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Protecting the Rights of Refugees in Transit Countries: What Role for National Human Rights Institutions (NHRIs)?

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Abstract: This paper explores the role of national human rights institutions (NHRIs) in protecting the rights of refugees in transit countries, with a special focus on the ongoing refugee crisis. Author argues that the executive branch bears the primary obligation to ensure the respect of human rights on national level. Therefore, it has to have a leading role in providing for refugees, as well. NHRIs, as oversight authorities, should serve as its obvious partner. The author maps number of possible NHRIs activities in relation to the refugee crisis, with the emphasis on complaint handling and *ex officio* investigations; legislative initiatives; prevention of torture and ill-treatment; ensuring full access to the asylum procedure; and cross border cooperation. Besides relevant academic literature on NHRIs and refugees, author builds on the results of international and regional conferences organized to explore these issues, as well as on the work of the Serbian Protector of Citizens (Ombudsman) and other NHRIs from the Balkans, in order to portray the experiences of transit countries.

Keywords: human rights, refugees, transit, national human rights institutions, NHRI, ombudsman, Serbia.

Introduction

The post-Arab spring refugee crisis has raised numerous human rights issues. We have witnessed grave human rights violations in the number of countries. International community has failed to react properly. Once again, security has prevailed over human rights, even in the countries traditionally seen as “human rights champions”. The European Union has struggled to come up with the common response, thus allowing its member states to introduce diametrically opposite solutions for countering migratory flow, i.e. from free flow to barbed wire fences on the borders. The EU has clearly securitized the issue (Glušac,2014).

Human rights are traditionally perceived as the (vital) core of human security (Alkire, 2003: 5). Thus, the protection of particularly vulnerable groups has been in the center of both concepts. People become refugees as a result of political and community insecurity (conflicts) (UNDP, 1994: 34-35 and UN, 2009: 6), causing them to flee from their country, thus falling under the jurisdiction of another. On a national level, the executive branch bears the primary obligation to ensure the respect of human rights, including

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those of refugees on its soil. Nevertheless, human security as people-centered, comprehensive and multi-sectoral concept embraces the active role of different actors in ensuring the well-being of the individuals. To that end, national human rights institutions (NHRIs) could play an important role in protecting the rights of refugees. This paper aims at identifying the key tasks and responsibilities of NHRIs in relation to the refugee crisis. Besides relevant academic literature on NHRIs and refugees, we build on the results of international and regional conferences organized to explore these issues, as well as on the work of the Protector of Citizens (Ombudsman) of the Republic of Serbia and other NHRIs from the Balkans, in order to portray the experiences of transit countries.

What are NHRIs?

National Human Rights Institutions (NHRIs) are common name for the independent state institutions operating on a national level, mandated to protect and promote human rights. NHRIs occupy a specific position in the state's politico-legal system, as they are part of so-called fourth branch of power, independent from three traditional branches. They act as oversight and corrective authority, established by the Constitution or special (organic) law.

What is particularly appealing in the very concept of NHRI is the freedom of the state to choose the institutional form (type) of the NHRI most suitable to it, i.e. depending on the legal system and tradition, existing human rights architecture and so on. Comparatively, three most usual NHRI types are human rights ombudsman (in continental Europe and South America), human rights commissions (in Commonwealth countries, Asia and Africa) and human rights institutes (in Western Europe).²

The Paris Principles, adopted in 1993 by the UN General Assembly Resolution 48/134, operate as a sort of NHRIs' international constitution, stipulating the conditions that NHRIs have to meet in order to be accredited as NHRIs with the highest A status. The accreditation is conducted by the Subcommittee on Accreditation of the Global Alliance of NHRIs (GANHRI), which accreditation system is recognized and facilitated by the UN (Glušac, 2016).

² Human rights centers and councils also exist. Centers are in Jordan, Finland, Moldavia, Norway and Slovakia, while councils can be found in Egypt, Morocco and Libya. See more in: Glušac, 2016.

