



A LEGAL LOOK AT MIGRATION



INTERNATIONAL HUMAN RIGHTS ACCORDS PROTECT MIGRANTS FROM DISCRIMINATION

By Melina Lito

In November 2015, an investigation of the terrorist attacks in Paris revealed that the main organizer — a Belgian citizen on at least one terror watch list — and other attackers had potentially sneaked back into Europe hidden among the thousands of refugees passing through Greece. According to an article in *The Telegraph* at that time: “The Schengen border-free zone of European countries now finds itself in an existential crisis, with migrants and terrorists alike travelling with ease to every corner of Europe.” Similar uneasiness has also appeared in the United States, where some politicians are pushing to block the admission of Syrian refugees amid growing concerns that their presence will increase terrorist threats. Additionally, there have been uncomfortable debates about admitting Christian versus Muslim refugees or banning Muslims from the country entirely.

Similarly, in September 2015, the Hungarian Counter-Terrorism Center reported that terrorists were crossing borders masked as refugees, causing serious national security concerns. “Danger of migrants traveling illegally and even without documents is a real, existing problem, along with the terrorist threat,” the center reported. The Hungarian government estimated in October 2015 that more than 156,000 migrants had already entered the country illegally that year to reach richer EU countries and apply for asylum. Zeid Ra’ad Al Hussein, the United Nations high commissioner for human rights, commented in a news release on Hungarian efforts to stem the tide: “I am appalled at the callous, and in some cases illegal, actions of the Hungarian authorities in recent days, which include denying entry to, arresting, summarily rejecting and returning refugees, using disproportionate force on migrants and refugees, as well as reportedly assaulting journalists and seizing video documentation. Some of these actions amount to clear violations of international law.”

With this background in mind, the time is ripe to discuss legal protections for migrants, the duties of states under international law and what that means for the security sector. Should a state prioritize national security or the right of the migrant to flee from violence and conflict in his country of origin? As people move from one territory to another, national security considerations can increase, especially given migrants’ vulnerability to human trafficking, smuggling and terrorism, resulting in part from socio-economics, political instability and the breakdown of the rule of law and good governance.

This discussion examines the rights of migrants to move freely, including on grounds of family reunification; the obligations of states to avoid discrimination based on color, race and other factors; the recommendation not to distinguish between citizens and noncitizens; and the rights of refugees not to be returned to a country of persecution. While security sectors must deal with pressing concerns arising from the rapid flow of migrants and refugees, including terrorism and transnational organized crime, measures put in place must not violate rights and responsibilities laid out in international migration law.

According to the primer “International Migration Law” from the International Office of Migration (IOM), most international migration law has developed only recently with the rise of globalization. Historically, migration had been regulated mainly at the national level. No single convention or treaty captures the rights of migrants and the responsibilities of other stakeholders, but these laws are usually pieced together from other sources, including treaties, conventions and customary international law. In recognizing that migrant rights are human rights, migration law can be defined by the rights and obligations laid out in various instruments including but not limited to the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR),

the Convention relating to the Status of Refugees (1951 Refugee Convention), the International Convention on the Elimination of Racial Discrimination (ICERD), the Convention of the Rights of the Child (CRC) and the Convention against Torture. At the center of it all is the state's supreme right to sovereignty and territorial integrity. As highlighted in the IOM primer, "state sovereignty is the traditional starting point when considering international migration law. States have authority over their territory and population. They can decide who can and who cannot enter their territory. States can secure their borders and decide on conditions of entry and stay as well as removal."

THE UDHR AND THE ICCPR

Building on the UDHR, which states that "everyone has the right to leave any country, including his own, and to return to his own country," the ICCPR guarantees the right to leave a country, with limitations on grounds of national security or public order. Moreover, a lawful alien can indeed be expelled from a state, but has the right to a court hearing unless national security priorities require a different process.

In addition to these provisions that speak directly to the flow of people from one country to another, the ICCPR also obligates states to respect the rights of people within its territory "without distinction of any kind, such as race,

THE ICERD

Moreover, the ICERD and the interpretations of the Committee on the Elimination of Racial Discrimination (CERD) discuss the distinction between citizens and non-citizens. Under the ICERD, "this Convention shall not apply to distinctions, exclusions, restrictions or preferences made by a State Party to this Convention between citizens and non-citizens." The CERD recognizes "the possibility of differentiating between citizens and non-citizens," but its guidance indicates that such distinction would violate nondiscrimination provisions, especially if it is not proportional to achieving a legitimate aim.

