

International Migration Law Newsletter

Issue 11 • Winter 2014



*It has been awhile since last I put my mind to rhyming
It must be a question of timing.
I am told that I must keep to the law
It is supposed to be without flaw!!*

*I would much rather speak of holiday and making merry
But seems that would be me being contrary
That however comes easy
So let me skip the law and be cheesy*

*In IML we want to spread love and joy
And only occasionally do we annoy
(But when we do we do it well
And when necessary even schnell schnell)
With this little newsletter
We think we will make your day so much better!!!*

*It is all about rights and good intention
So behold: pay attention!
Enjoy and have fun
Or turn around and run, run, run!
(We may catch you and put you in detention...
But you will know the permissible grounds if you have
paid attention)*

IML-RELATED EVENTS AND TRAININGS

- **23-24 September**
IML training for Government Officials, Luanda, Angola
- **30 September – 2 October**
IML training for National Coordinating Committee for Combatting and Preventing Irregular Migration, Cairo, Egypt
- **7-9 October**
Participation to the Congress of Judicial Power, San Jose, Costa Rica
- **21-25 October**
IML training for the Military Academy, Beijing, China
- **27-30 October**
Workshop on Migration, Environment and Climate Change, Santiago, Chile
- **18-20 November**
IML training for officials and CSOs, Benin
- **9-10 December**
Course on the Protection of Migrants and Refugees, Belgrade, Serbia
- **15-16 December**
IML training for African Union Representatives, Addis Ababa, Ethiopia

Would you like an IML training?
Please contact us at iml@iom.int



*In a gentle way, you
can shake the world.*

- Mahatma Gandhi

[WE LIKED....]

The documentary *On the Bride's Side* is about the road trip from Milan to Stockholm made by five undocumented Syrian and Palestinian refugees fleeing the war in Syria. Directors Gabriele del Grande, Antonio Agugliaro and Khaled Soliman Al Nassiry arranged a fake wedding party, enlisted a bride and a production team and embarked on the 3,000-kilometre journey, hoping to avoid detection and arrest. The aim was to show a transnational, supportive and irreverent Europe that plays with the too often restrictive laws applied to migrants' movements. The film was entirely crowdfunded, receiving contributions from 2,541 funders from 37 countries and finally was presented at Venice Film Festival this summer.



[WE ALSO LIKED that....]



Pope Francis calls on European Parliament for action: 'We cannot allow the Mediterranean to become a vast cemetery'

Addressing the Parliament on November 25, the Pope called for action following the deaths of thousands of migrants who have drowned while trying to cross the Mediterranean. Pope Francis called on European leaders to do more to help migrants arriving on their shores.

The leader of the Catholic Church said legislators risk turning the Mediterranean into a "vast cemetery" if they do not do more to tackle the immigration crisis. "The boats landing daily on the shores of Europe are filled with men and women who need acceptance and assistance" he said. He notably called for leaders to work together to protect immigrants from human traffickers and establish a Europe that "revolves not around the economy but around the sacredness of the human person". The Pope added that there is "a need to restore dignity to labor by ensuring proper working conditions".

[Did you know?]

In the fall of 2014 the European Court of Human Rights has rendered two important judgments concerning the asylum procedure under the “Dublin” regulation.

The first case, **Sharifi and others v. Italy and Greece**, concerned 32 Afghan, two Sudanese and one Eritrean nationals, who allegedly arrived in Italy irregularly from Greece and were immediately returned to that country. The applicants were expelled to Greece **without individual consideration of their cases and neglecting the procedural safeguards in place**; once there, they did not have access to asylum procedures and constantly feared to be deported to their respective countries of origin, where they faced the risk of death, torture or other ill-treatment.



The Court, in its Chamber judgment, found that with respect to four Afghani applicants, who were able to maintain regular contact with their lawyer, the Greek authorities had violated Article 13 (right to an effective remedy) read in conjunction with Article 3 (prohibition of torture and inhuman and degrading treatment) on account of the lack of access to the asylum procedure in Greece and because they were under the threat of deportation to Afghanistan, where they faced the real risk of being submitted to ill-treatment.

The Court also stated that **collective and indiscriminate returns** proscribed by Article 4 of Protocol No. 4 (prohibition of collective expulsion) could not be justified by reference to the Dublin system. Moreover, the Court found that Italy also violated Article 3, when returning the applicants to Greece, as well as Article 13 read together with the prohibition of collective expulsion and the prohibition of torture and inhuman and degrading treatment, because of the lack of access to the asylum procedure or to any other remedy on Italian territory.

