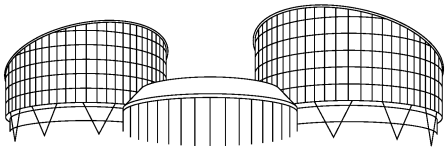

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

NON-REFOULEMENT AS A PRINCIPLE OF INTERNATIONAL LAW AND THE ROLE OF THE JUDICIARY IN ITS IMPLEMENTATION

Statement by François Crépeau

Opening of the Judicial Year – Seminar – 27 January 2017

Mr President, distinguished Judges, Ladies and Gentlemen,

It is a great honour for me to be here today. I follow as closely as possible the pioneering work of the European Court of Human Rights: I can testify to the fact that we teach many of your decisions in my law school at McGill University. I would like to express here my profound admiration for the extraordinary developments in European human rights law which your Court has produced over the past six decades.

In the hope of modestly contributing to your reflections, allow me to present a number of ideas resulting from the studies conducted during my mandate as the United Nations Special Rapporteur on the human rights of migrants.

Migrants are rights holders

To begin with, I wish to emphasise that all migrants are protected by international human rights law. There are only two narrowly defined exceptions to this, namely the right to vote and be elected and the right to enter and stay in a country. Even for those exceptions, procedural safeguards must be observed, as well as the principles of *non-refoulement*, non-discrimination, the best interests of the child and family unity.

All other rights extend to all, including all migrants, whatever their administrative status. This includes the right to equality and non-discrimination. Any distinction in the enjoyment of fundamental rights based on nationality or immigration status therefore needs to be justified: otherwise, it should be considered as prohibited discrimination. Surely, mere administrative status cannot justify a distinction in the enjoyment of fundamental rights.

As a response to the increased migration movements into Europe, we have seen European member states focus on increasing security. Their objective has been to “secure” their borders by building fences, using violence to stop irregular migrants from entering their country, using long-term detention as a deterrent and carrying out mass expulsions of irregular migrants to transit countries without any proper individual assessments.

One thing is clear: due to push-and-pull factors, stopping migration isn't possible over the long term. Migrants will continue arriving despite all efforts to stop them, often at a terrible cost in lives and suffering. Any attempt at "sealing" borders, without offering many more regular avenues for migration, will continue to fail on a massive scale.

Externalisation won't work in the long term

As part of efforts to secure borders, European States have moved their border management activities beyond their territorial borders, extending them to the high seas and third countries. In my missions I have seen much European cooperation with transit countries aimed at implementing Integrated Border Management systems and building detention centres, but no cooperation aimed at supporting their national human rights institutions in order to protect the human rights of migrants and refugees on their territory.

Externalising border controls has no impact on the push-and-pull factors determining migration movements: it responds neither to mobility needs nor to labour market needs. Therefore, it can only divert migration routes and make them more costly and more dangerous, as it pushes migrants deeper underground.

Too often, externalisation is a thinly disguised attempt to ensure that the human rights violations which are deemed necessary for effective deterrence and prevention of migration movements happen on another country's territory, thus avoiding the scrutiny of European human rights guardians, be they politicians, courts, national human rights institutions, journalists or civil society organisations. I must commend the judgments of the European Court of Human Rights and the European Court of Justice which have challenged externalisation practices, "the Dublin logic", immigration detention and issues regarding access to social protection.

The EU-Turkey Statement has prompted migrants to again find alternative routes to reach Europe. The number of deaths at sea has increased considerably and we all know about the human rights violations that migrants suffer in Libya. Readmission agreements are an area of particular concern. Despite protections against such practices in European Union legislation, I am very concerned about allegations of violations of the principle of *non-refoulement*, as we continue to hear about "pushbacks" or "turnbacks" at land and sea borders and about forced returns, often accomplished with violence, towards countries of origin and third countries with weak rule of law and poor asylum systems, all conducted without sufficient access to individual protection needs assessments and operated without proper oversight.

Such behaviour violates the principle which is at the root of all human rights, Immanuel Kant's categorical imperative: "Never treat the other only as a means, but always also as an end"[1]. If democracies are to remain founded on their three pillars of political representation, human rights and the rule of law, legal accountability for such actions is key, even when performed by the authorities of other countries, if they are prompted and funded by Global North countries.

In the past, the European Court of Human Rights has challenged such practices. In 2012 the Court, in *Hirsi Jamaa and Others v. Italy*, ruled that bilateral agreements cannot be used to justify practices that are incompatible with human rights. The Court has also challenged the lawfulness of the Dublin logic, raising concerns about the application of the *non-refoulement* principle within the EU. In 2014 the Court ruled, in *Sharifi and Others v. Italy and Greece*, that both countries had violated Articles 3 and 13 of the European Convention on Human Rights and Fundamental Freedoms. In *Tarakhel v. Switzerland*, in November 2014, the Court ruled on the refusal of Switzerland to examine the asylum application of the members of an Afghan family and the decision to send them back to Italy without

[1] "Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end" (*Immanuel Kant,* (1993) [1785], *Grounding for the Metaphysics of Morals*. Translated by Ellington, James W., 3rd ed., Cambridge (MA): Hackett, p. 30).

assurances that their rights would be protected. The Court held that there had been a violation of Article 3 of the Convention and discussed "systemic deficiencies" in the Italian system. In 2011, in *M.S.S v. Belgium and Greece*, the Court held that Belgium had violated Article 3 of the Convention by deporting an Afghan migrant to Greece despite systemic failures in asylum and social-protection provisions. Hence, in my 2015 report on the EU, I recommended incorporating human rights concerns into migration and border management policies and implementing the relevant recent judgements of the European Court of Human Rights.

