seekers, and displaced persons. The rapporteur is mandated to receive information, carry out studies and investigations, engage in dialogue with States, raise awareness on the implementation of relevant UN and OAU conventions, and prepare reports and recommendations to the Commission.

The African Court on Human and Peoples' Rights was established in 2004. For some countries (those who signed the declaration under Article 34.6 of the Protocol), individuals and non-governmental organizations may refer cases directly to the Court. In other cases, the Court may be referred to by the African Commission on Human and Peoples' Rights. The Court ensures compliance with OAU and UN conventions, including those relating to refugees and migrant workers.

C. Sub-regional Organizations

In 1979, the Economic Community of West African States (ECOWAS) adopted a Protocol on the Free Movement of Persons, which gives citizenship status to all citizens of the Member States and asks these States to "*abolish all obstacles to freedom of movement and residence within the Community*". The ECOWAS Treaty also stipulates that citizens of the Community are exempted from visas and residence permits and may take up employment and undertake commercial or industrial activities in all member countries.

In the case of the West African Economic and Monetary Union (WAEMU), the Treaty establishing the Union provides for the free movement of persons within the Member States and grants the right to engage in professional activity, but with many limitations. However, there is no regional agreement with regard to the Central African Economic and Monetary Community (CEMAC) and the

Southern African Development Community (SADC). In this region, a Protocol on the facilitation of the movement of persons has been adopted, but is yet to be ratified.

VI. -AFRICAN CONSTITUTIONS AND REFUGEE RIGHTS

The majority of African countries have provisions in their constitutions for the protection of refugees, thus we can cite:

Algeria

Art. 81. Every foreigner lawfully within the national territory enjoys protection of the law for his person and his property.

South Africa

Section 9.1 of the Constitution of South Africa states that all individuals are equal before the law and enjoy the same benefits and protection of the law. This includes all foreigners residing on the territory.

Benin

According to Section 147 of its Constitution, Benin has the duty to welcome and protect refugees from the sub-region and elsewhere.

Morocco

Art. 30: ….Foreigners shall enjoy the fundamental freedoms accorded to Moroccan citizens, in accordance with the law. Those who reside in Morocco may participate in local elections by virtue of the law, the application of international conventions or reciprocity practices. The conditions for extradition and the granting of the right of asylum are defined by law.

Tunisia

Art. 26: The right to political asylum is guaranteed in accordance with the law; it is forbidden to extradite persons who benefit from political asylum.

VII. THE ROLE OF CONSTITUTIONAL COURTS IN THE PROTECTION OF REFUGEES AND MIGRANTS

A. The Constitutional Court of the Central African Republic

Central African refugees have the right to vote in accordance with the Constitution. This ruling by the Constitutional Court of the Central African Republic, issued on 24 July 2015, is inconsistent with the law passed in early July by the Central African Republic, which excluded refugees from voting on the grounds of fraud.

While the decision of the Constitutional Court to allow refugees to vote has been welcomed by the UN, it does not delight the majority of Central African politicians. Of course, excluding them from the electoral process raises questions in terms of representativeness. But for some, letting refugees vote can only lead to massive fraud.

Most political leaders did not want refugees to vote, but they pledged to respect the Constitutional Court's opinion, while putting in perspective the importance of the refugee community.

According to UNHCR figures, one-tenth of the Central African Republic's population has fled the country since late 2012. This represents 460,000 persons, including 190,000 voters, i.e. about 10 per cent of the Central African electorate.

B. The Supreme Court of Kenya

In its judgement No. 227 of 9 February 2017, Kenya's Supreme Court ruled that the principle of non-refoulement is the cornerstone of international refugee law. As a result, the collective repatriation of Somali refugees from Kenya is illegal, discriminatory and unconstitutional as it violates international law.

This judgement was given in the case between the Kenyan Government and the Kenya National Commission on Human Rights and the Legal Advice Centre.

The Kenyan authorities decided to repatriate Somali refugees from Kenya. As a result, the claimants, namely the Kenya National Commission on Human Rights and the Legal Advice Centre, filed

a petition on 25 July and 30 September 2016 to request the Supreme Court to annul this decision.

The Government of Kenya invoked security reasons. In fact, it considers these refugee camps as staging grounds for terrorists. However, the decision was justified by Article 24 of the 2010 Constitution, which refers to limitations, as there is overcrowding in the camps, terrorist attacks, significant financial needs to maintain the camps, trafficking and the proliferation of weapons.

For their part, the claimants argued that the measures taken by the Government were drastic and would expose refugees to danger, torture, abuse, and potential death in their country of origin. They also argued that such refoulement was discriminatory because it targeted only refugees of Somali origin.

Responding to these factual and legal grounds raised by the parties and based in particular on the provisions of Article 20 of the Constitution, which makes no distinction between nationals and non-nationals, the Supreme Court annulled the decision of the Government of Kenya, considering it illegal, discriminatory, and unconstitutional.

