

COMMENTS ON DRAFT REPORT

IRREGULAR MIGRATION, HUMAN SMUGGLING AND HUMAN RIGHTS

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General

The draft report deals well with a very important and very topical issue. It makes a valuable contribution to the discussion, both emphasising the facts and context and establishing a good basis for judgement in international law. The issue of irregular migration is a ‘hot topic’ in domestic debates in a large number of states, both developed and developing, and the debate is often ill-conceived, misinformed and jingoistic. It is essential that it be reframed on the basis of fact and law. The draft makes a very useful contribution to that.

What is said in the draft report about irregular migrants generally is good and right but it is also necessary to recognise that refugees, and therefore those claiming refugee status, **ARE** different from all other migrants, both regular and irregular. There are international legal obligations towards refugees that are over and above all obligations, legal and moral, towards other migrants. The report makes a very valuable contribution in discussing the situations of all irregular migrants and challenging the approaches States take towards them, for example, in relation to “smuggled” people. But it would cause a serious problem if this broad brush approach were interpreted and applied to permit States to conflagrate refugees and other irregular migrants into a single mass and then treat them all the same way. The attempt here to improve the treatment of irregular migrants should not be permitted to lead to worse treatment of refugees and asylum seekers. Para 212, for example, comes perilously close to enabling this. The report needs to be careful at all relevant times to emphasise the additional legal obligations States have towards refugees and asylum seekers.

The contextualising chapters (1 to 3) are helpful to the reframing by dealing with history and contemporary experiences. It is especially good that they stress the benefits of irregular migration to receiving States and peoples, not only to the migrants themselves. Most of the focus is on how “these people” act “illegally” for their own benefit and the correlation between their ambitions and the needs of the receiving communities is usually ignored. This is an important contribution in the draft. It is helpful too to explain how, as Koser’s quote in the preface indicates, the political significance is more than the numerical.

The legal discussion (chapters 5 to 7) is also good and its comprehensive nature is welcome. The inclusion of international labour law and the law arising under the Palermo Protocols widens the legal consideration beyond human rights and refugee law alone, the usual focus of legal discussion. It helps therefore to provide a comprehensive legal basis for the discussion.

I have only a small number of specific comments.

Specific comments

Chapter II

para 75: In relation to Australia, while it is true that the terrorist events of 11 September 2001 provided another argument to be used in attempting to justify the hardline policies, in fact the worst of those policies were already in operation well before those events. The low point in Australia's policies and practices over the last 2 decades came in fact over the few weeks **BEFORE** 11 September, the notorious Tampa affair. In Australia counter-terrorism was merely another arrow in the bow of the hardline policies, not their real cause. I suspect the same is true in at least some other States.

Chapter V

General: The discussion of international human rights law in this chapter is good but there is an important component missing. It deals with the treaties but ignores "soft law" instruments, particularly the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*. Soft law of course does not create international legal obligations but it does indirectly "create" the detail of those obligations because soft law is an essential aid in the interpretation of hard law treaty provisions. For example, the ICCPR requires the humane treatment of all persons in detention but it doesn't define what humane treatment means. The Body of Principles does that by providing the content for understanding and applying the general obligation of humane treatment. The Australian Human Rights Commission used this interpretative approach continually in its critiques over many years of Australian policies towards asylum seekers – see for example *Those who've come across the seas* at www.humanrights.gov.au/human_rights/immigration/seas.html. The Commission there referred to the Human Rights Committee's General Comments as authority for this approach.

The Committee has identified a number of other international documents as accurately reflecting its interpretation of article 10 of the Covenant. Of particular relevance to this Inquiry among these documents are the UN Standard Minimum Rules for the Treatment of Prisoners (the Standard Minimum Rules)⁹ and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (the Body of Principles).¹⁰ Compliance with the standards established by these UN documents has been held to be a minimum requirement for compliance with the ICCPR's dictate that people in detention are to be treated

humanely (article 10).¹¹ In this report the Commission details the relevant provisions of the Standard Minimum Rules and the Body of Principles in its evaluation of Australia's compliance with the ICCPR.