Proper understanding of the place and the role of different state authorities in the protection and promotion of human rights is a prerequisite for establishing the legitimate expectations in connection with the very purpose of NHRIs. Namely, the states ratify international human rights treaties and enact constitution and law, through their legislative branch. Executive branch is responsible for ensuring that all guaranteed human rights are actually respected in the practice, while the judiciary interprets and applies all positive human rights regulations. NHRIs are, in the essence, corrective institutions which (in simplified words) monitor the implementation of human rights regulations and propose enactment of the new ones, with the aim to strengthen the enjoyment of rights. NHRIs cannot issue legally binding decisions, only recommendations and proposals.³ Without the adequate functioning of three traditional branches of power, particularly the executive, NHRIs are sometimes “forced” to come out of their corrective and oversight role, substituting the competent authorities (Glušac, 2016). NHRIs should not be panacea for all human rights related problems, neither replacement for other mechanisms of control and protection, but their obvious partner. Their *raison d'être* can only be fulfilled in the synergy with other functional stakeholders. In other words, NHRIs can help rectifying systemic and individual deficiencies in the work of public authorities, increasing the efficiency of their work and strengthening of the human rights guarantees, but only in the state where democratic order and the system of “checks and balances” have been established.

NHRIs and Protecting the Rights of Refugees

Emphasizing the importance of human rights-led approach to the refugee crisis, NHRIs have gathered in Belgrade⁴ and Thessaloniki⁵ to discuss their role in protecting the refugees. The Conferences have resulted in “The Belgrade Declaration on the Protection and Promotion of the Rights of Refugees and Migrants” and “The Regional Joint Action Plan of Ombudsman Institutions on Refugee/Migrant Crisis and Human Rights”. Both

³ *Stricto sensu*, NHRIs’ recommendations are not legally binding acts. On the nature of these recommendations, see Janković & Glušac, 2015.

⁴ More than 100 representatives of ombudsman institutions and NHRIs, international organizations and civil society organizations took part in the “Belgrade Conference of Ombudsman/National Human Rights Institutions: Human Rights Challenges in Refugee/Migrant Crisis” on November 23-24, 2015, organized by the Protector of Citizens (Ombudsman) of the Republic of Serbia, in cooperation with the European Network of National Human Rights Institutions (ENNHRI).

⁵ The Conference was organized by the Greek Ombudsman on 19 February 2016. Ombudsman/NHRIs operating on the Balkan route were present: Albania, Austria, Croatia, Greece, Kosovo*, Former Yugoslav Republic of Macedonia, Serbia, Slovenia, and Turkey were present. *This designation is without prejudice to positions on status and is in line with UNSCR 1244 and ICJ Advisory opinion on the Kosovo declaration of independence.

documents contain general provisions on the importance of awareness-raising and cooperation on all levels, but also more specific provisions on best practices and possible NHRI activities in protection of the refugees' rights. Building on these two documents, hereinafter we elaborate and further problematize some concrete activities that the NHRIs can employ, in order to protect the rights of refugees in transit countries.

Complaint Handling and Ex Officio Investigations

The Belgrade Declaration calls for NHRIs to promote the possibility to lodge complaints to them and encourage refugees to use this opportunity in cases where they believe their rights are violated. NHRIs are competent to protect the rights of all persons in the country, irrespective of their nationality.⁶ For instance, Serbian NHRI – the Protector of Citizens (Ombudsman) – protects the rights of all persons on the Serbian soil, regardless whether they are nationals of Serbia or some other country, i.e. Syrians or Iraqis. Thus, all of them can lodge complaint to it. The same applies to other NHRIs from the region.⁷ Additionally, NHRIs should start *ex officio* (own-initiative) investigations whenever doubt arises that human rights might not be fully respected (Belgrade Declaration, 2015). These are clearly ombudsman-based recommendation. While all NHRI types share the compliance with Paris Principles, which stipulates for the broad mandate for protection and promotion of human rights, it is the additional principle foreseen in the Paris Principles that actually distinct ombudsman from other NHRI types (i.e. commissions or institutes). That is a quasi-judicial competence, i.e. individual complaint-handling.

