

Human Rights Violations against International Migrants

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ABSTRACT:

The term international migrant has been defined numerous times by numerous organizations. It has become clear over the years that there is no clear, universally agreed definition of migrant. This has led to numerous counts of human rights violations against migrants. Rising fear and xenophobia have also played major roles in changing migration policy across borders by first world countries. In some cases this has led to imprisonment in detention centres. Hence there is a need to understand who international migrants are and how these hard line policies affect them.

Key words: *International Migrants, Xenophobia, Human Rights Violations, Hard Line Policies, Detention Centres.*

I. INTRODUCTION

The advent of the twenty first century has brought with it the new age of international migration. This new phenomenon which has increased exponentially has created major pressures leaving states with policy dilemmas. It has further facilitated in the world becoming more multicultural, multi- ethnic, multi-religions and multi- lingual. These gradual and in some cases sudden changes has forced governments as well as civil societies to not only accommodate these diversities in ways that promote peace but also ensure that there are no instances of human rights violations.

It is said that on an average, one in fifty human beings live outside their countries of origin as migrants or as refugees. This makes them highly susceptible to racism, xenophobia and discrimination. The extent and severity of this phenomenon have been on the rise all across the world. This is due to the fact that a large portion of international migration is irregular and largely unauthorized. Hence this in reality facilitates abuse and exploitation of the international migrants. However, even if their movements are legal and authorized, they tend to face high levels of discrimination since they fall under the category of non- citizens.

The battle for universal human rights is an uphill battle, which is a battle of hearts as much as it is a battle for laws and policies. In this twenty first century it is imperative that we respect each other's differences and recognise that we share the basic traits that make us human. In order to achieve this goal there is a need to build upon shared values and to view diversity as an enhancement rather than as a threat.

II. THE RIGHT TO MOBILITY

Globalization has been instrumental in accentuating the unevenness of development amongst states. Thus, creating a scenario, this has resulted in significant demand leading to the movement of labour across

international borders. Further a significant portion of this labour comprises of low skilled or unskilled workers, who move to neighbouring states which having growing economies. Since these states offer higher wages for relatively low skills. In principle, it is believed that the flow of labour between states should be regulated in such a manner that is economically beneficial to all states involved.

Migrants have a broad range of rights, which fall within the purview of human rights. Most of the rights that are accorded to migrants can be found in the Universal Declaration of Human Rights¹. Article 13 of the Universal Declaration on Human Rights (UDHR) states: ‘Every person has the right to leave any country, including his own, and to return to his country’². Several family and community rights pertinent to migrants are enshrined in the UDHR. Article 16 states that the family is ‘the natural and fundamental group unit of society’³. The right to family unity— in whatever form or expression of the family—is crucial for migrants, as family reunification and separation are both characteristics of international migration. Article 17 puts forth the notion that everyone has the right to ‘participate in the cultural life of the community’⁴.

The UDHR goes further by laying out the social and economic rights that pertain to international migrants. Article 23 reads, ‘Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment’⁵. And Article 25 states ‘Everyone has the right to a standard of living adequate for the health and wellbeing of himself and of his family, including food, clothing, housing and medical care and necessary social services’⁶. The rights to employment and to an adequate standard of living are both often the basis for emigration, in addition to this being their rights migrants still struggle to attain this in the host country. The civil and political rights set out in the UDHR also apply to migrants, including the “right to seek asylum”⁷, the right to “due process of law”⁸, and the right to “freedom from arbitrary detention”⁹. Although international migrants are often unable to engage in formal political participation, the human rights tradition provides civil and political protections for them, no matter their citizenship status.

Apart from the UDHR there are various other declarations as well which provide for protection of migrants. In 1990, the United Nations put forth a convention specific to migrants, called International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This convention recognizes

¹ UN General Assembly, *Universal Declaration of Human rights*, 10December 2948,217 A (III), available at: <https://www.refworld.org/docid/3ae6b3712c.html> [accessed 5 September 2019].

²*Ibid* at Art.13

³*Ibid* at Art.16

⁴*Ibid* at Art.17

⁵*Ibid* at Art.23

⁶*Ibid* at Art.25

⁷*Ibid* at Art.14

⁸*Ibid* at Art.10

⁹*Ibid* at Art.9

that family is the natural and fundamental group unit of society and thereby it is entitled to the protection of the state. This ensures that each signatory state takes the appropriate measure to ensure not only the protection but also the unity of the migrant's families. The convention further states that migrants shall enjoy equality of treatment as that which is accorded to a citizen of the country.