C. The Constitutional Court of Zambia

Zambian legislation gives the executive power a great deal of latitude to expel any person who, in the opinion of the public authorities, is likely to endanger peace and public order. This prerogative has been used on numerous occasions, and courts have been reluctant to oppose this practice. Long-term residents in Zambia were targeted by this practice. In 1994, the Interior Minister issued a deportation order against an Indian man married in Zambia to a Zambian woman whose two daughters lived in Zambia, claiming that his presence in Zambia posed a danger to peace, security, and public order. The courts followed the jurisprudence and refused to quash the Minister's decision.

In a more recent case, however, the Supreme Court placed certain limits on the prerogatives of the Government. It ruled against the

expulsion of Roy Clarke, a British-born writer who has been living in Zambia for three decades, married to a Zambian woman and with Zambian children and grandchildren, who has been unable to acquire citizenship since the legislation does not permit the transfer of a woman's nationality to her husband.

D. The Constitutional Court of South Africa

The Constitutional Court of South Africa reviewed the constitutionality of two clauses of Immigration Act No. 13 of 2002. Both clauses deal with the treatment of individuals suspected of being irregular migrants at the ports of disembarkation. The first clause, Section 34.8, allows an immigration officer to detain an illegal foreigner on board the ship on which he or she had arrived, pending his or her deportation to the border. Section 1.1 of the Immigration Act includes in the definition of 'ship' any vessel, boat, aircraft or other prescribed conveyance. The second clause, Section 34.2, limits the period of detention of illegal of foreigners to 48 hours, elsewhere than on a ship and for purposes other than his or her deportation.

The Government raised two preliminary issues concerning the capacity of the parties and the applicability of the Declaration of Rights. On the first issue, the Government deemed that the claimant (LHR) could not act in the public interest. The Court ruled that LHRs were acting in the public interest. Its ruling was reasoned by key concepts, such as the constitutional significance of the provisions at hand, the vulnerability of the group concerned and the difficulty of those individuals to bring legal action on their own.

The second issue was whether the Declaration of Rights applied to foreigners in an irregular situation. The Government argued, on the basis of Section 7.1 of the Constitution, that the Declaration of Rights only applied to persons "in our territory", excluding illegal migrants not officially admitted. The Court rejected this argument, finding that illegal foreigners were physically in the territory. They could therefore claim protection under Section 12 of the Constitution (right to liberty and security of persons) and Section 35.2 of the Constitution (rights of detained persons).

The detention of illegal foreigners on board a ship is a limitation on their rights to liberty and to not be detained without prior trial. The Constitutional Court found that such limitation could be justified under Section 36 of the Constitution only to the extent that Section 34.8 of the Act does not provide that detention on board a ship may be examined by a court after 30 days.

The Court held that the Act was unconstitutional in that it did not permit detention on board a vessel for a period exceeding 30 calendar days.

To remedy this unconstitutionality, the Court interpreted the terms of Section 34.8 of the Act as providing that detention on board a ship may not exceed thirty (30) days in the absence of a court order to that effect. In addition, it stated that a court could extend detention for an additional period not exceeding ninety (90) calendar days.

VIII. CONCLUSION

The problem (The issue) of migrants and refugees appears day by day as a challenge that Africa must take up to fulfil its promise of development. Violence, intolerance, injustice, poverty, and AIDS are all related to the refugee issue. Professor Theodore HOLO, President of the Constitutional Court of Benin, states: *"Africa, the cradle of humanity, is today considered the land of choice of refugees. People are forced to leave their country, having no alternative but the suitcase or the coffin, either because of their origin or their religious, political, or philosophical convictions. Others are fleeing economic misery, internal or international conflict, and Africa is still a major theatre of operations.*

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UNHCR (2000) Refugees around the world. Fifty years of humanitarian action, Paris, Éditions Autrement, 338 p.

UNHCR (2005) Refugees: global trends in 2005. UNHCR, Geneva, 115 p.

¬ International Organization for Migration (IOM), World Development Report, 2005.

¬ African Union, Report of the Expert Group on Migration and Development, 3-5 April 2006

Source: Michelle Guillon, The mosaic of African migrations, in Esprit, August-September 2005

Constitutions of African countries

Jurisprudence of African Constitutional Courts

MIGRATION AND REFUGEE LAW

M. Serhat MAHMUTOĞLU
TURKEY

MIGRATION AND REFUGEE LAW

M. Serhat MAHMUTOĞLU[*]

INTRODUCTION

Constitutional Court of the Republic of Turkey is a member of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). The Association aims to promote democracy, rule of law and fundamental rights in Asia by enhancing the exchange of information and experience regarding constitutional justice between the institutions that exercise constitutional justice and by enriching the friendly relations and cooperation.

At the 2nd Board of Members Meeting of the Association that was held in İstanbul in April 2014, it was unanimously held that Summer Schools on the constitutional justice would be organized in Turkey every year. It was decided during the 3rd Board of Members Meeting, held in 2016 in Bali, Indonesia, that a Permanent Secretariat of the AACC be established, and that a Centre for Training and Human Resources Development, which is one of the three branches of this Secretariat, be formed and become operational in Turkey. Within the scope of the activities of this Centre, the 5th Summer School themed "Migration and Refugee Law" will be held in Turkey on 17-24 September 2017.

The theme of this year's academic programme has been determined as Migration and Refugee Law. It must be underlined that the Republic of Turkey has opened its doors unconditionally and without hesitation to over 3 million refugees from all over the world, being in the first place Syria and Iraq, on the ground that they were subject to oppression and persecution.