The second **case of Tarakhel v. Switzerland** concerned the denial by the Swiss authorities to examine the asylum application of an Afghan couple and their five children and the decision to send them back to Italy, in application of the Dublin system, **without sufficient guarantees** that they would have been taken care of in a manner adapted to the age of the children and with due respect of the family unity. In its Grand Chamber judgment, the ECtHR found that there would have been a violation of the prohibition of inhuman and degrading treatment, under Article 3 of the Convention In view of the current situation of the reception system of asylum seekers in Italy and the general lack of accommodation or poor conditions in which migrants were kept, particularly due to overcrowding.

The Court recognized that asylum seekers require a **“special protection” under Article 3** of the Convention and this is particularly important when the persons concerned are children, even when they are accompanied by their parents.

What is important in these two cases is the fact that the Court has reiterated that the **Dublin system within Europe must be implemented in accordance with the rule law and does not provide a justification for collective expulsion or indiscriminate returns without adequate guarantees** from the Member State where they are to be returned that they will not be submitted to conditions or treatments contrary to Article 3 of the Convention.

The full text of the judgments can be found [here](#) and [here](#)

New Protocol to the Forced Labour Convention

In June 2014 a new legally binding Protocol and Recommendation supplementing the Forced Labour Convention No. 29 were adopted. These instruments are aimed to update the 1930 Convention that, although widely ratified, has now become outdated as it was tailored originally to address forced labour in overseas colonies and contained a number of transitional provisions.

The Protocol adds some new elements to the Convention attempting to make it **more effective in addressing modern practices of forced labour**. First of all, it states that forced or compulsory labour, as defined in Article 2 of the Convention No. 29¹, violates fundamental human rights of individuals, and that the States Parties to the Convention have a duty to make those acts punishable as penal offences. Another new aspect introduced by the Protocol is its **focus on trafficking** in persons and that it urges States to undertake specific action against trafficking for the purpose of forced or compulsory labour. (Article 1(3))

The Protocol also highlights the **necessity of preventive measures**, such as education and information, to protect vulnerable persons, from becoming victims of forced labour. (Article 2 (d)) Similarly, it contains provisions dealing with employers of all economic sectors, aimed at preventing them from taking part in such illegal practices and to protect persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process. In this way, the Protocol recognizes that forced labour often takes place in the **private sector** and it thus emphasizes the important role the private sector plays in fighting this offence. Finally, the Protocol removes the transitional provisions of Article 1, paragraph 2 and 3, and Articles 3 to 24 of the Convention on the conditions and guarantees in case of exceptional use of forced labour for public purposes.

One of the most important and welcomed parts of the Protocol is its inclusion of **a human-rights based approach**, which is reflected in most of the provisions. For example, Article 3 urges Members to take effective measures for the identification, release, protection, recovery and rehabilitation of all victims of forced labour.

Furthermore, Article 4 recognizes the right of all victims of forced labour, irrespectively of their presence or legal status in the country, to have **access to effective remedies**. This provision is of paramount importance for migrants who stay in the country irregularly as their migrations status often puts them at a heightened risk of forced labour. In particular, the Article also requires the Members to **avoid prosecuting or imposing penalties on victims** for their involvement in unlawful activities which they have been compelled to commit as a consequence of forced labour.

As per the Recommendation that was adopted together with the Protocol, **Articles 3 and 4 are to be applied irrespectively of the victims' willingness to cooperate in criminal or other proceedings and their legal status in the territory**. Consequently, irregular migrants also have a right to a reflection period during which they should be allowed to remain in the country and eventually to get a temporary or permanent residence permit and access to labour market.

As a legally binding instrument, the Protocol is subject to ratification. It shall enter in force twelve months after at least two Members have ratified the instrument.

¹ the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.

Workshop on Migration, Environment and Climate Change

The first Capacity Building Workshop on Migration, Environment and Climate Change took place in Santiago de Chile between the 28-30th October 2014. It was organized by the Chilean Ministries of Environment and of Foreign Affairs together with IOM, for government officials and experts in South America. Representatives from 10 governments (Argentina, Brazil, Bolivia, Chile, Colombia, Ecuador, Peru, Paraguay, Uruguay and Venezuela) actively participated and provided recommendations for national and regional actions.

Strategic partners collaborated in delivering the modules in conjunction with IOM. These included the UN Convention to Combat Desertification, the UN Office for Disaster Risk Reduction, the UN Educational, Scientific and Cultural Organization, the Pan American Health Organization, the University of Neuchatel in Switzerland, the South American Network for Environmental Migration and the Latin American Population Association.



A module was dedicated to improving the knowledge of the participants on the normative framework on migration, environment and climate change, with a focus on international and regional law. In this regard, it bears recalling that there are three regionally highly relevant initiatives: the Protocol of San Salvador (1988); The Declaration of San José on Refugees and Displaced Persons (1994*); the MERCOSUR Declaration on the International Protection Principles of Refugees (2012); and the Cartagena Declaration on Refugees (1984). Although these instruments do not specifically envision protection for environmental migrants or those affected by climate change, they make reference to human rights and principles which are of crucial importance in the context of such migrations. The thirtieth anniversary of the Cartagena Declaration in Brazil in December 2014 (Cartagena+30) will offer a strategic process of reflection on pending challenges.

