Refugees and national human rights institutions: a growing engagement

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Summary: In recent years national human rights institutions have begun to bridge the long-standing gap between practice in the refugee and human rights fields. Often using their mandate as national preventive mechanisms under the Optional Protocol to the Convention Against Torture, NHRIs visit refugees in detention as well as in other types of camp. This has been particularly marked among Balkan ombudsman institutions in their response to the recent mass influx of refugees.

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1. Refugees and human rights

At first glance, the relationship between human rights and refugee protection is self-evident. Those that we call refugees are usually in flight from places where their human rights are at serious risk. In their country of asylum they seek protection for these rights and the enjoyment of various other rights, mainly social and economic, that will make their new life viable. Their access to this protection and these rights is in turn to be guaranteed by the procedural rights that international human rights law lays down as universal benchmarks.

Yet practitioners in both the refugee and human rights fields know from bitter experience that these links seldom function in practice. One reason for the disjuncture is that legally the refugee and human rights regimes are quite distinct. The 1951 Refugee Convention did not make use of the concept of human rights in defining the basis for the refugee claim, using instead the notion of persecution, which has no precise meaning in human rights law. Even the concept of 'protection,' apparently central to both bodies of law, has quite distinct meanings in each. Refugee protection is about providing a surrogate for the diplomatic protection that states axiomatically provide to their citizens, in circumstances where the individual is 'unable or… unwilling' to avail herself of that protection (Fortin 2001). Human rights (and international humanitarian law) uses 'protection' with the commonsensical meaning of protecting individuals against violations of their rights. Of course, the ultimate aim of refugee protection is also to guarantee rights by substituting the role of the refuge state. But this is not the only possible path to protection in the broader sense. To take one obvious contemporary example, the proliferation of 'subsidiary protection' – a status that

falls short of full diplomatic protection – may meet the commonsensical requirement while not achieving the original purpose of international refugee law.

The 1951 Convention does make extensive reference to rights, as applied to the entitlements of refugees, yet provides no procedural guarantees for refugees who seek recognition of their status and access to these rights. Even the concept of non-refoulement, which straddles human rights and refugee law, has a somewhat different meaning in each. Non-refoulement in human rights law is both narrow in scope and unrestricted in application. In refugee law, the principle has broad scope but may be limited on grounds of national security. All in all, the two bodies of law are a poor fit, notwithstanding the efforts of some scholars to reconceptualise refugee protection as human rights (Hathaway 1991) and the frequent injunction to interpret refugee law in the light of human rights (UNHCR 1997).

This legal mismatch is one possible explanation, although by no means the only one, for a corresponding disjuncture in practice. There are many honourable exceptions – the practice of Amnesty International national sections being an important one – but the practitioner communities of human rights and refugees have tended to follow quite distinct paths. While on the one hand human rights advocates have tended to lack knowledge and understanding of refugee issues and procedures, refugee advocates have been correspondingly reluctant to invoke the guarantees that human rights norms offer refugees. This short article focuses on one corner of the human rights practitioner community, namely national human rights institutions (NHRIs). Historically, for systemic reasons that will be briefly explored, NHRIs have tended not to cross the divide between human rights and refugee practice. There have, however, been a small number of notable exceptions to this observation. This article explores a few examples of best practice and suggests that, for a combination of legal and

structural reasons, these may be indicative of a positive trend whereby NHRIs are becoming more actively engaged in refugee protection.

2. National human rights institutions

National human rights institutions trace their ancestry to a recommendation developed by the Economic and Social Council in the early months of the United Nations. The suggestion was for the formation of "national human rights committees" to monitors states' adherence to the new commitments in the UN Charter. The Commission on Human Rights, a body of states, was less than enthusiastic about this proposal. However, the gradual emergence of national level institutions over the following decades, especially human rights commissions and ombudsman institutions, led to a revival of the idea, crystallized most famously in the Paris Principles of 1991. These principles, endorsed by both the Human Rights Commission and the General Assembly, embodied the view that NHRIs constituted a bridge or a transmission belt between the international human rights system and national implementation. The years since the Paris Principles have seen a massive proliferation of NHRIs, sometimes because of endogenous factors (such as the collapse of Communism in Central and Eastern Europe), but also because of a systematic promotional campaign by the United Nations (Cardenas 2003).

One consequence of the international promotion of NHRIs was that governments were encouraged to create new institutions whose mandate encompassed the full panoply of international human rights norms, rather than simply constitutional rights. This clear trend was observable in NHRIs created after the early 1990s and, especially, after the turn of the century (Carver 2010). This meant that, in principle, these institutions aimed to promote and protect the rights of all persons, not just citizens.

In many instances, however, the availability of NHRIs to protect the rights of non-citizens was hampered by these institutions' strong emphasis on complaints-handling. All ombudsman institutions and most other types of NHRI handle individual complaints. The focus on complaints potentially disadvantages non-citizens in two ways. First, non-citizens, including refugees, are less likely to have either knowledge of or access to these mechanisms. Secondly, the workload created by complaints tends to hamper NHRIs in identifying the most important human rights issues and directing scant resources towards them.