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According to the 2015 data of the United Nations High Commissioner for Refugees (UNHCR), more than 3 million refugees out of approximately 21 million refugees worldwide are in Turkey. This reveals that the number of refugees in Turkey is more than the populations of 61 countries that are members of the UN.

Within the scope of this study, international and national legislations on Migration and Refugees, applications lodged by foreigners with the Constitutional Court and summaries of some of the important judgments of the Constitutional Court in this respect have been discussed.

As detailed by Prof Rick Lawson and Prof Pınar Ölçer at the morning session, according to the European Convention on Human Rights, in cases where foreigners face the risk of being ill-treated in case of deportation, the states are obliged to protect them.

I will not repeat the practice of the European Court of Human Rights and the relevant legislation, as our distinguished lecturers have mentioned those issues in the morning. Instead, I will explain the practice of the Turkish Constitutional Court concerning the applications lodged by foreigners, the working method of the Court and, if any time remains, three judgments of the Court.

First of all, I can say that the Constitution of the Republic of Turkey and the Convention contain similar safeguards and that the practice of the Turkish Constitutional Court in terms of individual application is parallel with the practice of the ECHR.

CASE-LAW OF THE CONSTITUTIONAL COURT

The Constitution contains no provision concerning the entry of foreigners into the country, their residence in the country and their deportation from the country. As also acknowledged in the international law, this issue remains within the scope of the sovereignty power of the State. Accordingly, there is no doubt that the State has discretion in allowing the foreigners to enter into the country or deporting them. However, in cases where such actions constitute an interference with fundamental rights and freedoms

safeguarded in the Constitution, they can be subject to individual application.

Besides the right to life, Article 17 § 1 of the Constitution also guarantees the right to protect and improve individuals' corporeal and spiritual existence. Paragraph 3 therein provides that no one shall be subject to "torture or ill-treatment" and that no one shall be subject to punishment or treatment "incompatible with human dignity". As can be understood from the Article, the corporeal and spiritual existence of individuals that is generally safeguarded in Paragraph 1 is distinctively protected against ill-treatment in Paragraph 3.

However, for the consideration that the rights protected by way of such prohibition are guaranteed in real terms, it is not enough for the State not to subject the individuals to ill-treatment. The State must also protect the individuals against the acts of public officials and third parties that may cause ill-treatment (see A.A. and A.A., § 57).

As a matter of fact, in Article 5 of the Constitution, provision of the conditions required for the development of the individuals' material and spiritual existence is considered among the fundamental aims and duties of the State. Considering Articles 17 and 5 of the Constitution together, it is understood that the State also has a positive obligation to protect the individuals against the prohibition of ill-treatment (see A.A. and A.A., § 58).

When Articles 17, 5 and 16 of the Constitution are interpreted in conjunction with the international law, especially the Geneva Convention, it must be accepted that it is among the positive obligations of the State to protect the foreigners under its sovereignty, who might be subject to ill-treatment if deported, from the risks against their corporeal and spiritual existence (see A.A. and A.A., § 59).

In order to provide a protection -within the scope of the positive obligation in question- for the person to be deported against the risks he might face in his country, he must be provided with

"an opportunity to effectively object" to the deportation order. Otherwise, it cannot be said that a foreigner alleging to be subject to ill-treatment if deported and having more limited opportunities than the State to substantiate his allegation has actually been protected (see A.A. and A.A., § 60).

Therefore, it is beyond doubt that the positive obligation to protect against ill-treatment –by the very nature of the rights protected by the prohibition in question- also includes procedural safeguards to provide a foreigner against whom a deportation order has been given with the opportunity "to have his allegations examined" and "to have the deportation order examined fairly" (see A.A. and A.A., § 61).

Within this framework, in cases where a foreigner alleges that the prohibition of ill-treatment will be violated in the country he will be sent to as a result of deportation, the administrative and judicial authorities must investigate in detail whether there is a real risk of violation in the relevant country. As a requirement of the procedural safeguards in question, the deportation orders given by the administrative authorities must be examined by an independent judicial authority; the deportation orders must not be executed during this examination; and the parties must effectively take part in the proceedings (see A.A. and A.A., § 62).

The obligation to protect against ill-treatment does not always require such an examination in every deportation process. In order for such an obligation to arise, the applicant must in the first place submit an arguable allegation. In this respect, the applicant must reasonably explain the alleged risk of ill-treatment in the country he will be retuned to; he must submit the relevant information and documents to substantiate his allegation, if available; and his allegations must attain a certain level of seriousness. However, as an arguable allegation may vary according to the circumstances of the case, each case must be examined in its exceptional circumstances (see A.A. and A.A., § 63).

Regarding an allegation as arguable does not necessarily mean that a violation will be found in the application. This only means that

the applicant's allegations can be examined. Whether the applicant's allegations that he might face certain risks given the conditions of the country he will be returned to and his personal status are true or not and whether his explanations are reasonable or not must be examined rigorously. In the examination of whether the applicant's allegations are true or not and whether any risk exists or not, the reports issued by national and international institutions or other sources that might provide information on the case might be taken into account (see A.A. and A.A., § 64).