Critical national legislations were also explored. For example, Bolivia's migration legislation now includes the concept of "climatic migrants" as "groups of persons who are obliged to displace themselves from one State to another due to climatic affects, when this risk exists or threatens their lives, either for natural causes, environmental disasters, nuclear, chemical or starvation".

The workshop was a success and it is anticipated that similar events will be organized in other regions in the near future.

[Frequently Asked Question]

What is the impact of an epidemic such as the Ebola Virus Diseases (EVD) on the rights of migrants and the obligations and prerogatives of States during exit of or entry on a State's territory?



In times of epidemic or when people seeking to enter a State 's territory carry a disease, States' authorities should determine authorization or refusal of entry on a case by case basis, according to laws and procedures in place, avoiding any discrimination, arbitrariness and violations of general principles such as the principle of non-refoulement.

However, States must also comply with their obligations to protect the health of their citizens and other persons under their jurisdiction, and to prevent epidemics (see the International Health Regulations of 2005, IHR). According to OHCHR's

"Recommended Principles and Guidelines on Human Rights at International Borders", States should ensure that "public health is only invoked as a ground to limit rights of entry where there are serious threats to the health of the population".

Concerning the case of EVD, WHO declared on 8 August 2014, the disease outbreak a Public Health Emergency of International Concern (PHEIC) in accordance with the IHR, recommending exit screenings for States with intense Ebola transmission (Guinea, Liberia, Sierra Leone). According to WHO's recommendations, any person with an illness consistent with EVD symptoms or Ebola contacts should not be allowed to travel unless as part of an appropriate medical evacuation. These measures may limit the right of everyone to leave any country including his own guaranteed by article 12 paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR). Such restriction must however be provided by law, when necessary to protect national security [or] public health [...] or the rights and freedoms of others, and be consistent with the rights recognized in the Covenant, in compliance with paragraph 3 of same article 12 ICCPR. On the other hand, WHO urges that there should be no general ban on international travel or trade.

We will develop this important topic in a thematic article in one of the next IML Newsletters.

Understanding the interplay between abuse of a position of vulnerability, human trafficking, and exploitation of mobile populations during conflict and crisis.

By Sarah Craggs & Agnes Tillinac



An analysis of the concepts of 'vulnerability' and 'abuse of a position of vulnerability' is central in order to understand the context in which human trafficking plays out and the ultimate exploitation of its

victims. Indeed, in 2013 UNODC commissioned a number of working papers on specific aspects of the definition of human trafficking including the concept of 'abuse of a position of vulnerability'. Less discussed, however, is the interplay (if any) between abuse of a position of vulnerability and trafficking of persons during times of crisis². Do human traffickers deliberately seek to abuse those in a position of vulnerability because of conflict or crisis? Are certain populations more at-risk of human trafficking and other forms of exploitation when there is war or environmental catastrophe? Are there conflict and crisis-induced forms of human trafficking that may come to the fore during or after an event requiring a humanitarian intervention? Throughout 2014 there have been an unprecedented number of crises globally- whether related to conflict in the Middle East and North Africa or Eastern Europe, environmental disasters in Asia, or health epidemics in Africa to name but a few examples. It is therefore critical that we strive to better understand if - and how - human traffickers seek to abuse the position of vulnerability of mobile populations caught up in crises, while ensuring the prevention of their exploitation.

'Vulnerability' is often used to refer to inherent, environmental or contextual factors that increase the risk of an individual or group to human trafficking such as, poverty, human rights violations, inequality, discrimination or gender-based violence. There are certain groups which are generally considered to be more vulnerable and at-risk of being trafficked such as women, children, disabled persons, migrants, refugees and internally displaced

persons as they often represent groups that already lack an ability to exercise power and status in society. The precise definition of vulnerable persons will of course depend on the specific characteristics of the individual or group of individuals, as well as on the social or economic development of the countries involved. When concerning children, however, they are largely considered as particularly vulnerable to trafficking, with factors such as being unaccompanied when travelling or lacking birth registration being seen as additional risk factors to their potential exploitation.

Of increasing focus, although still too little understood, is the extent to which conflict and crisis increases an individual's or certain group's risk and vulnerability to human trafficking. For example, there have been increasing reports about the vulnerability of refugees and IDPs to trafficking for forced labour. Would these individuals be as vulnerable in times of peace and stability? Would the risk factors to human trafficking be as prevalent? When we are discussing 'vulnerability' in this sense we are however referring to the various factors that may increase the *susceptibility to trafficking*.