There is a conflicting discussion on the efficacy of the individual complaint-handling in academic literature, ranging from view that “there is a very strong case for saying that complaints-handling is actually one of the least effective means of addressing human rights issues” (Carver, 2012: 202) to the quite opposite, that without individual complaints-handling competence, the NHRIs are missing the “real teeth” (de Beco & Murray, 2014: 102). Anyhow, in the recent years the international human rights

⁶ For more on this, see for example: Kucsko-Stadlmayer, 2008: 18-19.

⁷ Croatia (see Art. 20 of the Ombudsman Law, “Official Gazette”, No. 76/12), Bosnia and Herzegovina (see Art. 18 of the Ombudsman Law, “Official Gazette”, No. 32/00, 35/04 and 32/06), Montenegro (see Art. 3 of the Ombudsman Law, “Official Gazette”, No. 42/11 and 32/14), Macedonia (see Art. 13 of the Ombudsman Law, “Official Gazette”, No. 07-4502/1).

mechanisms have increasingly embraced the NHRIs' quasi-judicial competences (UN Committee on the Rights of the Child, 2002).

The ombudsman model, while not exclusively geared to addressing complaints, is nonetheless built around that central function. Other NHRI types stipulate a more "systemic fashion" of addressing human rights violations. These two are not mutually exclusive. In contrary, only with combination of the two, the best results can be achieved. Namely, the two strengthen each other, i.e. a general standpoint can be reinforced with the examples from the ombudsman's individual complaint-handling practice, to show how one problem affects citizens.

In transit countries, it is not realistic to expect a big number of complaints to the NHRIs, as the refugees are not spending enough time in one country to lodge complaint and then wait for the outcome of investigation. Thus, the NHRIs have to be present where refugees are placed. The NHRIs can collect information on human rights violations or deficiencies in administration procedures from refugees, and then open *ex officio* investigation, without a need to wait for formal complaints. While the outcome of those investigations may not be useful for refugees that have provided the initial information (as they have perhaps already left the country), it can certainly prevent future problems.

Legislative Initiatives

While not all NHRIs have a right to submit legislative initiatives, many of them do. As known, MPs and the Government are the most usual bill proposers. As a specific "legislative actor", NHRIs should use their right to submit legislative initiatives if two cumulative conditions are met: (1) when it is necessary to amend law or a draft law to ensure full and unhindered exercise of guaranteed citizens' rights; and (2) when other authorized bill proposers (usually the Government) fails to use its legislative initiative to ensure respect, exercise, protection and improvement of citizens' rights and there is a danger of delay (Ombudsman of Serbia, 2015: 249-250).

We argue that proposing of amendments and laws directly to the Parliament should be the last step that the NHRI takes, and that only when it finds that the so-called "first-line" bill proposer (i.e. Government) will not take the necessary steps to the benefit of the citizens' rights on the basis of an initiative, a recommendation or other proposal previously made by the NHRI. In other words, the NHRI legislative activity should be primarily be reflected in submission of substantial initiatives to public authorities (i.e.

ministries) to prepare and propose necessary regulations. That is because in most legislations, it is the Government's constitutional (and/or legal) competence to establish and implement policy, including the human rights policy.

Prevention of Torture and Ill-treatment

Both Belgrade Declaration and Thessaloniki Action Plan contain provisions reminding states that when dealing with refugees, they must adhere to their commitments deriving from the ratified international and regional treaties regulating deprivation of liberty as a last resort and forced return, so as to prevent inhuman or degrading treatment of migrants and refugees.

NHRIs, especially ones that also operate as National Preventive Mechanism for Torture (NPM) in accordance with the Optional Protocol to the UN Convention against Torture (OPCAT)⁸, play vital role in preventing any form of ill-treatment and torture. NPM's work is predominantly based on visits to all places of detention. NPM also monitors forced returns. For example, Serbian Ombudsman, operating in its NPM capacity, monitored forced return of Serbian citizens from EU countries which asylum requests have not been accepted. A forced return was conducted by a special charter flight from Düsseldorf to Belgrade. In that particular case, no violations of returnees' rights were registered.