In order to conclude that the prohibition of ill-treatment may be violated if the deportation order is executed, it must be demonstrated that the existence of a risk in the country to which the applicant will be returned is beyond a possibility and that it constitutes "an actual risk". The burden of proof in this respect may be on the public authorities and/or the applicant according to the nature of the allegation. The following assessment criteria concerning the burden of proof must be taken into account in the assessment of whether an allegation is arguable or not (see A.A. and A.A., § 65).

Firstly, the applicant may claim that he might be subject to ill-treatment due to the long-lasting general political instability in the country he will be returned to and the internal disorder that spread all over the country. In such a case, the public authorities must objectively prove that the general conditions of the relevant country will not violate the prohibition of ill-treatment (see A.A. and A.A., § 66).

Secondly, it may be alleged that the public authorities of the country to which the relevant persons will be returned may systematically subject them to ill-treatment due to their ethnic origins, religious beliefs, political views or membership to a certain group. In such cases, the public authorities must investigate whether the persons or groups under such conditions have been subject to ill-treatment in their countries or not. The applicant on the other hand must prove that he belongs to or is a member of the groups allegedly under the risk (see A.A. and A.A., § 67).

Thirdly, the alleged risk in the country might derive directly from the relevant person's personal status, independently of his belonging to or being a member of a certain group. In this case, the applicant must explain why he will subject to ill-treatment in the country he will return to, as well as he must clearly put forth the facts that might substantiate his claims (see A.A. and A.A., § 68).

Lastly, it may be claimed that the risk in the country comes from persons or groups who are not public officials. In this case, the applicant must demonstrate that the risk is real and that the public officials of the relevant country will not be able to provide sufficient guarantees to eliminate the risk in question (see A.A. and A.A., § 69).

As a rule, the circumstances of the date on which the deportation order was made must be taken into account when investigating whether the material facts regarding the existence of a real risk exist or not. However, in cases of important developments that might directly affect the outcome of the assessment to be made, the new situation must also be taken into consideration (see A.A. and A.A., § 70).

Statistics as to the Applications Lodged with the Constitutional Court by Foreigners

Number of individual applications lodged with the Court by foreign natural persons between 23 September 2012 and 15 September 2017 is 1223. Out of them, 250 applications were lodged by Syrian citizens, 169 by Russian citizens and 118 by British citizens. These are respectively followed by Iranian, Uzbek and German citizens.

In 420 of these individual applications, the Court reached the conclusion that in case of deportation, the applicant would face a severe risk to his life, or his corporeal and spiritual existence in his country of origin

In 420 of these individual applications, the Court reached the conclusion that in case of deportation, the applicant would face a severe risk to his life, or his corporeal and spiritual existence in

his country of origin and accordingly ordered, as a measure, the suspension of deportation. Out of the interim decisions delivered by the Court, 413 decisions concern the right to life and the prohibition of ill-treatment as well as 7 decisions concern the right to respect for private and family life.

WORKING METHOD OF THE CONSTITUTIONAL COURT

Examination as to Request for an Interim Measure and on the Merits

If the Court receives an individual application filed by a foreigner with an alleged violation of the prohibition of ill-treatment in case of deportation, it primarily makes an assessment as to whether an interim decision may be rendered for the suspension of the execution of deportation order.

As also underlined by Prof. Lawson, the aim of rendering an interim decision is to prevent the applicant's deportation unless the Court renders a judgment as to the merits of the individual application. This is because, it is explicit that a violation judgment to be rendered after deportation would not afford a protection for the applicant within the meaning of the prohibition of ill-treatment.

I. Prominent Decisions/Judgments of the Constitutional Court on Refugees and Migration

1. Interim Decisions

a. Application by G.B. and Others (no. 2015/15273, 17 September 2015)

G.B. is a Russian citizen residing in Turkey. The remaining applicants are G.B.'s children who were born in 2008, 2012 and 2013 and are temporarily residing with their grandmother in Russia.

G.B. was arrested and taken into custody while trying to illegally cross the border to Syria. Thereafter, on 22 November 2014, the İstanbul Governor's Office ordered the applicant's deportation.

G.B. brought an action for the suspension of the execution of her deportation. She also requested to be granted international protection from Turkey.

When taken into custody, the applicant sent her children in need of care to Russia to stay with their grandmother. However, after making a request for international protection, she called back her children to Turkey.

The children arrived in Turkey; however, after being made to wait for 4 days at the airport, they were repatriated to their country of origin due to the *exclusion order* imposed on them in Turkey.

The applicant then brought an action before the administrative court and requested the court to stay the exclusion order. The administrative court suspended the exclusion order imposed on the applicant's children.

Following this administrative court's decision, the children once again arrived in Turkey but were not allowed, at the airport, to enter into the country.

Thereafter, the applicants filed an individual application with a request for an interim measure with the Constitutional Court.

The Court reached the conclusion that causing the applicants, who were a minor and, beyond question, in need of care given their ages, to live apart from their mother until an uncertain date may cause irreparable damages to their spiritual existence. Accordingly, the Court acknowledged the applicants' request for an interim measure, taking into consideration Articles 3 and 8 of the Convention.

