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Policies of Discrimination based on National Origin in Migration-Related Detention: Realities and Remedies

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Abstract

While customary human rights law and the major human rights treaties prohibit discrimination based on national origin, many States do discriminate, particularly during the detention of asylum-seekers. This paper examines two separate cases – the detention of asylum-seekers of certain nationalities in Greece, and the detention of Palestinian refugees in Jordan – showing that despite being party to human rights treaties prohibiting such acts, States with a large influx of refugees appear to regularly detain based on national origin. In order to ensure that asylum-seekers are protected, there is a role for UN Agencies, NGOs and national courts to play.

Introduction

According to the UN High Commissioner for Refugees, there are 22.5 million refugees in the world, out of a total of 65.6 million forcibly displaced persons.¹ All of these persons have general rights protected under customary human rights law, as well as specific rights related to forced migration and refugeehood.

Because of the nature of forced migration, asylum-seekers often find themselves detained in countries where they seek protection. However, there are certain rules governing detention in general and migration-related detention in particular, and among those rules there are the fundamental principles of equality and non-discrimination in human rights law, which will be the focus of this essay.

Due to the current refugee influxes in Europe and elsewhere, this paper seeks to show that illegal policies of discrimination are a reality that many asylum-seekers face in detention, not simply because of their status as asylum seekers, but in particular for reasons of national origin. This is in countries that have both signed the 1951 Convention Relating to the Status of Refugees (“Refugee Convention”) and relevant human rights treaties, and those that have not. This essay will examine and compare specifically the official and unofficial policies as applied to asylum-seekers and refugees of certain nationalities in Greece and Jordan, and suggest remedies.

Detention in forced migration-related contexts

The issue of detention and deprivation of liberty more generally is addressed in the Universal Declaration of Human Rights, where it is stated that, “No one shall be subjected to arbitrary arrest, detention or exile”². During armed conflict, common Article 3 of the Geneva Conventions, as well as both Additional Protocols I and II, require humane treatment for all civilians and persons hors de combat, and this applies to both State and non-State actors.

In particular regarding refugees and migrants, the 1951 Refugee Convention provides that refugees should not be detained or penalized

¹ UNHCR, *Figures at a Glance*, UNHCR, accessed May 28, 2018, <http://www.unhcr.org/figures-at-a-glance.html>.

² *Ibid.*, Article 9.

because they were compelled to enter a country irregularly or without proper documentation (Article 31), and they must have the opportunity to seek asylum in a fair and effective asylum procedure (Article 16). Moreover, the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families also ensures the right to liberty and security of persons, and provides protections against unlawful detention (Article 16).

Indeed, under the UNHCR's Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention (UNHCR Guidelines on Detention), "detention of asylum-seekers should normally be avoided and be a measure of last resort."³ However, it is recognized that States sometimes must detain asylum-seekers and, thus, the ten guidelines provide the conditions under which asylum-seekers may be detained and, crucially, the conditions under which they may not be detained. These guidelines include, inter alia, the right to liberty and security of persons (Guidelines 2), the prohibition of arbitrary detention (Guideline 4), and humane conditions of detention (Guideline 8). While these guidelines are not binding, they are intended to provide guidance for, among other actors, States dealing with refugees and asylum-seekers.

Differentiation vs. discrimination

Of course, detention in these contexts must be consistent with other rights, particularly the right of equality and non-discrimination. Indeed, this is consistent with other human rights norms. For example, Articles 1 and 2 of the Universal Declaration of Human Rights affirm that "all human beings are born free and equal in dignity and rights," without distinction of "any kind". The principles of non-discrimination are further reiterated in other human rights instruments⁴, as well as the 1951 Refugee Convention (Article 3) and the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 1).

³ UNHCR, *Guidelines on the Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, 6.

⁴ *International Covenant on Civil and Political Rights* 1966 (Article 26), *International Covenant on Social, Economic and Cultural Rights* 1966 (Article 2(3), 3), *International Convention on the Elimination of All Forms of Racial Discrimination* 1965, *International Convention on the Elimination of All Forms of Discrimination Against Women* 1979, and others.

Yet, certain types of ‘discrimination’ or differentiation are permitted and, indeed, necessary. The rules of International Humanitarian Law (IHL) treat combatants and non-combatants differently because of their status. Law in general differentiates between minors and adults. Certain groups are rightly viewed as needing special protection.

Indeed, in the refugee contexts, certain populations are accepted as *prima facie* refugees due to the fact that their large numbers make individual refugee status determination onerous on the State. Temporary protection regimes (TPR) for mass influxes of refugees have been used in the past and continue to be used. These regimes are generally “based on categories, groups or scenarios, allowing for a flexible and immediate response to ... [a] crisis.”⁵ For example, Turkey passed laws specific to refugees fleeing Syria due to the war there, stating that, “The citizens of the Syrian Arab Republic, stateless persons and refugees who have arrived at or crossed our borders coming from Syrian Arab Republic... shall be covered under temporary protection.”⁶ In the United Kingdom, a special programme was established in early 2014 in order to provide a route for certain vulnerable Syrians to come to the UK. The UK then committed to taking in 20,000 Syrians driven from their homes by 2020. These forms of differentiation take into account the specific conditions of that particular category of persons.