Thus it is abundantly clear that international law as well as the human rights tradition provides for the right to emigrate and lays down specific provisions for those who migrate. It is important to understand that the right to enter another country does not exist in human rights conventions and treaties. It is the freedom to leave which is a more fundamental right as opposed to the freedom to enter.¹⁰ Some thinkers disagree with this view, they believe the right to emigrate would effectively be rendered useless if there is no country to which one can migrate to. Further they contend that emigration and immigration are inextricably complementary to each other and it feels like the UDHR has somehow stopped halfway through with its recognition of a right to move.¹¹

In this world which perpetrates global inequalities, these restrictions that are placed are in reality a safety mechanism which protects the birth right privileges of those born into wealthier states. On the other hand it traps people born in poor families in poor states and forces them to live a life of deprivation. Further the option of emigration is always available to citizens of developed states since they have a higher skill set. However, the vast majority of people who wish to emigrate do not have a high skill set.

III. RECEIVING STATES IMMIGRATION POLICIES AND HUMAN RIGHTS:

The biggest feature of the right to mobility as a human right does not rest solely on their presence in the new country but it is largely depended on how they are received in the new country. It further depends on the kinds of civil, political, social and economic rights that they are granted by the destination country. The right to mobility is not only an individualistic right but it covers within its ambit a wide spectrum that is inclusive of families, communities and in some cases even entire countries.

Trends in Contemporary Border Controls

Over the years it has been observed that the migration which was previously focused on Europe and North America has branched out to include Africa, Asia Pacific and Latin America as well. Further the trend that has been observed which is common amongst all these states is the rise of restrictive migration policies. Migration is now viewed in terms of a security issue, as a threat, which has been sparked by the growing terrorism threats. Irregular migration which is seen as the most pivotal threat since it indicated the porosity of the borders hence

¹⁰ Rainer Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship', *European Journal of Sociology/Archives européennes de sociologie* 50 (2009): 1–31.

¹¹ Antoine Pe'coud and Paul de Guchteneire, 'International Migration, Border Controls, and Human Rights: Assessing the Relevance of a Right to Mobility', *Journal of Borderlands Studies* 21, no. 1 (2006): 75.

creating a demand for more stringent measures of patrolling and deportation. This has led to extreme fortification and the utilization of sophisticated methods of monitoring. One of the most glaring examples of this is the wall being built by United States of America between its border and Mexico. This same trend was visible in and around Gibraltar and the border between Spain and Morocco.

Of late these external controls are accompanied with internal control mechanisms which are utilised to identify undocumented migrants who have entered illegally. In order to ensure this identification, workplace controls were envisaged. These workplace controls have been exceedingly ineffective since it not only displeases the employees it also has a high economic and political cost. Further when stringent internal measures are applied, there cannot be a blatant difference between the way citizens and migrants are treated. Hence in the long run it has been seen that it leads to an unprecedented intrusion into the privacy of the lives of the citizens of the country rather than help identify illegal immigrants. Further the response of detention and expulsion of illegal immigrants which was only prevalent during very specific circumstance like wars has now become increasingly common.

Human rights violations have been on the rise, irrespective of whether the states have full or partial control over their borders. One of the most important concerns that have arisen is that of asylum. The measures utilized by the various governments to monitor and control immigration has had a direct and glaring consequence on the principle of asylum, which states that all human beings are entitled to seek protection from persecution. Due to the increase in restrictive immigration policies, the trend of late has become that economic migrants tend to pose as asylum seekers. This has led to increased suspicion on all refugees seeking asylum and leads to the implementation of even more restrictive measures. The confusion that arises in the course of distinguishing which claimant is in reality a refugee gives a lot of scope for the utilization of extremely long procedures in order to prove persecution and leads to human rights violation of both the “fake” as well as “genuine” refugees. There exists a new problem that is born out of this situation, wherein states in their quest to discourage migrants have affected the ability of refugees to seek asylum in their states. In Europe, for example, states increasingly discuss the possibility of prompting refugees to stay in countries near their region of origin rather than considering their case on European soil.¹² On the other hand there is also another argument that has been made, that a policy of “open borders” would threaten the right to asylum by diluting its specifically humanitarian nature into a broader system of free movement, closed borders make the very fact of leaving one’s country to seek protection problematic.¹³

¹²Schuster, Liza, ‘The Exclusion of Asylum Seekers in Europe. Policy and Society’ Working Paper No. 1, Centre on Migration, University of Oxford, Oxford, England (2004).