2. General Principles and Judgments on the Merits

a. General Principles

a. Application by Azizjon Hikmatov (no. 2015/18852, 10 May 2017)

--Citizen of Uzbekistan--

The applicant requested to be granted international protection from Turkey by maintaining that he had become a target in his country for involving in political protests against the government and for taking part in youth-led movements during the period when

he was studying at the Tashkent State University of Economics and that those who desired to freely practice Islam and to carry out studies on this field were exposed to duress and oppression in his country.

Thereafter, the applicant was referred to Gaziantep for the completion of the necessary procedures concerning his request for international protection.

He then got married with another citizen of Uzbekistan, S.K., with whom he had got acquainted there. They have two children who were born in 2011 and 2012.

The applicant and his family were granted a temporary residence permit until the conclusion of their request for international protection, on condition of not leaving Gaziantep without permission.

In the meantime, the applicant applied to the Office of the United Nations High Commissioner for Refugees ("the UNHCR") to seek asylum.

On 30 June 2010, the applicant was granted temporary refugee status by the UNHCR.

On 15 March 2015, he was arrested while travelling in a vehicle with a Syrian plate which was stopped by the police teams of the Kilis Security Directorate. It was revealed that he did not have any identity card with him.

The security officers considered that the applicant, in company with four other persons, tried to enter into certain regions of Syria, where clashes were taking place, through illegal means.

However, the applicant maintained that as there was limited number of job opportunities in Gaziantep, he was going not to the region where the clashes were going on but to the safe area, with a view to selling some objects; and that he had made an agreement with the driver in return for payment. He also noted that as a result of the vehicle-search conducted, the police officers found a camouflage (winter coat) owner of which was not known.

The applicant further stated that he tried to enter into Azez region located opposite to Kilis and a safe area where thousands of civilians were residing; that he knew Arabic and that he received trainings in the fields of trading and marketing; and that nor did he aim at entering into the region where the clashes were taking place. He also submitted documents and certificates indicating that he knew Arabic and that he received trainings in the field of marketing.

Thereupon, an order for the applicant's deportation was issued.

The action brought by the applicant for annulment of the deportation order was dismissed by the competent administrative court. The administrative court's decision did not include any examination or assessment as to the applicant's allegation that in case of his deportation, he might be killed or would be ill-treated in Uzbekistan.

On 4 December 2015 the applicant became aware of this decision. Thereupon, he lodged an individual application for an interim measure on the same date.

The Constitutional Court emphasized that the administrative court failed to make an examination or assessment as to the risk alleged, by the applicant, to be present in his country of origin. The Court further indicated that the administrative court did not take into consideration the reports issued by institutions and non-governmental organizations −namely the United Nations, the Human Rights Watch and the Amnesty International that are operating in the field of human rights− concerning Uzbekistan; and that nor were the conditions prevailing in that country investigated. For these reasons, the Court found a violation of the prohibition of ill-treatment jointly safeguarded by Article 3 of the European Convention on Human Rights and Article 17 of the Constitution.

However, I would like to emphasize that the violation judgment of the Court does not mean that the applicant would be exposed to torture in Uzbekistan. The Court underlines in its judgment that in cases where such an allegation is raised, a deportation order cannot be taken without an investigation into the alleged risks, as strictly required by the prohibition of ill-treatment.

b. Application by A.A. and A.A. (no. 2015/3941, 1 March 2017)

The applicants maintained that they had to leave their country of origin, Iraq, and to take shelter in Turkey due to terrorist acts of the DAESH; and that in case of deportation, their life as well as their corporeal and spiritual existence would be at risk.

In brief, the Plenary of the Constitutional Court made the following assessments:

In order to conclude that the prohibition of ill-treatment may be breached in case of the enforcement of the deportation order, it must be proven that existence of a risk in the country where the person would be repatriated is beyond a probability and attains a level of "real risk". The burden of proof in this respect may be on the public authorities and/or on the applicant, by the very nature of the allegation.

In the event that the risk in the country where the person would be repatriated is alleged to arise from persons or groups that are not public officers, the applicant must prove both the existence of this risk and the fact that the public authorities of the relevant country would remain insufficient to afford sufficient protection for the elimination of this risk.

It is beyond doubt that the applicant's allegations that their home had been bombed by the DAESH terrorist organization and that their corporeal and spiritual existence would be at risk in case of being deported are not unfounded. However, it is not possible to accept that every allegation of running away from a terrorist organization is not *per se* arguable. The applicants are required to reasonably explain the current and probable risks concerning their personal situations and to submit, if any, information and documents in respect thereof.

The applicants submitted certain photos by asserting that their home had been bombed by the DAESH terrorist organization. It has been observed that a certain part of the procedural safeguards that must be provided within the scope of the prohibition of ill-treatment (the obligation to carry out inquiry, effective participation in the

proceedings) was not afforded during the proceedings before the administrative court; and that both in the course of the proceedings and the individual application, the applicants failed to make an explanation to prove that these photos were of their own home. What is more important, the applicants' refraining from giving information about from which region of Iraq they had come makes it difficult to verify the accuracy of their allegations.