These types of differentiation notwithstanding, the act of detention purely based on national origin is illegal according to international human rights law, as well as the relevant treaties for those States that have signed them. Indeed, the UNHCR Guidelines explicitly state that detention must not be discriminatory (Guideline 5), and lists the prohibited types of discrimination,⁷ which include national origin. However, it appears to be a factor in determining who gets detained in different places.

⁵ Paragraph 11, UNHCR, *Guidelines on Temporary Protection or Stay Arrangements*, UNHCR Division of International Protection, February 2014.

⁶ Turkey: Regulation No. 29153 *on Temporary protection* (October 2014), Provisional Article 1

⁷ These include: “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, such as asylum-seeker or refugee status.” UNHCR *Guidelines on Detention*, 25.

Realities on the ground

This section will examine two specific examples – the so-called ‘pilot project’ for certain nationalities of asylum seekers in Greece, and Palestinian refugees from Syria (PRS) in Jordan – to show that discrimination based on national origin is not an exception in migration-based detention, particularly for asylum-seekers. While it is easier to challenge in States with a more robust court system, measures can still be taken by UN Agencies to protect migrants in States that do not.

Greece

Particularly, but not exclusively, due to the war in Syria, Europe has seen a large influx of refugees. The numbers peaked in 2015 (over 800,000 arriving on the Greek islands), but significantly decreased due to the EU Turkey deal⁸. While all refugees arriving on the Greek islands are subject to a geographical restriction, meaning they cannot leave the island until that restriction is lifted, asylum seekers from certain nationalities were being detained due to a ‘pilot program’. According to a police circular in June 2016 describing the program, people from ‘low rate of recognition’ nationalities were termed as ‘economic profile’, instead of ‘refugee profile’ applicants, and would be subjected to administrative detention⁹. It was initially applied to persons from six nationalities: Pakistan, Bangladesh, Egypt, Tunisia, Algeria and Morocco.¹⁰ This type of detention creates a bias against the asylum seeker and strengthens the presumptions about the outcome of asylum application¹¹.

⁸ European Commission, *EU-Turkey Statement: One Year On*, March 17, 2017, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf.

⁹ Maya Thomas-Davis, “September Report on Rights Violations and Resistance in Lesbos” (Legal Centre Lesbos, September 30, 2017), <http://www.legalcentrelesbos.org/2017/09/30/september-report-on-rights-violations-and-resistance-in-lesvos/>.

¹⁰ Saima Hassan, *Interview: Asylum Procedure Based on Nationality rather than on Merit – the Situation of Pakistani Asylum Applicants under the EU Turkey Deal* (European Council on Refugees and Exiles, December 8, 2017), <https://www.ecre.org/interview-asylum-procedure-based-on-nationality-rather-than-on-merit-the-situation-of-pakistani-asylum-applicants-under-the-eu-turkey-deal/>.

¹¹ Maybritt Jill Alpes, Sevda Tunaboylu, and Ilse Van Liempt, *Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum*, European University Institute, no. 29 (November 2017): 3.

After the Supreme Administrative Court of Greece declared Turkey a safe third country for Syrian asylum seekers, it was then also applied to single Syrian men. However, the cases were challenged through the Administrative Court of Mytilene, and the Judge ordered the detention to be lifted¹². It was replaced with the obligation to remain on Lesbos. However, the pilot program resumed for those from countries with low recognition rates. In March 2017, the list of countries was increased to 28¹³.

The pilot program officially ended in January of 2018¹⁴. However, because police officers have the authority to detain under Greek law for reasons including, inter alia, the risk of absconding the applicant, national security, and that “there are reasonable grounds to believe that the applicant is making the application for international protection merely in order to delay or frustrate the enforcement of a return decision”¹⁵, police officers have some discretion when detaining migrants. Indeed, detention appears to be still largely based on nationality, as most of those detained upon arrival are from countries where the majority of citizens are denied international protection¹⁶. Thus, the policy appears to remain de facto intact.

Jordan

Jordan, due to its proximity to Syria, has also had a large influx of refugees from Syria. According to the UNHCR, there were approximately 657,000 refugees from Syria in Jordan as of January 2018¹⁷. According to the UN Relief and Works Agency (UNRWA), there are over 20,000 PRS in Jordan¹⁸. Most of these arrived in early 2012, prior to when Jordanian authorities began to turn away Palestinian refugees fleeing Syria in 2013¹⁹.

¹² Mary Malafeka, *Moria Refugee Camp: Restriction of Movement and Living Conditions*, April 2018, <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2018/04/moria-refugee>.

¹³ Greek Council for Refugees, *Differential Treatment of Specific Nationalities in Detention* (Asylum Information Database, n.d.), <http://www.asylumineurope.org/reports/country/greece/detention-asylum-seekers/differential-treatment-specific-nationalities>.

¹⁴ Thomas-Davis, *September Report on Rights Violations and Resistance in Lesbos*.