However, another important development has provided a counterweight to this complaints and casework emphasis. The Optional Protocol to the Convention Against Torture (OPCAT) envisages a role for national mechanisms in monitoring state adherence to its obligations to prevent torture and other ill-treatment. It thus embodies the vision of independent national mechanisms as the bridge between international norms and national implementation. In this instance, the National Preventive Mechanism (NPM) monitors state compliance by visiting all 'closed institutions' or places where people are deprived of their liberty – including, of course, immigration detainees. A small number of NPMs are newly created and some are pre-existing inspection bodies. The vast majority, however, are NHRIs. These will almost invariably have had some prior role in visiting closed institutions, but their focus will usually have been on prisons. The change triggered by the OPCAT has been that all closed institutions must be inspected on a regular basis.

The other important development in recent years is that some well-established NHRIs, for example in Ukraine and Georgia, have been confronted with the problem of how to work in situations of conflict within their own countries. Other institutions, for example in Colombia and Peru, were created in countries that were already experiencing protracted conflict – and

corresponding displacement. In each of these examples, the primary instance of forced migration has been internal displacement rather than refugee flows, which poses slightly different issues for the NHRI. However, this increased engagement of NHRIs with conflict has led to the emergence of an embryonic normative framework, encapsulated in the Kyiv Declaration of October 2015, the outcome of a conference of NHRIs working in conflict.[1] The declaration sets out three areas of work for NHRIs: in conflict prevention and early warning; in attempting to resolve conflict; and in protecting the rights of victims of conflict, including refugees.

3. NHRIs and refugees: an evolving practice

The main argument of this article is that recent developments have pushed some NHRIs towards engagement with refugees. The Australian Human Rights Commission, by contrast, has been concerned with refugee issues since its formation in the 1980s. Of particular concern has been the almost universal use of detention against asylum seekers. All asylum seekers arriving on the Australian mainland without a valid visa must be detained (in contravention of Article 31 of the 1951 Convention, which prohibits penalties against undocumented refugees). Refugees arriving in outlying territories may be detained. In recent years, Australia has operated a policy of interdiction of all migrants arriving by sea and their confinement to outlying or neighbouring territories.

[1] http://ennhri.org/IMG/pdf/the_kyiv_declaration.pdf

Australia has only recently ratified the OPCAT, but the AHRC has long enjoyed and exercised powers to inspect places of detention. In 2001, the Commission launched a national inquiry into child asylum seekers, concluding that detaining children was inconsistent with Australia's obligations under the Convention on the Rights of the Child. The Migration Act was amended as a result. The Commission has also succeeded in promoting changes to the detention of asylum seekers more generally, which it has found to be arbitrary under the terms of the International Covenant on Civil and Political Rights (Carver 2014).

The AHRC has a strong international law mandate. It is empowered to protect and promote the rights contained in a number of international treaties, whether or not these have been ratified and incorporated into municipal law. The contrast with its near neighbour, Malaysia, could hardly be greater. The Malaysian National Human Rights Commission (SUHAKAM) has a weak mandate, empowered only to protect constitutional rights. Its founding statute contains only a passing reference to the Universal Declaration of Human Rights. Malaysia has a weak record of ratifications, not being party to the 1951 Convention or 1967 Protocol, or most human rights treaties. Yet SUHAKAM has made creative use of the limited levers available to it. It has argued that the principle of non-refoulement is customary international law and hence unaffected by Malaysia's failure to ratify the 1951 Convention. It argues that the principle of non-discrimination in the UDHR protects the rights of refugees. And it uses the conventions on the rights of the child and of women as a basis for the protection of refugees. One of the crucial issues affecting refugees in Malaysia is detention, since asylum seekers are not distinguished from other immigrants and are routinely detained for lack of identification. SUHAKAM has succeeded in securing access to places of detention for the UNHCR. The case of the Malaysian commission is an interesting one because it has played a poor hand extremely well. Lacking either a strong international law mandate or OPCAT

powers, SUHAKAM has nevertheless treated refugee protection as a core aspect of its work and had some success with this (Renshaw 2011; Carver 2014).

The most striking recent example of the growing NHRI orientation towards refugees has come in the Balkans. In 2015, the ending of the European Union's Mare Nostrum search and rescue operation in the Western Mediterranean and the increased moves to interdict refugee boats off the North African coast resulted in a shift in migration patterns towards the 'Balkan route.' Refugees travelling through Turkey crossed the Aegean Sea to Greece (or less frequently crossed Turkey's land border in Thrace). Thence they passed through some or all of the non-EU countries in the Balkans, notably Macedonia and Serbia, and into Croatia, Hungary or Austria. The final destination for most was none of these countries, but the rich countries in the north, notably Germany and Sweden. In all the above-named transit countries the NHRI is also the OPCAT NPM and hence has a mandate to visit places where migrants are detained. The striking feature of the response in many of these countries was the level of international coordination. This had been a feature of NHRIs in the region for some years.