In the reports issued by the international human rights organizations, it is indicated that the DAESH is active not throughout Iraq but in certain regions of the country. Neither is there an assessment concerning the fact that the Iraqı Government remains insufficient to ensure safety of its citizens in the regions under its control.

As regards the applicant's assertion that "they are in dispute with the Iraqi government", there is no need to make a further assessment as there is no allegation that the Iraqi government has ill-treated, or may ill-treat, the applicants due to a dispute nature of which is not known.

Consequently, having reached the conclusion that the applicants' allegations that they may be subject to ill-treatment in their country of origin in case of being deported are not of arguable nature, the Constitutional Court found no violation of the prohibition of ill-treatment safeguarded by Article 17 of the Constitution.

Thanks for your attention,

I greet all you with my respect.

IMMIGRATION AND REFUGEE LAW

Abdumannob RAKHIMOV
UZBEKISTAN

IMMIGRATION AND REFUGEE LAW

Abdumannob RAKHIMOV[*]

Выступление старшего эксперта Конституционного суда Республики Узбекистан Абдуманноба Рахимова на семинаре «Миграционное право и законодательство о беженцах» г. Анкара (Турция), 17-24 сентября 2017 г.

Ассалому-алайкум муҳтарам Раис!

Ҳурматли хонимлар ва жаноблар

Уважаемый председатель!

Уважаемые дамы и господа,

участники семинара!

Проблема беженцев и соблюдение их прав сейчас стоит перед мировым сообществом особенно остро. Она связана с происходящими конфликтами, внутренним положением целого ряда стран, ответственностью правительств, деятельностью международных организаций, неправительственных фондов и даже отдельных граждан во всем мире.

В **Нью-Йоркской декларации о беженцах и мигрантах**, принятой Генеральной Ассамблеей ООН 19 сентября 2016 года, отмечается, что перемещения больших групп беженцев и мигрантов имеют трансграничные политические, экономические, социальные и гуманитарные последствия и последствия для процесса развития и прав человека. Это явление носит глобальный характер, что требует применения глобальных подходов и принятия глобальных решений.

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[*] Expert, Constitutional Court Of Uzbekistan.

Цели устойчивого развития, принятые в 2015 году на саммите ООН в Повестке дня в области устойчивого развития на период до 2030 года, также отмечают положительный вклад мигрантов в обеспечение всеохватного роста и устойчивого развития государств.

В 2017 году Узбекистан вступил в качественно новый этап своего независимого развития. За годы независимости Узбекистан достиг колоссальных успехов в социально-экономическом и политико-правовом развитии.

В целях коренного повышения эффективности проводимых демократических реформ, создания условий для обеспечения всестороннего и ускоренного развития государства и общества, реализации приоритетных направлений по модернизации страны и либерализации всех сфер жизни был принят Указ Президента Республики Узбекистан от 7 февраля 2017 г. **«О Стратегии действий по дальнейшему развитию Республики Узбекистан».**

Указом Президента Республики Узбекистан утверждены:

во-первых, Стратегия действий по пяти приоритетным направлениям развития Республики Узбекистан в 2017–2021 годах;

во-вторых, Государственная программа по реализации Стратегии действий в Год диалога с народом и интересов человека.

В рамках Стратегии действий **пятое направление посвящено вопросам обеспечения безопасности, межнационального согласия и религиозной толерантности, осуществление взвешенной, взаимовыгодной и конструктивной внешней политики,** направленные на укрепление независимости и суверенитета государства, создание вокруг Узбекистана пояса безопасности, стабильности и добрососедства.

Стратегия действий является «дорожной картой» Узбекистана по выполнению Целей устойчивого развития ООН

и реализуется в 5 этапов, каждый из которых предусматривает утверждение отдельной ежегодной Государственной программы по ее реализации в соответствии с объявляемым наименованием года.

В этой связи анализ законодательства Узбекистана показал, что, несмотря на отсутствие специальных нормативно-правовых актов, регулирующих вопросы миграции, прав и статуса беженцев, оно в целом отражает основные принципы защиты прав беженцев, установленные в международных актах.

В частности, закреплены общепризнанные принципы и стандарты в области прав человека, вытекающие из обязательств, принятых республикой в рамках присоединения к шести основным международным документам ООН по правам человека.

Данные положения полностью соответствуют Нью-Йоркской декларации о беженцах и мигрантах, где подчеркивается, что **«хотя для регулирования порядка обращения с беженцами и мигрантами установлена отдельная нормативно-правовая база, они обладают теми же универсальными правами человека и основными свободами, что и остальные люди».**

Кроме того, статус иностранных граждан и лиц без гражданства в Узбекистане определен Правилами пребывания иностранных граждан и лиц без гражданства в Республике Узбекистан, утвержденными постановлением Кабинета Министров от 21 ноября 1996 года **«О порядке въезда, выезда, пребывания и транзитного проезда иностранных граждан и лиц без гражданства в Республике Узбекистан»**.

В частности, иностранные граждане, включая граждан государств – участников СНГ и лица без гражданства могут постоянно проживать или временно пребывать в Узбекистане.

Правила определяют порядок временной прописки иностранных граждан, находящихся в Республике Узбекистан на срок действия въездной визы, выдачи иностранным гражданам

разрешений на постоянное проживание; передвижения иностранных граждан по территории страны, сокращения сроков пребывания и выдворения из страны иностранных граждан за нарушение законодательства.