¹⁵ Greek Law, L 4376/2016, Article 46(2)

¹⁶ Thomas-Davis, *September Report on Rights Violations and Resistance in Lesbos*.

¹⁷ UNHCR, *Jordan Factsheet*, January 2018, <https://data2.unhcr.org/en/documents/download/62241>.

¹⁸ UNRWA, *Palestinian Refugees from Syria in Jordan*, UNRWA, accessed April 6, 2016, <http://www.unrwa.org/prs-jordan>.

¹⁹ Human Rights Watch, *Not Welcome: Jordan's Treatment of Palestinians Escaping Syria*, Human Rights Watch, August 7, 2014.

Because of this no-entry policy, many PRS are residing illegally in Jordan and are extremely vulnerable. They also do not have access to the same services as Syrian refugees, as they fall under the mandate of UNRWA and not the UNHCR. Due to their precarious situation, some do not present themselves to UNRWA for fear of being caught by the authorities.

This fear is not unfounded; when caught, PRS were initially held in a special camp. There were six camps in Jordan: Za'tari camp (the largest camp), Azraq camp, Cyber City, King Abdullah Park, Mafraq camp (for defectors from the Syrian army), and Emirates Jordan Camp; however, three-thirds of refugees live outside the camps. Cyber City was in the northern city of Irbid and had been housing PRS as well as some Syrian refugees. While Syrians were permitted to leave Cyber City if they were sponsored by a Jordanian, this option was not available to PRS; they could only leave if they wished to return to Syria²⁰. However, now and again informal permission was given to some PRS to visit family members in other cities²¹. This treatment overall amounted to detention and arbitrary deprivation of liberty. Cyber City has since been closed, and PRS were moved to King Abdullah Park in Irbid. Syrian wives are also held with their PRS husbands. There are no precise numbers for how many PRS are currently held in King Abdullah Park, but estimates range from 300-1000. The UN Working Group on Arbitrary Detention considers that arbitrary deprivation of liberty includes situations where “asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy”²². This is most certainly the case for PRS detained previously in Cyber City, and in King Abdullah Park. Moreover, this treatment largely applies to PRS, and not Syrians, which violates human rights law.

Possible remedies

The most obvious remedy would be to require States to comply with their obligations under customary human rights law and the relevant

²⁰ Human Rights Watch, 18.

²¹ Neil Sammonds, *'A Dog Has More Freedom' – Palestinians at Cyber City Camp for Refugees from Syria*, Amnesty International, July 29, 2013, <https://www.amnesty.org/en/latest/campaigns/2013/07/a-dog-has-more-freedom-palestinians-at-cyber-city-camp-for-refugees-from-syria/>.

²² *Report of the Working Group on Arbitrary Detention*, Human Rights Council, Sixteenth session. UN Doc. A/HRC/16/47, annex, para. 8 (d).

treaties. Organizations such as the UNHCR, as well as lawyers, national courts and civil society have an important role to play, particularly in States that have ratified international human rights treaties. For example, the decision to cancel Greece's pilot program came after much criticism from NGOs and challenges by lawyers in the courts. Greece is part of the European Union, and thus the European Convention of Human Rights also applies, as well as all the major global human rights treaties. This can be used to challenge the de facto policies of detaining asylum-seekers from low-recognition countries.

In States like Jordan, which is also party to the International Covenant on civil and political rights (CCPR), Committee on the elimination of racial discrimination (CERD) and other major human rights treaties, the UNHCR as well as UNRWA may attempt to intervene on behalf of refugees singled out because of their nationality. The UNHCR may try to prioritize their resettlement or transfer to a country that will not detain them, and where they can have the same rights as other refugees. Turkey, for example, officially treats PRS the same as Syrians fleeing from Syria²³. National resettlement programs may also include PRS detained in neighbouring countries of Syria.

Conclusion

While all the major global and regional human rights treaties contain general clauses prohibiting discrimination based on national origin, and while there are specific rules related to the deprivation of liberty based on national origin in UN Guidelines and customary human rights law, some States experiencing an influx of refugees are detaining asylum-seekers based on national origin. Asylum-seekers in States that have ratified the 1951 Refugee Convention must be allowed to have their claim individually assessed, and not be placed in detention because they come from a 'low recognition' country, as we have seen occurring in Greece.

In States that have not ratified the 1951 Convention, such as Jordan, there are still obligations owed to migrants under human rights treaties and customary international law. Placing PRS in detention solely because they are Palestinian may act as a deterrent to PRS attempting to enter into

²³ Susan Akram et al., *Protecting Syrian Refugees: Laws, Policies, and Global Responsibility Sharing*, Boston University School of Law, 2014, <http://www-syst.bu.edu/law/central/jd/programs/clinics/international-human-rights/documents/FINALFullReport.pdf>.

Jordan, making them stay in a conflict zone where their lives are at risk. Moreover, it makes PRS who managed to enter Jordan more vulnerable, as they are less likely to seek help.

There is a role for the UN, NGOs and national courts in these cases in order to ensure that asylum-seekers are protected from discrimination in their country of refuge, to protect their dignity in the country of refuge, and to protect them from feeling forced to return to areas where they are at risk of persecution.