¹³ Castles, Stephen, ‘The Factors that Make and Unmake Migration Policies’, *International Migration Review* 38 (3): 852-884, (2004).

The second major human right violation scope has arisen due to the stringent policies is that of trafficking and human smuggling. The restrictive border policies have created a lucrative business of cross border human mobility, which has paved way for the prosperity of criminal activities since it has become almost impossible for migrants to enter these states legally. Rationally, it would be assumed that tight border security would ensure proper regulations which would bring down the chances of trafficking and human smuggling. However, the reality is that the stricter the measures are the more the reliance on smugglers increases. Hence this model is actually a self-perpetrating process where, in the quest to stop the immigrants, there is a perpetration of trafficking.

The next major challenge posed is that of the human cost that is paid by the migrants themselves. A large number of migrants perish on their way to the receiving states either due to hypothermia, dehydration, sunstroke, drowning etc. The number of migrants who has perished over the years is still undiscovered since it has not been possible for the authorities to estimate how many people have left the country illegally and how many have died. Further these undocumented migrants are extremely susceptible to exploitation and abuse which is a result of the defects in the existing policies that stem from the unsuccessful attempt to regulate immigration. Further there exists a lot of tension between security personnels at the border and the immigrants.

A border has no longer become just a territorial limit of the country but has become a threat and a concern for the security of the citizens within the country. With states focusing more on addressing these security concerns this leave very little scope to address issues of human rights violations which tends to stem from it. Further there exists different levels of attention that is accorded to various human rights violations. The highest priority is usually given to human trafficking. Asylum also attracts a lot of attention but the manner of addressing this issue has been different, since it is considered to be separate from immigration policies. This is because the nexus between the two is not as obvious as in the case of trafficking.

International Law's Stand on Migrants

International law is actually designed with keeping in view the rights of the migrants while at the same time ensuring that it provides very little chance for human rights violation. It further “prohibits states from making the unauthorized entry of immigrants a crime”¹⁴ and it recognizes that all people have the “right to seek and receive asylum in a foreign territory”¹⁵. Under the International Covenant on Civil and Political Rights, 1966, Art.9 states that “Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary

¹⁴ Migrants who cross borders without authorization may be subjected only to administrative, rather than criminal, sanctions. The Working Group on Arbitrary Detention has concluded that “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.” Human Rights Council, Report of the Working Group on Arbitrary Detention, ¶ 53, U.N. Doc.A/HRC/7/4 (Jan. 10, 2008), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/100/91/PDF/G0810091.pdf?OpenElement>.

¹⁵ Supra note 1 at art.14

arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure [sic] as are established by law.”¹⁶ Furthermore, the Refugee Convention clearly stipulates that states may not penalize asylum seekers for their unauthorized entry or presence in a foreign territory.¹⁷

This shows that the basic tenant’s like the right to liberty and security of the individual is guaranteed and this requires that the receiving states should treat non-citizens with a presumption of all these basic rights. This leads to the inference that states cannot detain asylum seekers even under the guise of precautionary measure based solely on their entry or presence without valid entry papers in the country of refuge.

The International Covenant on Civil and Political Rights has made it very clear that the covenant is not limited solely to the citizens of the states that are a party to the covenant but also it is applicable to all individuals irrespective of their nationality who may find themselves in the territory or subject to the jurisdiction of the state party. Hence, this convention protects all immigrants from arbitrary detention in any form. The Human Rights Committee¹⁸ a body which was set up the covenant to help monitor the states compliance with the treat has interpreted Art.9 in such a manner that should detention be required then it must be “reasonable, necessary, and proportionate” in light of the particular circumstances of each case.¹⁹This is not the only safeguard that the migrants have; they are also entitled to a variety of procedural protections which includes access to courts and counsels. In totality this leads to the understanding that international law explicitly prohibits states from imposing criminal penalties on immigrants who enter their territory without authorization.²⁰

So according to international law, a state must show, before it detains an asylum seeker that in that particular individuals case, there does not exist any coercive alternative other than detention left to achieve a legitimate government purpose. The United Nations High Commissioner for Refugees detention guidelines clearly states that there are only three conditions under which detention of an asylum seeker can be considered legitimate under international law. The first condition is that of public order, second is that of public health and the last is in the cases of national security. Furthermore in order to prevent any kind of arbitrary detention under the guise of any one of these conditions, these detentions are subject to judicial review. The new policy of mandatory administrative detention that has been adopted by various governments, which seeks to place asylum seekers in

¹⁶International Covenant on Civil and Political Rights, Art. 9, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171.

