

# Without a Residence Permit: The Protection of Asylum-Seekers and Illegal Immigrants

Professor Yorgos Kaminiis, Ombudsman of Greece

## **Workshop 3: Without a Residence Permit: The Protection of Asylum-Seekers and Illegal Immigrants Wednesday, June 10, 2009**

*Developed countries stand before a fundamental dilemma in dealing with asylum-seekers and illegal immigrants: They must respect the human rights of these persons in accordance with the international agreements they have signed, while maintaining internal public order and security. Today, this dilemma is of unprecedented intensity. There are two main areas of tension in the European area: First, between the Northern and Southern countries, the latter of which are feeling completely new challenges posed by illegal immigration; second, between the traditional liberal convictions of Europeans in general and the pressures posed by the uncontrolled arrival of migrant populations. While politicians have a duty to find solutions, our duty as ombudsmen is to defend constitutional legality together with all the international conventions that bind our countries in the field of human rights.*

### Introduction: The extent of the phenomenon

Armed conflicts, civil disputes, social and religious unrest, ecological disasters and climate change, combined with the international financial crisis, force thousands of people from all over the world to seek protection – or simply a better life – outside their own countries. These people try to enter another country illegally, either to remain there or to enter another country, which most of the time is a European Union country.

The magnitude of this phenomenon gained dramatic proportions, especially in the countries of Southern Europe (Cyprus, Greece, Spain, Malta and Portugal) that neighbor the countries of Africa and Asia. In 2008 in Greece, a country with a population of 11 million, 146,337 illegal immigrants and 2,200 human smugglers were placed under arrest. Just a month ago, the Italian Navy returned 227 migrants to Libya before they could land in Italy. As Interior Minister Roberto Maroni told reporters at a news conference: “For the first time, we have affirmed the principle of repulsion in Mediterranean waters to the country from which the migrants left – not their country of origin. Today, in the name of all countries of the European Union, we have developed a new model to fight clandestine immigration – that is, to repulse at sea all those who try to enter illegally.”

The operation was the result of 12 months of diplomatic negotiations between Italy and Libya, and the actions were closely coordinated with Libya. The government of Malta was also apprised of the operation because the interception took place in Maltese waters.

Mr. Maroni said such interceptions at sea and the return to the country where the boats originated was the “rule that we want to apply from now on.”

What Mr. Maroni did not say is that such a practice violates the fundamental principle of the right to asylum, since it denies a basic procedural right: the right to have access to an asylum procedure. Among other things, it should be stressed that Libya cannot be considered a “safe country” according to international standards, since it has not signed the Geneva Convention relating to the status of refugees.

Facing this massive and uncontrollable flow of foreign population, public opinion in European countries rapidly develops xenophobic reflexes. Last year in Germany, the number of racist attacks recorded was greater than that of any other year in the post-war period. In Great Britain, a country which normally welcomes immigrants, economic development during the past 15 years has resulted in an increased number of foreigners and also in reinforced phenomena of xenophobia: 60% of Britons reportedly agree that “there are more immigrants in the country than there should be.” The British Conservative Party has even suggested its withdrawal from the Geneva Convention.

The rise of crime, the economic crisis and unemployment, as well as the cultural differences between Europeans and Asians and Africans who arrive *en masse* and the fear of Islamists, among others, all create a climate of very deep concern.

These days we speak about “mixed flows” of immigration, since the immigrating populations do not discriminate between persons who would fall under the legal status of those entitled to international protection on the one hand, and illegal economic immigrants on the other. Unfortunately, when they are arrested during their attempt to enter a country, many of those who belong in the second category declare that they actually belong in the first. They do so in order to receive the special status provided by international law to persons who apply for asylum. This abuse undermines the right to asylum in the eyes of Europeans, to such a degree that public opinion applauds actions like those recently taken by the Italian government. It must be noted that last year, 75% of those who arrived in Italy by sea applied for asylum.

### The dilemma: Protecting citizens or protecting human beings?

Developed countries stand before a fundamental dilemma: On the one hand, they must respect the human rights of these persons, as these rights have been established by their respective Constitutions and the international conventions which they have signed. On the other hand, these countries need to maintain internal public order and security, to protect the labor market, the public health care system, etc. Today, this dilemma is of unprecedented intensity. On the one hand, these unruly population movements to developed countries are

larger than ever before; therefore the pressure is enormous. At the same time, during the last few decades, the expansion of human rights protection in the western world has also benefited migrants. Legal protection – both domestic and international – has started, slowly but steadily, to shift from the citizen to the person, including those who enter or attempt to enter a country illegally.

As we have mentioned, the migrating populations do not have the same characteristics and therefore we are dealing with “mixed flows” of migration. These populations are comprised of people who belong to one of the following two categories: The first category is relatively easier to distinguish – it comprises illegal immigrants, who can also be described as immigrants without the proper documents. These are persons who enter another country illegally mainly for purposes of seeking employment. The second category includes persons who require international protection, according to international human rights law. Let us begin with the illegal immigrants.

## Illegal immigrants

At first glance, the status of a person who enters a country illegally seems simple to determine. This person has committed an illegal act and he or she must face the legal consequences. Even when illegal entry is criminally prosecuted, what usually happens is that the competent authorities refrain from imposing legal penalties and set in motion the process of expulsion instead. In many cases, expulsion to the country of origin is impossible. Countries such as Pakistan, Afghanistan, Somalia, Eritrea or Iraq do not accept their citizens back. When the administrative detention of illegal immigrants ends, they are released and are ordered to leave the country. This rarely happens. Because of this procedure, in many countries, especially those of Southern Europe, hundreds of thousands of people are trapped there without legal status. As a result, they are denied even their basic human rights. They cannot work properly, they do not have social insurance, they do not have access to health care, education and welfare services, etc. These people, while struggling to survive, are deprived of every legal means and end up as victims of every kind of exploitation – labor, sexual, etc. – or resort to criminal behavior.