Many of the human rights issues in the Western Balkans are a direct legacy of the wars of the 1990s. Many of the complaints filed with the region's NHRIs concern not only obvious minority rights issues but also questions such as pension entitlements and property claims that can only be resolved transnationally. Generally speaking, the NHRIs have been talking to each other for longer and on a more cordial basis than their respective governments. The most striking example is of the necessarily informal relationship between the ombudsman institutions of Serbia and Kosovo. The Kosovan Ombudsman has also worked for some while in collaboration with his counterparts in Montenegro and Macedonia to resolve refugee

issues. The region's NHRIs meet regularly and in 2011 signed a formal memorandum of collaboration.[2]

This history of semi-formal communication and collaboration was to be important in 2015 when large numbers of migrants attempted to pass through the region. Regional collaboration encompassed other countries that had not been part of the former Yugoslavia, notably Greece. In the latter part of 2015, much attention focused on the Greek-Macedonian border at Idomeni.[3] The Macedonian authorities had closed the border, blocking the refugees' transit, with the result that up to 15,000 refugees were encamped there as the Balkan winter fell. Macedonian-Greek official relations are also at a low ebb because of the enduring dispute over the naming of the former country, yet the Macedonian and Greek ombudsman institutions combined to inspect the camp and attempt to ensure assistance and protection for its inmates.

The efforts of the Macedonian Ombudsman, however, focused on those refugees who had succeeded in crossing the Greek border before the closure, but were trapped in the country by the corresponding Serbian border closure, including those at the Vinojug centre in Gevgelija, just across the border from Idomeni. Visits there were variously organized in conjunction with Greek and Austrian counterparts, while a visit to the Tabonovce transit centre in northern Macedonia saw the participation of the Serbian Ombudsman. Although the Macedonian visits were carried out under the NPM mandate, it is striking that the concerns addressed by the Ombudsman went far beyond the issues of conditions in the

[2] The information in this paragraph is based upon conversations with the following officials: Sami Kurteshi, former Ombudsman of Kosovo; Šućko Baković, Ombudsman of Montenegro; Miloš Janković, Deputy Ombudsman of Serbia and head of NPM; and Milena Gogić, advisor for international cooperation to the Croatia People's Ombudsman.

[3] The following discussion is based upon information gathered during the author's visit to Macedonia in November 2015, as well as a series of inspection reports by the Macedonian NPM, available at http://ombudsman.mk/en (last accessed 18 March 2017).

centres or the risk of ill-treatment. Refugees were advised on potential travel arrangements and, after the border closures, their rights to seek asylum in Macedonia (countering misinformation provided by the authorities). The scope of the Ombudsman's intervention was limited only by the parlous institutional state of the NPM, given that at the height of the crisis there were precisely zero staff members assigned to the mechanism because of a freeze on hiring by the Ministry of Finance.

The Croatian People's Ombudsman was also active on a range of issues affecting refugees, including not only conditions in transit centres but also issues surrounding the registration of refugees and other migrants. Being much better resourced than its Macedonian counterpart, the Croatian NPM was able to conduct 26 visits in the weeks between the arrival of refugees and the end of 2015. The institution conducted joint inspections with the Serbian and Bosnian Ombudsman institutions, as well as consulting with the Slovenian Ombudswoman.

This regional cooperation was crystallised in the Belgrade Declaration of November 2015, made at a conference of regional NHRIs convened by the Serbian Ombudsman institution.[4] The declaration identified essentially four areas of work in the refugee crisis for NHRIs: promoting their complaints functions, or investigating issues on their own initiative; inspecting places of detention or other refugee holding centres; combatting xenophobia and increasing public awareness; and coordinating activity regionally and internationally.

4. Conclusion

It is important not to overstate the extent to which NHRIs have engaged with refugee rights. Some, like the Macedonian Ombudsman, have been hampered by being starved of

[4] http://www.zastitnik.rs/attachments/4429_Declaration%20english%20language.doc

resources. Yet, in that instance, an institution that had not been known for standing up to government pressure chose this issue to exert its independence. By contrast, the Hungarian Ombudsman largely failed to stand up to one of the most xenophobic governments in the region. Although Hungary detains a higher proportion of refugees (and other immigrants) than other countries in Europe, from mid-2015 until February 2017 the institution had conducted just one NPM visit to a detention centre.[5]

However, if the NHRI contribution should not be exaggerated nor should it be ignored. During a period when much of the European response to the refugee crisis was a source of deep shame, a number of human rights institutions not only took a principled stand but made sure that they were on the ground to protect refugee rights. If refugee protection is to be reconceptualised in human rights terms, these independent governmental actors will have to play a central role.

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