Similarly, under the ICERD, states commit not to discriminate in enforcing the right to leave the country of nationality. The CERD has noted that:

"Article 5 of the Convention incorporates the obligation of States parties to ... eliminate racial discrimination in the enjoyment of civil, political, economic, social and cultural rights. Although some of these rights, such as the right to participate in elections, to vote and to stand for election, may be confined to citizens, human rights are, in principle, to be enjoyed by all persons. States parties are under an obligation to guarantee equality between citizens and non-citizens in the enjoyment of these rights to the extent recognized under international law."

The CERD recommends legislative reforms that will align the nondiscrimination provision and "ensure that legislative guarantees against racial discrimination apply to non-citizens regardless of their immigration status," and that "measures taken in the fight against terrorism do not discriminate, in purpose or effect, on the grounds of race, colour, descent, or national or ethnic origin and that non-citizens are not subjected to racial or ethnic profiling or stereotyping ... and to promote a better understanding of the principle of non-discrimination in respect of the situation of non-citizens." Finally, the CERD recommends that states "take resolute action to counter any tendency to target, stigmatize, stereotype or profile" non-citizens based on race, ethnicity or nationality.

THE REFUGEE CONVENTION

Under the 1951 Refugee Convention, in contrast to a migrant who leaves his country of origin voluntarily, a refugee is a person who is forced to leave out of a well-founded fear of persecution or a lack of protection in his or her own country. Under the convention, when a refugee enters the host country without authorization, the state "shall not impose penalties, on account of their illegal entry or presence," but give the refugee an opportunity to "show good cause." When a person has claimed refugee status, the state cannot restrict freedom of movement, except in cases in which the refugee has been granted temporary admission. States "shall not expel a refugee lawfully in their territory save on grounds of national security or public order." A refugee has a right to submit evidence in defense of himself or herself, "except where compelling reasons of national security otherwise require."

colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." While states can waive these rights in national emergencies, measures taken cannot violate international law; cannot involve any kind of discrimination based on race, color, religion or social origin; and cannot violate non-derogable rights such as the right to life, freedom of thought and religion and freedom from torture, inhuman or degrading treatment and slavery. Articles 5(1) and 5(2) of the ICCPR clearly say that states cannot destroy any rights or freedoms given by the covenant and that fundamental rights shall not be restricted.



Abdelhamid Abaaoud, a Belgian national suspected of planning the November 2015 terror attacks in Paris, may have used a fake passport to slip back into Europe among the flow of refugees. REUTERS



Migrants riot as Hungarian police fire tear gas and water cannons at the border crossing with Serbia in September 2015. Migrants have the right to leave any country, but host countries are not required to accept all migrants, especially if they are considered security threats. REUTERS

The 1951 convention also stipulates that a state cannot expel a refugee “when his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This principle of non-refoulement is a key provision. “A refugee should not be returned to a country where he or she faces serious threats to his or her life or freedom. This protection may not be claimed by refugees who are reasonably regarded as a danger to the security of the country, or having been convicted of a particularly serious crime, are considered a danger to the community.” The principle of non-refoulement is highlighted also in the Convention against Torture, which says states cannot expel “a person to another state when there are substantial grounds for believing that he would be in danger of being subjected to torture.” The other state’s human rights record is key in determining whether these substantial grounds exist.

THE CRC

Finally, the CRC protects migration for the purposes of family reunification, mainly “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunifications” and obligates states to deal with such requests “in a positive, humane and expeditious manner. . . . States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country.”

Arguably, just like there has been evolution in the nature of conflict, there has been an evolution in security concerns that affect most states, from the traditional threats of nuclear weapons, illicit flows of small arms and light weapons, and biological and chemical weapons, to emerging threats arising from transnational organized crime, terrorism and international migration. Such threats are interconnected and difficult to detect and prevent.