Так, к примеру, иностранный гражданин может быть выдворен за пределы Республики Узбекистан в случае нарушения правил пребывания, то есть в случаях проживания без документов, предоставляющих право на постоянное или временное жительство или по недействительным документам, несоблюдения установленного порядка временной или постоянной прописки, передвижения или выбора места жительства, уклонения от выезда по истечении срока пребывания, несоблюдения правил транзитного проезда через территорию Республики Узбекистан, с последующим ограничением в праве на въезд в Республику Узбекистан сроком от одного года до трех лет.

Административное выдворение иностранных граждан и лиц без гражданства за пределы Республики Узбекистан заключается в принудительном или контролируемом самостоятельном их выезде с последующим ограничением в праве на въезд в Республику Узбекистан сроком от одного года до трех лет. Административное выдворение применяется судьей по административным делам районного (городского) суда.

Следует отметить, что вопрос о законодательном обеспечении прав беженцев, определения статуса беженцев находится в настоящее время на стадии широкого обсуждения юридической общественности.

С учетом норм международного права в Конституции страны, закреплены полномочия Президента относительно решения вопросов предоставления гражданства и политического убежища в стране. По этим вопросам окончательное решение принимает Президент путем подписания указа по каждому конкретному делу. Действующее законодательство предоставляет возможность решения вопроса о политическом

убежище на основании использования единых процедур, предусмотренных при предоставлении гражданства.

Указом Президента Республики Узбекистан от 29 мая 2017 года, утверждено «Положение о порядке предоставления политического убежища в Республике Узбекистан».

Данное Положение регулирует порядок предоставления политического убежища иностранным гражданам и лицам без гражданства исходя из национальных интересов Республики Узбекистан на основании принципов международного права, в соответствии с Конституцией и законами Узбекистана.

Политическое убежище в Республике Узбекистан предоставляется лицам и членам их семей, ищущим убежище и защиту от преследования или реальной угрозы стать жертвой преследования в стране своей гражданской принадлежности или постоянного местожительства за общественно-политическую деятельность, религиозные убеждения, расовую или национальную принадлежность, а также других случаев нарушений прав человека, которые предусмотрены нормами международного права.

Необходимо подчеркнуть, что лицо, которому предоставлено политическое убежище в Республике Узбекистан, и члены его семьи пользуются на территории Республики Узбекистан правами и свободами, а также несут обязанности, установленными законодательством или международными договорами Республики Узбекистан.

Вместе с тем, следует отметить, что согласно законодательству, политическое убежище в Республике Узбекистан не предоставляется, если лицо:

– преследуется за действие (бездействие), признаваемые преступлением, или виновно в совершении действий, противоречащих основополагающим целям и принципам Организации Объединенных Наций;

– привлечено в качестве обвиняемого по уголовному делу либо в отношении него имеется вступивший в законную

силу и подлежащий исполнению на территории страны обвинительный приговор суда;

– прибыло из третьей страны, где ему не грозило преследование;

– имеет гражданство третьей страны, где оно не преследуется;

– представило заведомо ложные сведения;

– не может или не желает вернуться в страну своей гражданской принадлежности или страну своего постоянного местожительства по экономическим, экологическим или социальным причинам, а также в связи с чрезвычайными ситуациями природного и техногенного характера.

Лицо, которому предоставлено политическое убежище в Республике Узбекистан, утрачивает предоставленное политическое убежище в случаях:

– возвращения в страну своей гражданской принадлежности или страну своего постоянного местожительства;

– выезда на постоянное местожительство в третью страну;

– добровольного отказа от политического убежища;

– приобретения гражданства Республики Узбекистан или другой страны.

Предоставленное лицу политическое убежище в Республике Узбекистан также может быть утрачено по соображениям национальной безопасности, а также, если это лицо занимается деятельностью, противоречащей основополагающим целям и принципам Организации Объединенных Наций, либо если оно совершило преступление и в отношении него имеется вступивший в законную силу и подлежащий исполнению обвинительный приговор суда.

В заключении хотелось бы отметить, что действующее законодательство Узбекистана полностью соответствует всем общепризнанным нормам и демократическим стандартам в

области прав человека, в том числе и по защите прав беженцев, а также отвечает национальным интересам нашего государства.

Благодарю за внимание!

CLOSING SPEECH ON THE FIFTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

Esteemed Guests,

Every beautiful thing has also an ending. We have come to the end of the fifth Summer School of the Asian Constitutional Courts and Equivalent Institutions. The subject of this year's Summer School was actual, interesting and good "immigration and refugee law. It is really interesting because it describes an incident that occurs every day in our country. I hope it was useful to all of you.

According to our court officials and the organizers of this event, in which I could not participate but I would have loved to, the information you have received from us was valuable but the one we received from you was as much important. We are also grateful for this and your contributions will be a guide for Turkey, as well.

This meetings help jurists from different countries to get closer and it gives the opportunity to help each other and spread the regional and general thoughts of law. This is a very positive result.

In addition to that it brings the people from different nations closer, too. I hope that you are content of this meeting, of Ankara and Turkey. When you are back we want to regard you from now on as representatives of Turkey.

