

Address to the symposium "Populism? Human Rights Regression and the Role of the Ombudsman"

Third panel: "Regression of rights in situations of emergency and migration crisis: Ombudsman monitoring tools"

Chairman, colleagues, Rafael, it is an honour and a privilege to contribute to this important conference and I thank the IOI and particularly its European President for hosting it and attracting such an important group of speakers.

The challenges faced by Ombudsmen and human rights institutions in relation to refugee protection and migrant issues are not new, but the events of the last few years from the fallout of the Arab Spring and civil war in Syria allied to the more recent political game-changers of Brexit and Donald Trump have given those challenges a particular urgency and salience.

All of us, in different ways, and under varying political circumstances, have dealt with these issues. Some, like the colleagues in Greece or Turkey or Italy, at their direct human interface but all of us in environments where our work isn't always in harmony with the domestic or international political imperatives of the day. Imperatives change over time, sometimes slowly, sometimes rapidly, adding an additional layer of challenge to what we do.

I believe that for Ombudsmen, this work is the most difficult if not uncomfortable part of our job. I say that not just because of the political sensitivities that frequently clash with that work, but because, just as the politicians are challenged ethically, so at times are we. None of us are immune from the questions that globally surround these issues, from 'what is a refugee?', to 'What are the limits of a state's responsibility to them?'

These are the big questions that practitioners, academics, policymakers are now forced to grapple with as the collective realisation dawns that a refugee policy born out of the very particular circumstances of post-war Europe has been for a very long time no longer fit for purpose. In a bookshop in England at the weekend, I counted over one hundred separate titles for books under the Refugee and Migration Studies category.

It is no longer enough – even if it ever actually was – to reach for the lawyers for an answer. The history of refugee policy and refugee law since the 1950s

is considered one of incoherence and uncertainty. Legal certainty is frequently subverted or ignored by a political imperative deemed to be more important, further frustrating efforts to achieve a coherent let alone humane response by the state to the problems that land on our desks.

Added to that are the often unforeseen consequences of policies adopted either at state or at EU level to deal with the latest humanitarian or political crisis. Chancellor Merkel's very personal response to the plight of Syrian refugees was met with hostility both domestically and outside German borders. States often react in accordance with their own particular historical narrative and that too must be understood. Yet the end result was not just a brake on the number of refugees entering the country, but also the implementation of the EU/Turkey deal, the effective outsourcing of the problem to a third country when EU solidarity failed.

Well intentioned and humane policies can have consequences rarely visible until it's too late. The resources, mental, physical, financial, required by refugees for example to reach Europe inevitably means that the poorer and the weaker – those in need of most protection – are left behind. And when the time comes for rebuilding a shattered state, many of those who could have made the greatest contribution are no longer willing to return. It is estimated, for example, that half of all Syrians with university degrees are now in Europe.

The too little, too late phenomenon, also plays a role. The countries to which many Syrians fled to initially for example, countries within their own region such as Jordan and the Lebanon, failed to get the international support necessary to provide the refugees with what they most needed, not just immediate humanitarian aid, but also possible future pathways towards an income and stability. When many of those refugees, and others in similar situations, saw their lines of progress blocked, the journey to Europe became inevitable as did the political backlash in the UK and elsewhere leading to the political fallout we're all now very familiar with.

In a thoughtful and important new book on the global refugee system, authors Alexander Betts, and Paul Collier speak of the headless heart and the heartless head. The headless heart creates policies that spring from empathy and compassion but which have drastic unintended consequences, while the

heartless head develops policies that resonate with a domestic population but refuse to recognise obligations that go beyond the selfish.

They write, “The European policies that have shaped the Syrian refugee disaster have lurched between the headless heart and the heartless head. Panic is not too strong a word to describe what happened: each step was a reaction to the unanticipated consequences of previous actions that turned out to be blunders. The cumulative legacy was a series of misfortunes...”

The authors add that ‘the cultural clashes and political polarisation which accompanied the influx had the sad consequence of reducing the sympathy of many Europeans for the plight of the displaced. Such sympathy is the key resource on which refugees need to rely. This loss will ultimately make the task of constructing a system which properly responds to refugee needs more difficult.”

I make those points because I think it’s important to frame the environment in which we operate. We need to understand the dysfunctionality of the core system I believe better to understand both the possibilities and the limits of our role as Ombudsmen.