General Comment 21 para 5

This element of interpretation could usefully be incorporated into chapter V of the draft report. It would be especially useful to refer to the Body of Principles – it is an important and highly relevant instrument but it is totally absent from the text as drafted. Footnote 217 refers to the *Standard Minimum Rules for the Treatment of Prisoners* but immigration detainees are not prisoners and so these Rules do not apply directly to them, only by argument, that is, if it is obligatory to treat prisoners this way, then non-prisoner detainees are entitled to at least this level of treatment. The Body of Principles, on the other hand, applies directly to immigration detainees and is directly related to the meaning of humane treatment in ICCPR Article 10 and so should be discussed in chapter V.

Para 117: Reference to the obligation to ensure humane treatment of detainees should be added here.

Para 119: The right to humane treatment in detention is another right that is applicable equally to nationals and non-nationals. There can be no discrimination in the enjoyment of this right (Human Rights Committee General Comment 21).

Box on children page 43: Another very significant point here is that refugee and asylum seeker children are given specific recognition under Article 22. Virtually all States have ratified the Convention on the Rights of the Child. This means that all States (except the USA and Somalia) have obligations under the CRC towards refugee and asylum seeker children. This is especially important in relation to those States that have not ratified the Refugees Convention. Non ratification of the Refugee Convention does not mean that these States have no special obligations in relation to refugee and asylum seeker children.

Conclusion

Paras 210 to 212: The distinct legal situations of refugees and asylum seekers and other irregular migrants needs to be recognised and affirmed. The argument in these paragraphs could be misused to justify reduction in the legal entitlements of refugees and asylum seekers.

Para 214: There is also a clear divergence between refugee law and the law relating to other irregular migrants.

Para 221: To the extent to which irregular movement is driven by human rights violations, cooperation with the countries of origin might not be a good idea. The point being made in this paragraph is that the fundamental drivers of irregular movement in countries of origin must be addressed and not merely the consequences of those drivers in

the arrival of irregular migrants in countries to which the irregular migrants flee. That may involve cooperation with countries of origin in development and human rights improvement and, where that is not possible, the effective use of international mechanisms to address human rights violations.

Para 235: As an example of what is being encouraged here, national human rights institutions in the Asia Pacific region are already undertaking a joint project on migrant workers. They have adopted their own declaration on migrants (the Seoul Guidelines on the Cooperation of NHRIs for the Promotion and Protection of Human Rights of Migrants in Asia) and are cooperating in joint research and action. See www.asiapacificforum.net/news/nhris-join-forces-to-tackle-abuse-of-workers.html.

Paras 242-243: The discussion of regularisation will not be taken seriously unless it is accompanied by consideration of whether regularisation will encourage more irregular movement and, in particular, thereby jeopardise even more the lives of irregular migrants who will take great risks to reach a desirable country. The draft report rightly discusses predominantly the push factors in irregular migration but the potential pull effect of regularisation has to be considered if regularisation is to be recommended.

Annex

The areas of rights covered in the annex do not include the right to humane treatment if detained. Although the draft report rightly argues against detention, it cannot ignore the fact that many irregular migrants are detained and will continue to be detained. It is essential that the right to humane treatment in detention has to be included. Section B in the annex deals with freedom from unjustified detention and prosecution and procedural protection in the case of detention but it does not deal with the right to humane treatment in detention. That right should be an additional section in the annex.

Para 271: Children may only be detained as a last resort, that is, if necessary because there is no other available, reasonable and appropriate alternative. That needs to be added to the paragraph.

Para 275: The right to challenge the legality of arrest and detention must be an effective right. A right to go to court is not an effective right to challenge detention if the court has no power to overrule the decision of the government and order the release of the detainee (see the Human Rights Committee decision in *A v Australia*).

Para 289: The paragraph should also include the right of a child to express her or his views and have them give due weight in deciding on a matter affecting the child.

Paras 298 and 312: Here or elsewhere in the annex the law relating to child labour should be included.

Para 325: These State obligations relate to all children, accompanied and unaccompanied. The issue is that the State has an even greater obligation in relation to the protection of unaccompanied children.

Paras 356-361: The section should include an additional paragraph relating to the implementation of the right to education for those in detention. Children in detention in particular are often deprived of the fundamental right to free, universal primary education and access to secondary education without discrimination.

Select bibliography

Many national human rights institutions have written extensively about the application of international human rights law to irregular migrants. See for example the Australian Human Rights Commission at www.humanrights.gov.au/human_rights/immigration/index.html. Some of this material could be included in the bibliography.