According to the U.S. National Security Council



A cemetery worker on the Greek island of Lesbos adjusts the headstone on the fresh grave of a migrant who drowned attempting to cross the Aegean Sea from Turkey. REUTERS

(NSC), terrorists increasingly use transnational organized crime groups for funding, weapons and other logistics: “While the crime-terror nexus is still mostly opportunistic, this nexus is critical nonetheless, especially if it were to involve the successful criminal transfer of [weapons of mass destruction] material to terrorists or their penetration of human smuggling networks as a means for terrorists to enter the United States.”

The U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplements the Convention against Transnational Organized Crime. Trafficking in persons is defined as the recruitment, transfer or harboring of an individual through force, fraud, coercion, deception or abuse of vulnerability, for purposes of exploitation, including for prostitution, sexual exploitation, forced labor or the removal of organs. According to the NSC, trafficking includes “illegal entry of a person or persons across an international border, in violation of one or more countries’ laws, either clandestinely or through deception, whether with the use of fraudulent documents or through the evasion of legitimate border controls.”

The IOM considers international terrorism to be a migration issue because it involves crossing borders: “It touches on a range of matters directly affecting migration policy, including: border integrity (entry and/or residence with illicit intent), national security, integration, ethnic/multicultural affairs and citizenship.” In this threatening landscape, by fleeing war-torn communities and being forcefully displaced, migrants and refugees can be vulnerable to exploitation and deception that leads to trafficking in persons and smuggling. But, current events show that migrants and refugees can also be the offenders and perpetrators that spearhead the spread of extremist ideology.

International migration law makes it clear that states absolutely have a right to decide who enters their territory and when, as well as a right to secure their borders, but their rights are limited in that they cannot violate fundamental human rights.

First, as per the ICCPR, while the obligation to respect people’s rights without discrimination can be set aside in the interest of national security, states still cannot discriminate on the basis of race, color, sex, language, religion or social origin. These provisions imply that any security sector initiatives that would try to regulate the presence or the treatment of migrants and refugees on these factors would violate the nondiscrimination provisions. Instead, the security sector has a responsibility to assist the state in preventing ethnic profiling and xenophobic attitudes, as the CERD has interpreted.

Second, any security initiatives that would deny entry to refugees may violate international migration law. Granted, the state has discretion not to admit a refugee if to do so would jeopardize national security or

public order, but this discretion is limited by the principle of non-refoulement. Considering that many of the present-day refugees are leaving their countries of origin to escape rising extremism and severe breakdowns in national security, rule of law and governance, denying their admission would arguably be a violation of the non-refoulement principle.

Third, any initiatives that would try to distinguish between citizens and non-citizens for security purposes would have to be handled delicately. When states are targeting terrorism or addressing other national security concerns, they still have an obligation to promote equal treatment for citizens and non-citizens and make efforts to deter ethnic stereotyping and profiling.

Fourth, the freedom of movement within and outside national borders is affirmed, but the duty to admit migrants and refugees is not stipulated within international migration law. According to the IOM, “under international law, there is no corresponding right to enter the territory of another country. This creates a major limitation on the right to freedom of movement and is an example of a gap in international migration law.”

CONCLUSION

While states can make policies and introduce initiatives that prioritize national security, international law reigns supreme, at least in principle. The IOM asserts: “A fundamental principle is that international law prevails over national law. This means that a State cannot rely on a provision of national legislation to avoid responsibility under international law.” However, the obligation of a state’s security sector to be bound to these provisions is limited to whether or not the state is party to the relevant instruments. International law is only as strong as states make it through ratification. These instruments protect migrants and refugees so long as their countries of origin and host countries have ratified these instruments. That said, some aspects of international migration law — mainly the principle of non-refoulement — are matters of customary international law and therefore states are bound to them, regardless of ratification of the 1951 Refugee Convention.

With the increasing flow of migrants and refugees, national security risks increase and security sector initiatives and measures that strengthen border control can deter and prevent admission to safe host countries. As some have pointed out, while a migrant has a right to leave his country, the host country does not have a similar obligation to admit him. However, under international migration law, there are limitations to states’ discretion. Similarly, while there is room in the law for the security sector to regulate based on national security considerations — including terrorism and transnational organized crime — there are limitations on this power insofar as it cannot be based on discrimination. □