NHRIs should engage pro-actively in fact finding regarding cases of ill-treatment, exploitation and other violations of human rights. They should make available fiches as well as posters and leaflets on their competences and work to all refugee camps and reception/registration centers, including hotspots (Thessaloniki, 2016), on language known to them. Making themselves visible is of utmost importance, as it makes refugees feel more protected, and public authorities additionally cautioned to adhere to all applicable laws and standards.

Ensuring Full Access to the Asylum Procedure

The refugee law (Goodwin-Gill & McAdam, 2007; Zimmermann, 2011) stipulates that all states along the refugee routes must respect the principle of *non-refoulement*

⁸All national ombudsman institutions operating on the Balkan route (Greece - Macedonia - Serbia - Croatia - Slovenia) are also NPMs. See more at: UN Subcommittee on Prevention of Torture. For more on the Balkan route, see for example: Lipovac & Đurić, 2015.

(Edwards, 2005; Goodwin-Gill, 2014); and ensure, without discrimination on any ground, the unhindered access to fair, prompt, effective, and gender-sensitive asylum procedures, and especially safeguard the best interests of the child.

NHRIs can investigate, establish and explain how the current situation deprives, or not, potential asylum seekers from the possibility to exercise their right and apply for protection (Thessaloniki, 2016). They can also monitor the current state of affairs and recommend state authorities to take measures to guarantee effective and fair access to asylum, including through legislative changes, where necessary. Additionally, developing the user-friendly “asylum guide” and making it available to refugees also helps.

For instance, the Serbian Ombudsman, acting in its NPM capacity, issued 27 recommendations to the Ministry of Internal Affairs and the Commissariat for Refugees and Migration as early as in 2014 aiming at improving the treatment of irregular migrants and particularly asylum seekers in Serbia. In 2014 and 2015, the Protector of Citizens’ activities were focused on overseeing compliance with these recommendations, which prompted more than 100 visits to relevant authorities and institutions (Ombudsman of Serbia, 2015). Similarly, the Croatian Ombudsman paid 26 visits to 17 different locations where refugees were held (Ombudsman of Croatia, 2016: 170), while the Macedonian Ombudsman issued the special report on the situation at the temporary transit centers Vinojug and Tabanovce, containing specific recommendations for improving the conditions of accommodation and sojourn of migrants, following several visits to those centers (Ombudsman of Macedonia, 2015).

Cross Border Cooperation

In instances such as the refugee crisis of this scale, cross border cooperation comes as a natural and necessary mechanism. All states receiving large numbers of refugees have to cooperate closely and establish channels to exchange reliable information in order to provide a humanitarian response and to secure human rights compliant reception of refugees who are staying or transiting through their territories (Belgrade Declaration, 2015). Thessaloniki Action plan also calls for intensive NHRIs’ cooperation whenever possible, through, *inter alia*, establishment of contact points, early warning mechanisms and standard coordinated rules of reaction/engagement (e.g. complaint mechanisms, fact-finding visits on the spot). Through cross border cooperation, NHRIs can engage with their governments to create the transit mechanism that would impose only the

absolutely necessary inconveniences for refugees, not contributing to their additional sufferings. With joint activities, NHRIs can influence creating the common standard procedures and practices regarding border checks and crossings. To that end, Serbian, Macedonian and Croatian Ombudsman institutions have conducted the cross border visits to oversight the treatment of refugees in transit through Balkan route, with particular attention to the organization of transit, work of border police and migration authorities, administrative and asylum procedures, conditions in reception centers and shelters (on both sides of the border), and so on. As a result, number of recommendations have been issued to the competent national authorities.

CONCLUSION

Many of the problems during the refugee crisis in transit countries have been result of the unpreparedness and *ad hoc* approach to tackling this strategic challenge. We have argued here that the executive branch bears the primary obligation to ensure the respect of human rights on national level, including those of refugees. We have also shown that NHRIs could play an important role in advising the government on how to create a more systemic and strategic human rights based approach to the refugee crisis. With such approach, the states would be in far better position to guarantee refugees' freedom from want and freedom from fear.