¹⁷Convention Relating to the Status of Refugees (Refugee Convention), art. 31, opened for signature July 28, 1951, 189 U.N.T.S. 150.

¹⁸Under its mandate, the Human Rights Committee investigates cases of deprivation of liberty imposed arbitrarily or otherwise inconsistently with the ICCPR. In such cases and in its general comments, it interprets the scope of states’ obligations under the treaty.

¹⁹Human Rights Comm., General Comment No. 35: Article 9 (Liberty and Security of Person), ¶ 18, U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014)

²⁰Migrants who cross borders without authorization may be subjected only to administrative, rather than criminal, sanctions. The Working Group on Arbitrary Detention has concluded that “criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate illegal immigration and leads to unnecessary detention.” Human Rights Council, Report of the Working Group on Arbitrary Detention, ¶ 53, U.N. Doc. A/HRC/7/4

detention without individualized determination of the necessity of detention is a violation of the requirement laid down by the detention guidelines.

The Refugee convention and Protocol provides an additional layer of protection to all refugees and asylum seekers. The basic principles that this convention has to offer is that of non-discrimination, non-penalization and non- refoulement²¹. This ultimately gives asylum seekers a special protected status under international law. Since, once they enter the territory of a state that has ratified the Refugee Convention or Protocol that state cannot take measures that penalize the asylum seekers for their presence within their territory or discourage them from applying for asylum.²²This holds true even in cases of humanitarian emergencies, wherein states face a mass influx of people seeking refuge within their territory, states are obligated to uphold their non-refoulement obligations and cannot penalize unauthorized entry or reject people at the borders.

It is important to understand that the detention policies adopted by the wealthy western states are no longer bound by their territorial boundaries. The tendency that has been adopted by these wealthy states who are signatories to the Refugee Convention, 1951 is to deploy strategies which are aimed at restricting the entry of migrants and asylum seekers even before they reach their states and can call on them for protection. The most prevalent strategy adopted by them is to exercise influence over the asylum policies of their sovereign neighbours. Immigration detention is one of the most important parts of this exported policy control into their sovereign neighbour's jurisdiction. Europe has built its immigration detention centres in Ukraine and in North Africa. On the other hand United States has a fully funded detention centre in Guatemala and Mexico border. Australia is no exception to this export policy, having developed a system of immigration detention centres in Indonesia by the mid 1990's. The overall effect of this export policy is that it has created a buffer zone which is instrumental in denying access to asylum seekers and migrants from reaching states that are signatories to the Refugee Convention. These examples clearly shows that despite there existing various measures in order to safeguard the rights of migrants and asylum seekers, states have found legal loopholes which helps them circumvent the obligations imposed upon them by international law.

IV. XENOPHOBIA AND ITS IMPACT:

With the increasing ethnic and racial diversity that has been the outcome of international migration which has taken place over centuries. This is visible in the number of states that have become more multi ethnic. Whilst the governments of these states are grappling with the realities of their multi ethnic societies, there has been a

²¹This concept prohibits the expulsion or return of refugees to territories where their lives or freedom would be threatened on account of their race, religion, nationality, political opinion, or membership in a particular social group.

²²Conclusions Endorsed by the Executive Committee on Protection of Asylum-Seekers in Situations of Large-Scale Influx, U.N. GAOR, 36th Session, Supp. No. 12A, at 17, U.N. Doc. A/36/12/Add.1, § II.A (1981) [hereinafter, Executive Comm. Conclusion No. 22 (XXXIII)].

marked increase in the discrimination and violence that has been directed towards international migrants. Since these occurrence has become so generalized, widespread as well as common it has now become a defining feature of international migration in today's world.