A different but related concept is the one of *abuse of a position of vulnerability* (APOV) which is specifically set out in Article 3 of the 2000 Trafficking in Persons Protocol³. From this perspective, instead of the increased susceptibility to trafficking, the emphasis is on the *abuse of vulnerability as a means* by how the first part of the *actus reus* element of trafficking is carried out. Although these are two distinct concepts, they are closely related and will often overlap. For example, in relation to migrants, the irregularity of an individual's legal status vis-à-vis the country of destination is widely acknowledged to be an important factor in enhancing their vulnerability to being trafficked (susceptibility to

² See also trafficking Risks and Prevention of Exploitation in Times of Crisis: The Case of the Middle East and North Africa, <http://weblog.iom.int/trafficking-risks-and-prevention-exploitation-times-crisis-case-middle-east-and-north-africa>

³ UN Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime. [HTTP://WWW.UNCJIN.ORG/DOCUMENTS/CONVENTIONS/DCATOC/FINALE_DOCUMENTS_2/CONVENTION_%20TRAFF_ENG.PDF](http://www.uncjin.org/Documents/Conventions/dcatoc/finale_documents_2/convention_%20traff_eng.pdf)

trafficking). Nevertheless, irregular status is also a form of vulnerability that is particularly amenable to becoming a means by which an individual is placed or maintained in a situation of exploitation (APOV). For example, the traffickers could threaten to disclose information about the migrant's irregular status to authorities to keep that individual in a situation of exploitation.⁴ Further still, in times of crisis, traffickers may abuse the very situation of an individual's enhanced vulnerability and take advantage to obtain their exploitation. Would there, for example, be as much of a demand for cheap and exploitative labour or forced and underage marriages⁵ without a supply of individuals caught up in crises - such as refugees, IDPs, host communities, and trapped migrant workers - and perhaps as a consequence, more willing to undertake riskier survival strategies?

Under international law, one has to demonstrate that three particular elements have been present in order to establish trafficking:⁶ First there needs to be an **act** (Recruitment, transportation, transfer, harbouring or receipt of persons) by **means** of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the *abuse of power or of a position of vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purpose of **exploitation**.⁷

As none of the 'means' of trafficking are defined in international law it is difficult to know what exactly is meant by abuse of a position of vulnerability and the exact meaning was disputed during the drafting of the Protocol.⁸ However, the *Travaux Préparatoires* include an interpretative note that describes APOV as referring to 'any situation in which the person involved has no "real and acceptable alternative" but to submit to the abuse involved' without explaining what is meant by 'real and acceptable alternative'. Similarly, the Explanatory Report accompanying The Council of Europe

Convention against Trafficking in Human Beings 2005 provide additional clarification on the concept of APOV, stating that 'the vulnerability may be of any kind, whether physical, psychological, emotional, family- related, social or economic. The situation might, for example, involve insecurity or illegality of the victim's immigration status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited.

In this case, and to better understanding the interplay between abuse of a position of vulnerability, human trafficking, and exploitation of mobile populations during conflict and crisis: Do mobile populations caught up crises have 'real and acceptable alternatives' to, for example, accepting exploitative work to ensure their survival; or to arranging the early-age marry of a daughter to ensure her future survival? Do migrant workers, trapped in a conflict zone working in forced labour, have any 'real and acceptable alternative'? Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.⁹ We must therefore ensure the due protection of all individuals and groups potentially at-risk of human trafficking, while continuing to reduce the plethora of vulnerabilities that may come to the fore during times of crisis and safeguarding against human traffickers stepping in to abuse these vulnerabilities¹⁰.

⁴ Gallagher A. T. & McAdam M. for UNODC (2013) *Abuse of a position of vulnerability and other 'means' within the definition of trafficking in persons*, p. 15.

⁵ See also trafficking Risks and Prevention of Exploitation in Times of Crisis: The Case of the Middle East and North Africa, <http://weblog.iom.int/trafficking-risks-and-prevention-exploitation-times-crisis-case-middle-east-and-north-africa>

⁶ Please note that this is for adults and in relation to children one does not have to prove means but only an act and exploitation.

⁷ Definition from art 3 Palermo Protocol

⁸ See the *Travaux Préparatoires*, at 343.

⁹ European Trafficking Convention, Explanatory Report, at para. 83.

¹⁰ In line with humanitarian obligations and International Humanitarian Law and International Human Rights Law.



IOM is providing diverse forms of assistance to IDPs at Baharka camp, Erbil, Iraq. In November 2014, IOM staff visited the camp to assess trafficking during crisis contexts" © IOM/Sarah Craggs



You are important!

If you have any questions, or if you want to provide any feedback or ideas on how to improve our newsletter, please contact us at iml@iom.int

Thank you!

Merci!

Gracias!