REFERENCES

Alkire, S. (2003). *A Conceptual Framework for Human Security*. Oxford: Centre for Research on Inequality, Human Security and Ethnicity - CRISE, University of Oxford.

Beco, G. d., & Murray, R. (2014). *A Commentary on the Paris Principles on National Human Rights Institutions*. Cambridge: Cambridge University Press.

Belgrade Declaration on the Protection and Promotion of the Rights of Refugees and Migrants. (2015). *The Protector of Citizens of the Republic of Serbia*. Retrieved May 7, 2016, from <http://zastitnik.rs/index.php/166-2014-12-17-11-05-24/4467--2015>

Carver, R. (2012). National Human Rights Institutions in Central and Eastern Europe. In R. Goodman, & T. Pegram, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* (pp. 181-209). New York: Cambridge University Press.

Edwards, A. (2005). Human Rights, Refugees, and the Right 'To Enjoy' Asylum. *International Journal of Refugee Law*, 17 (2), 293-330.

- Glušac, L. (2016). Razvoj nacionalnih institucija za ljudska prava. In Đ. Stojanović, & M. Lišanin, *Srbija i institucionalni modeli javnih politika: problemi i perspektive* (pp. 265-301). Beograd: Institut za političke studije.
- Glušac, L. (2014). Securitizing Migration in the European Union: from Openness to Ban-Opticon. *Serbian Political Thought* (2), 159-177.
- Goodwin-Gill, G. S. (2014). International Law of Refugee Protection. In E. Fiddian-Qasimiyeh, G. Loescher, K. Long, & N. Sigona, *The Oxford Handbook of Refugee and Forced Migration Studies* (pp. 36-47). Oxford: Oxford University Press.
- Goodwin-Gill, G. S., & McAdam, J. (2007). *The Refugee in International Law*. Oxford: Oxford University Press.
- Janković, S., & Glušac, L. (2015). Zaštitnik građana (Ombudsman) Republike Srbije - pojašnjenja nekih čestih nepoznanica. *Iustitia* (3), 50-55.
- Kucsko-Stadlmayer, G. (2008). *European Ombudsman-Institutions: A comparative legal analysis regarding the multifaceted realisation of an idea*. Wien: Springer.
- Lipovac, M., & Đurić, S. (2015). Migrantska kriza u EU i zapadnobalkanska ruta. *Godišnjak Fakulteta bezbednosti*, 67-89.
- Ombudsman of Croatia. (2016). *2015 Annual Report*.
- Ombudsman of Macedonia. (2015). *Special report on the situation at the Temporary Transit Centres Vinograd and Tabanovce*.
- Ombudsman of Serbia. (2015). *2014 Annual Report*.
- Ombudsman of Serbia. (2016). *2015 Annual Report*.
- Ombudsman of Serbia. (2014, February 2014). *The Recommendation to the MoI and CRM*. Retrieved May 7, 2016, from <http://www.ombudsman.rs/index.php/lang-sr/2012-02-07-14-03-33/3190-2014-02-14-08-47-05>
- Thessaloniki Regional Joint Action Plan of Ombudsman Institutions on Refugee/Migrant Crisis and Human Rights. (2016, February 16). *Synigoros*. Retrieved May 7, 2016, from <http://www.synigoros.gr/resources/160223-actionplan.pdf>
- UN Committee on the Rights of the Child. (2002). *General Comment No.2*.
- UN Subcommittee on Prevention of Torture. (2016). *National Preventive Mechanisms*. Retrieved from <http://www.ohchr.org/EN/HRBodies/OPCAT/Pages/NationalPreventiveMechanisms.aspx>
- UNDP. (1994). *Human Development Report*.
- United Nations. (2009). *Human Security in Theory and Practice*.

Zimmermann, A. (2011). *The 1951 Convention Relating to the Status of the Refugees and its 1967 Protocol: A Commentary*. Oxford: Oxford University Press.