However, until the illegal immigrants are deported, they enjoy some minimum protection, a set of rights that is safeguarded in most domestic and international laws of human rights protection. I will only refer to the relevant documents of the Council of Europe, due to time constraints. Firstly, detention conditions prior to expulsion must respect human integrity. Furthermore, the expulsion order should not conflict with the principle of non-refoulement established in Article 3 of the European Convention of Human Rights. According to this principle, the return of foreigners to a country where they are likely to face inhuman or degrading treatment is contrary to Article 3 of the Convention.

According to the International Convention of the Rights of the Child, minors in particular are granted access to the basic education system, subject to

the length of their stay (Art 14 1c). If an adult does not accompany the minor, the obligations of the host countries are even more demanding. In those cases, expulsion is not permitted. The only measure allowed is the return of the minor to his or her home country, to a family member, or to a nominated guardian, in a place where adequate reception facilities in the state of return exist (Article 10).

In addition, in many countries, public officials are obliged to report illegal immigrants whenever they come in contact with any one of them. In a state governed by rule of law, this practice contradicts the constitutional obligation to protect health and life, which must not be limited to the indigenous population. This is a right of every human, because it arises from fundamental human values.

## Asylum Seekers

The second category includes people who require international protection, according to the terms of international humanitarian law. At its core, this category includes refugees, as defined by the Geneva Convention; namely, “*any person being persecuted for reasons of race, religion, nationality, and membership of a particular social group or political opinion.*” However, six decades have passed since the Geneva Convention (1951), during which experience has shown that there are people who are forced to leave their countries without necessarily being persecuted. Alternatively, their persecutors may be state agents or individuals organized as irregular army groups. So, the country in which these people reside is either persecuting them, or it is unable to protect them.

Today, then, we are talking about people who are in need of international protection. Along with the refugee, this wide category also includes “persons eligible for subsidiary protection” – that is, any “person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, would face a real risk of suffering serious harm.”

According to Directive 2004/83/EC (Art. 15), serious harm consists of: a) death penalty or execution; b) torture or inhuman or degrading treatment, c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict. Depending on the interpretation given to the third point, the range of persons who require international protection could expand or, conversely, be significantly limited. An important recent ruling of the European Court of Justice said:

The word ‘individual’ must be understood as covering harm to civilians irrespective of their identity, where the degree of indiscriminate violence characterizing the armed conflict reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his pres-

ence on the territory of that country or region, face a real risk of being subject to the serious threat referred in Article 15(c) of the Directive.<sup>2</sup>

While the substantive right to international protection has been considerably enlarged since the Geneva Convention, the procedural right – “the right to an asylum process” – started suffering serious limitations even before the recent Italian incident mentioned earlier, which actually obliterates it. Increasing attempts are being made to target asylum seekers before their arrival in member states, mainly through the establishment of controls outside the borders of the European Union.

## Conclusions

On the issue of asylum and migration, one can confirm that, at least in the European area, there are two major sources of tension, which no serious discussion should overlook.

The first concerns different approaches between the Northern and Southern European countries. The Northern European countries have a more or less long tradition of receiving immigrants in their territory. In some cases, these were old colonial countries that began early on to receive the natives of their colonies. Today, in these countries, the wave of illegal migration is increasingly being felt, however, not as strongly as in the five Southern European countries that are points of entry for immigrants. It is ironic how the situation has been reversed, since historically these were once countries of origin rather than countries of destination for immigrants. Today, these countries are called to face up to completely new challenges, but domestic public opinion is not yet prepared to go along with this. Surveys show that public opinion has begun to react strongly. It is not accidental that the first fully unconcealed denial of the right to asylum process has taken place in Italy, in cooperation with Malta. It is not accidental either that Greece demonstrates the lowest rate of granting asylum.

The conclusion is that part of the weight that Southern European countries bear must somehow be redistributed to the rest of the EU countries, whether this concerns protecting external EU borders or hosting foreigners internally in their territory. The question of how this weight is to be redistributed between Northern and Southern European Countries constitutes a major point of disagreement between them.

The second source of tension is about the endurance of liberal convictions that run through the European Union, against the pressures arising from the uncontrolled arrival of migrant populations. We saw that there is a regression regarding access to the asylum seeking process. In the field of illegal immigration, the relevant issues have an even greater intensity. However, as I already mentioned, in many cases the return of illegal immigrants to their countries of origin is actually impossible. The latest EU directive (2008/115) pro-

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<sup>2</sup> Ruling of European Court of Justice of February 17<sup>th</sup> 2009, case C-465/07, Meki Elgafaji, Noor Elgafaji v. Staatssecretaris van Justitie.

longs administrative arrest. It allows those foreigners who reside illegally in the territory of the European Union to be held under arrest for a period of six months and, if necessary, for another year, until the time of deportation. I wonder if there is any meaning to this regulation in the first place, and secondly, if it can be applied. In Greece, Spain and Italy, for example, there are hundreds, or more precisely, hundreds of thousands of uncontrolled illegal immigrants, most of whom have already undergone administrative arrest. Besides, does anyone honestly believe that any European country is in a position to carry out arrests of thousands of immigrants and at the same time establish and maintain concentration camps, where thousands of people will be kept? Is this compatible with today's European culture? Besides, the problem persists: What will happen after a year and a half, if, as seems probable, the return of these people to their countries is still impossible?

The issues that I discussed present serious dilemmas. Politicians have a duty to find solutions. We, as ombudsmen, have a duty of our own: to defend legality in its widest possible meaning; above all, constitutional legality together with all the international conventions that bind our countries in the field of human rights.