We work best in a system where the misfortunes that befall citizens are not because of bad or badly intentioned law but rather because the law is being badly implemented by the administration. In countries where the rule of law is strong and where independent institutions such as the Ombudsman are both respected and seen as an integral part of the checks and balances of a healthy democracy such problems will be quickly fixed as the Government itself will have either created or supported the relevant law or regulation.

Yet in the same states, where normally the vast majority of Ombudsman decisions are accepted, when it comes to refugee issues, those simple lines are sometimes blurred. The incoherent and confused interpretation of international refugee and asylum law, allied to public indifference to, or ambivalence towards, the plight of refugees, allows governments to avoid taking what they consider to be politically unpleasant decisions. And neither they, individually, nor we, as Ombudsmen, are in a position to fix an essentially broken international system that so far has failed to attract the necessary enlightened solidarity that would enable that to happen.

For decades, my own Government in Ireland refused even to allow the Ombudsman to make recommendations in the asylum and migration area. It is only very recently, since Peter Tyndall's time in office, that it has opened up to external oversight and I congratulate him, and the relevant Minister, in finally getting that important matter across the line. Successive governments had wanted to exert maximum control in deciding who was allowed into the country, regardless of what rights they had under international law or conventions. The area had become an outlier from the norm when it came to the working relationship between the Ombudsman and the administration.

But none of that means that we are powerless or that we cannot, even within those limits, insist that the administration remains conscious of its humanitarian obligations at the very least. And we collectively, have to add our voices to those calling for a freshly reconfigured, a reformed system of refugee policy that recognises the vastly different landscape of the 21st century with its challenges, yes, but also with its remarkable, unprecedented, possibilities.

My experience shows that the collaboration between the EU and at national level within the European Network of Ombudsmen can make a difference. Similarly the co-operation within the wider IOI network has a major role to play. It is vital to maximise the impact of our work not just to achieve particular results but to highlight the interconnectedness of this issue and to push for a shared, intelligent, and generous response.

When I came into office in 2013, I recognised of course that most citizens' complaints are dealt with at national level. I receive complaints only against the EU institutions agencies and bodies and therefore relatively few people need my direct intervention. But I also recognised that that did not limit my ability to bring about important change both in standards of good administration but also in relation to the protection of fundamental rights protected under the charter of fundamental rights.

To do that, in addition to dealing with complaints, I have the power proactively to launch own-initiative inquiries into human rights and other issues. I have exercised this power to address human rights issues

concerning people who may not be able to file a court action or even seek my assistance directly. Migrants and asylum seekers are good examples.

One of my first own-initiative inquiry concerned the organisation of return flights by the EU's border agency Frontex. Frontex organises these flights on behalf of one or more EU Member States to return people denied asylum either to their home or to another country.

My concern was the human rights standards employed on those sensitive journeys, matters such as the use of restraints, the treatment of women and children and the care of those who are ill. These are matters more than capable of being dealt with by domestic and EU authorities. To be denied asylum is hard, but to have that pain added to by poor or insensitive treatment as you are effectively being forced out of the country, is unconscionable.

I invited my colleagues from the ENO to launch parallel inquiries into the forced returns operations, and I was immensely grateful when 19 replied positively. This was crucial for the success of this initiative since my colleagues, as national prevention mechanisms, have long-standing experience in monitoring return flights. Your support unquestionably helped me to convince Frontex that it should accept my recommendations. Later on, our investigators met in Madrid and discussed practical aspects of monitoring of human rights compliance during return operations, and how to make a complaints mechanism available for returnees.

Another strategic inquiry focused on whether Frontex has in place an adequate mechanism to ensure that human rights are observed in all its operations. This resulted in an important legislative change requiring FRONTEX to set up an internal complaints mechanism.

This mechanism will allow potential victims of human rights violations and especially migrants to complain directly to the FRONTEX Fundamental Rights Officer and have their case investigated and, if necessary, directed to the correct national authority. My Office and the European Network of Ombudsmen offered Frontex expertise on how to put such a mechanism in place. Last December, national colleagues from the Network and my representatives, met with the Frontex Fundamental Rights Officer in

Brussels to discuss the practicalities of such a complaints mechanism which is now in place.