We want to thank you very much for your participation and want to say goodbye after you will have visited İstanbul.

My best compliments,

Burhan ÜSTÜN
Vice-President of the Constitutional
Court of the Republic of Turkey

5th SUMMER SCHOOL OF THE AACC
17 – 24 SEPTEMBER 2017
LIST OF PARTICIPANTS

Executive Committee:

Name-Surname	Title
Mr. Selim Erdem	Secretary General
Mr. Murat Azaklı	Deputy Secretary General
Mr. Dr. Mücahit Aydın	Rapporteur Judge (Moderator)
Mr. M. Serhat Mahmutoğlu	Rapporteur Judge
Mr. Yücel Arslan	Rapporteur Judge

Lecturers:

Name-Surname	Institution
Burhan Üstün	Constitutional Court of the Republic of Turkey
Prof. Dr. Rick Lawson	Faculty of Law, Leiden University
Prof. Dr. Ali Kemal Yıldız	Faculty of Law, Turkish-German University
Jose Fischel De Andrade	The Office of UN High Commissioner For Refugees in Turkey
Gamze Gül Çakır Kılıç	The Turkish Ministry of Interior, Directorate General of Migration Management
Assoc. Prof. Dr. Pınar Ölçer	Faculty of Law, Leiden University
Assoc. Prof. Dr. Faruk Kerem Giray	Faculty of Law, İstanbul University
Mehveş Bingöllü Kılcı	European Court of Human Rights
Moussa Laraba	Secretary General, Conference of Constitutional Jurisdictions of Africa

Participants:

Name-Surname	Institution
1. Mr. Ahmad Siyer Sarwary (Legal Expert)	The Independent Commission for Overseeing the
2. Mr. Mohammad Asef Sahak (Legal Expert)	Implementation of Constitution of Afghanistan

1. Ms. Nigar Yusubova (Advisor) **2.** Mr. Rustam Salimov (Senior Advisor)	Constitutional Court of Azerbaijan
1. Mr. Nikolai Stoliov Pashkunov (Legal Expert) **2.** Ms. Victoria Viktorova Mingova (Legal Advisor)	Constitutional Court of Bulgaria
1. Mr. Jefri Porkonanta Tarigan (Case and Decision Data Processing Staff) **2.** Mr. Mardian Wibowo (Senior Substitute Registrar)	Constitutional Court of Indonesia
1. Mr. Giorgi Sulkhanishvili (Chief Advisor) **2.** Mr. Nika Arevadze (Senior Advisor)	Constitutional Court of Georgia
1. Ms. Zorka Karadžić (Advisor) **2.** Ms. Marija Ivezić (Advisor)	Constitutional Court of Montenegro
1. Ms. Yelena Artemyeva (Director) **2.** Ms. Mensulu Amangaliyeva (Advisor)	Constitutional Council of Kazakhstan
1. Mr. Kubanychbek Alybaev (Head of Department) **2.** Mr. Nurmatov Ulanbek (Senior Consultant)	Constitutional Chamber of Supreme Court of the Kyrgyz Republic
1. Mr. Jung Won Kim (Rapporteur Judge) **2.** Mr. Hyun Jun Park (Rapporteur Judge)	Constitutional Court of Korea
1. Mr. Sevdail Kastrati (Chief Legal Advisor) **2.** Ms. Anita Çavdarbasha (Legal Advisor) **3.** Ms. Vesa Caka (Legal Advisor)	Constitutional Court of Kosovo

1. Mr. Awang Kerisnada Bin Awang Mahmud (Session's Court Judge) **2.** Ms. Rozi Binti Bainon (Director of Policy and Legislation Division)	Federal Court of Malaysia
1. Ms. Enkhzaya Amgalan (Officer) **2.** Mr. Erdenebat Beejin (Officer)	Constitutional Court of Mongolia
1. Mr. Abdumannob Rakhimov (Expert)	Constitutional Court of Uzbekistan
1. Mr. Baigozin Konstantin Deputy (Head of Department) **2.** Mr. Dmitrii Kuznetsov (Counsellor)	Constitutional Court of Russia
1. Ms. Shahlo Kholiqova (Chief Specialist) **2.** Ms. Nataliya Rahimova (Leading Specialist)	Constitutional Court of Tajikistan
1. Mr. Kongkieat Suraka (Officer) **2.** Mr. Chenwiwatt Thongpasonk (Officer)	Constitutional Court of Thailand
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8. Mr. Sinan Armağan (Rapporteur Judge) **9.** Ms. Gizem Ceren Demir Koşar (Assistant Rapporteur Judge) **10.** Mr. Mustafa Kadir Atasoy (Director of İnternational Relations) **11.** Ms. Özlem Talaslı Aydın (Translator/İnterpreter) **12.** Ms. M. Azra İlhan Durmuş (Translator/İnterpreter) **13.** Mr. Mehmet Akif Eren (Attendant) **14.** Ms. Enise Özdemir (Translator/İnterpreter) **15.** Ms. Özge Elikalfa (Translator/İnterpreter)	Constitutional Court of Turkey

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BAŞKAN ve ÜYELERİMİZ


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