It is evident that the extent of racial discrimination and xenophobia has been down played to a very large extent and in most cases authorities find it easier to deny its existence. It is important to note that Racism and Xenophobia are different phenomenon's despite the fact that the overlap or occur simultaneously. Racism generally implies a distinction that is based on the difference in physical characteristics, which is inclusive of skin colouration, facial features etc. On the other hand Xenophobia indicates a behaviour that is specifically based on the perception that the other person is foreign or originates from outside that particular nation or community.

Xenophobia has been defined by various scholars in various fields in order to understand this phenomenon. The dictionary defines it as the intense dislike or fear of strangers or people from other countries. Sociologists have defined Xenophobia as "an attitudinal orientation of hostility against non-natives in a given population."²³ Xenophobia describes attitudes, prejudices and behaviour that reject, exclude and often vilify persons, based on the perception that they are outsiders or foreigners to the community, society or national identity.²⁴

In most cases it becomes very difficult to distinguish between racism and xenophobia since both these actions are formed on the differences in physical characteristics which are used to distinguish the "other" from the common identity. This is inferred since the manifestation of xenophobia is seen against people of identifiable physical characteristics, which could even extend to their shared ancestry, who are considered by the occupants to be outsiders.

The lack of protection of human rights and the promotion of an environment that is inclusive is absent in most countries. This creates an environment which is conducive for the manifestation of xenophobic acts which are in essence a violation of human rights. Hatred is not considered natural or spontaneous hence all xenophobic acts are usually attributed to outcomes of propaganda and incitement to hatred, hostility and violence.²⁵ This is carried out on various level which ranges from social, political discourses and the way media portrays information to the public.

²³Boehnke, Klaude, cited in Akokpari and Matlosa: International Migration, Xenophobia and Policy Challenges for Regional Integration in Southern Africa. Pretoria, July 2001.

²⁴Declaration on Racism, Discrimination, Xenophobia and Related Intolerance against Migrants and Trafficked Persons. Asia-Pacific NGO Meeting for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance. Teheran, Iran. 18 February 2001.

²⁵Ms.NaviPillay, United Nations High Commissioner for Human Rights, Cape Town, July 2012.

Almost all core international human rights instruments contain provisions which are essential for combating the manifestations of xenophobia. The international Convention for the Elimination of Racial Discrimination has played a very important role in addressing xenophobic discrimination and xenophobic anxiety. All the anti-xenophobia initiatives that are present within the United Nations framework have all been aimed at personal prejudicial approaches in order to combat this issue. It has advocated the punishment of individual or perpetrators who were motivated by prejudice to commit xenophobic discrimination. Further all instruments promote the promotion of tolerance between migrants and the receiving states. This is achieved through either direct or indirect human rights education or other initiatives that can diminish anti -foreigner prejudice.

The main challenges faced in curbing this phenomenon are the lack of accountability and recurring impunity which remains largely unaddressed. Further those who are commit these acts are not held accountable and are released after a short period of time. This shows that that there exists a lack of prompt and effective investigation creating an environment of distrust. The violence met out to the victims of xenophobia ranges from hate crimes to threats to verbal abuse to rape and much more. In most cases these incidents go unreported since the victims do not have confidence on the judicial system of that government. Furthermore in the few cases that are reported the victims are harassed by law enforcement officials and are forced by their relatives to withdraw the charges against the perpetrators.

Thus in order to combat this phenomenon, there exists a need for a holistic human rights based approach. There is a need to develop and enforce laws effectively in order to address hate crimes. Ensure that there is a prompt, impartial and through investigation and prosecution in such cases. Ensure that there are effective as well as accessible remedies to the victims. Further if there is full participation of victim groups in the design and implementation of measures against xenophobia then this will ensure that their voices are heard.

V. CONCLUSION

People are forced to migrate from their country of origin in large numbers in the last few years. There is no denying this fact. However, this has led to an increased vulnerability which leaves them defenceless when faced with the various hard line policies adopted by the states. This highlights not only the need for the international community to arrive at a consensus as a whole on how to address this issue, but also there exists a need to change the mind frame of the citizens as well, who feel threatened by the arrival of these migrants. It is true that there are legitimate issues with the growing influx of migrants which revolve around the threat to security and the threat to the job security of citizens. Boundaries were created by humans and can be removed by humans. Hence there is a need for creating an integrated world order which does not focus on ethnicity or race or religion or sex and rather focuses of the sanctity of the basic rights of human beings.

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