My Office has also worked closely with the European Asylum Support Office to convince it to set up a similar complaints mechanism accessible to those affected by its participation in the hotspots and in all other activities whose importance will increase, as a new role is assigned to EASO within a revamped EU asylum system. I was also able to convince EASO that it should have one representative of the Network on a rotational basis at its Consultative Forum. I am grateful that the Greek Ombudsman set the rotation process in motion in November last year.

I was able to convince EASO of the value of this representation by pointing out the very direct and critical work that many Ombudsman colleagues carry out in this area and the wealth of experience they have with administrative procedures on asylum claims, with assessing reception conditions, with returns and with integration. They are present at border crossing points, reception and accommodation centres, detention centres and interact with civil society.

My colleagues' experience also influenced the decision I took last summer to launch a joint investigation into complaints submitted by three Spanish NGOs (the Spanish Committee for Helping Refugees, the Spanish Association of Young Lawyers, and Women's Link Worldwide) and individual Spanish citizens.

The issue in this case was whether the European Commission should carry out a human rights impact assessment in the context of the EU-Turkey Statement, signed last year in which Turkey agreed to receive refugees refused asylum in Greece in return for financial support.

The Commission took the view that such an assessment was not required because of the political nature of the agreement; and that in any event its Communication and reports on the progress made in the implementation of the Statement, constitute such an assessment.

I took the view that the political nature of the Statement did not absolve the Commission of its responsibility to ensure that its actions are in compliance with the EU's fundamental rights commitments. In January this year, I closed the case by proposing to the Commission that it deal more explicitly with the human rights implications in its future reports on the implementation of the agreement.

Finally, I also carried out a strategic inquiry alongside the Network, about the Asylum Migration and Integration Fund or AMIF. AMIF gives financial support to Member States for housing and other programmes for asylum seekers and resettled refugees with particular focus on vulnerable groups. However, AMIF programmes must be implemented in accordance with the Charter of Fundamental Rights.

My inquiry sought to have the Commission verify that the National Programmes, which detail how the Member State will use the funds, are available online to allow the national Ombudsmen to check if the funds were being used properly.

As you can see from these examples, the role of the European Ombudsman is important in dealing with human rights issues but it is different from that of national ombudsman who are more directly involved with individual human rights violations in sensitive areas such as migration. Given the current stage of European integration and the powers of the Union, the European Ombudsman can more easily deal with systemic issues and insist on the promotion of fundamental rights and on the setting up of procedural and institutional mechanisms ensuring respect for fundamental rights.

I appreciate that many of you work in environments, unlike that of Brussels and Strasbourg, where the hard edge of populism and reinvigorated nationalism further erodes the capacity of administrations to protect the human rights of others. When racism, hate speech and other manifestations of xenophobia are tacitly encouraged through silence or inaction that makes your job doubly hard. It is very easy to preach as to how you should challenge those dangerous tendencies when the best support we can give is our

solidarity and our commitment to working in practical ways together. But we should also remember that longstanding democracies are not immune either from those tendencies as we have witnessed with Brexit and with the election of Donald Trump. We can see the normalisation of rhetoric and opinion that would previously have been condemned, and the reluctance at times to challenge it.

We can all be fearful at times like this and sometimes it is important to be brave, to realise the importance of our role and our duty to abide by its obligations. We don't have to be martyrs either but rather use our offices intelligently and well to achieve that which is reasonably possible for us to achieve.

I want to end with a reflection on what is to be a refugee, on the nature of displacement and on its causes. And on our incapacity at times fully to appreciate its daily lived reality. I quote from an essay by the writer Mark Mazower called *The Endless Exodus*.

"It is a privilege," he says, "not to have known war. It is also a kind of ignorance. The wars of the last century are fading from view across much of Europe, as they are in the US. But there is a price to pay for this erosion of memory. The European Union emerged out of the second world war with one main goal: to ensure the peace. It has done the job so well that many Europeans now assume that peace can look after itself."

And speaking to the core of what all of us are speaking about here today, Mazower says: "refugees, economic migrants, displaced persons: ours is a world of bureaucratic categories that carry life or death implications, and we have become accustomed to making fine and frequently unsustainable distinctions... But surely, what we are talking about, is simply people on the move. Indeed, that is perhaps as good a definition of history itself as any other. Over the millennia, millions have poured out of Europe and Asia; millions more have poured in. Without populations in motion, there would be no history of the Americas. Nor of anywhere else".