The priorities should be clear: fighting smuggling operations is less important than saving lives and protecting human rights. For example, the argument according to which one should not increase search and rescue capacity in order to avoid encouraging smuggling operations is morally, politically and legally bankrupt. It is vital that the European Union and all signatory States to the European Convention on Human Rights strengthen their search and rescue capacity, while also adhering to the principle of *non-refoulement*, allowing undocumented migrants to disembark immediately at the nearest port where their lives and freedoms would not be threatened, providing them with information, offering care and support, processing their asylum claims equitably, and supporting private vessels to carry out rescue operations without risk of being considered accessories to smuggling operations.

The criminalisation of undocumented migration threatens human rights

In many countries, the criminalisation of irregular migration is in discourse and practice more than in the law and policies proper, as migrants are most often dealt with under administrative law, not criminal law. Until recently, administrative law was not invasive of individual rights. But now administrative immigration regulations, proceedings and policies "mimic" the criminal justice system in many ways, including the importation of criminal categories, criminal-law enforcement mechanisms, institutions of criminal punishment and crime control rationales.

However, the stringent guarantees which evolved over a few centuries in criminal law – for example, regarding the burden of proof or the admissibility of evidence – because it was the most dangerous field of law on the books, have not reached administrative law, which is why States prefer it to criminal law as a more flexible and "efficient" tool. Yet in many States, such as those in Europe, that do not have the death penalty and do not extradite towards jurisdictions that have it, the administrative judge is today the only judge who can send people to face execution, torture or arbitrary detention, in direct violation of the principle of *non-refoulement*. For migrants, administrative law is today the most dangerous law of the land.

A good example of this trend relates to detention. Too often, migrants are detained for little else than being undocumented, despite having committed and being charged with no crime. This detention can often extend for months or years, and oversight mechanisms are too frequently lenient regarding the authorities' justifications for detention, preferring to defer to their judgment. For non-nationals as for citizens, freedom should always be the default condition and restrictions on freedom should be specifically justified. Considering the consequences of long-term detention for anyone, the test should be strenuous.

The situation is particularly worrisome regarding children. The Committee on the Rights of the Child has determined that the administrative detention of migrant children can "never ever" be in their "best interests" and that it is therefore always a violation of their rights. Yet I have met migrant children in detention in all European countries and neighbouring countries that I have visited: they are treated essentially as undocumented migrants, when they should be treated first and foremost as children.

My further concern is that the margin of appreciation often comes at the expense of the fundamental rights of migrants. It is not acceptable that migrants are kept in a precarious status because States have the administrative discretion to do so. Migrants' rights are fundamental rights

by which States are bound, even in a so-called "crisis" situation. The margin of appreciation cannot justify systematic derogation from such obligations.

Politics regarding migration is increasingly toxic

Electoral democracies don't know how to "represent" migrants. Human rights struggles have been mostly won on the basis of the political claim to equal citizenship: industrial workers, women, Aboriginals, detainees, gays and lesbians, persons with disabilities know that very well. Only when these groups started speaking up on the political stage and using their vote strategically did politicians pay attention and change their own conceptions, language and behaviour, in turn altering the perceptions of the electorate and empowering lawyers and judges to alter the interpretation of the law and expand human rights guarantees.

This open political struggle won't be available any time soon for migrants and refugees. If you are not represented, your rights are not defended in the political system. Consequently, undocumented migrants and migrants with a precarious status rarely mobilise, speak up, contest, protest or go to court to defend their rights, preferring strategies that do not threaten their situation as migrants: "moving on" is often a better strategy than trying to enforce one's rights. As citizens do not mobilise in favour of migrants either, there is actually no political accountability for anti-immigration discourse.

Nationalist populist politicians are setting the current dominant narrative, offering simplistic solutions to complex issues, scapegoating migrants with total impunity and saying that migrants steal jobs and drain social budgets, that all refugees bring insecurity or increase crime rates, or that all foreigners change our values, assertions which have all been proven wrong by social sciences. Ranting against courts – and especially foreign tribunals – which prevent them from dealing with migrants as they wish will earn certain politicians political points in the polls. Some even claim that undocumented migrants should not be covered by international or European human rights law. They invoke their conception of a "crisis" to justify trampling the rights of migrants, forgetting that human rights safeguards were put in place to remind States of their obligations, not only in times of peace but more especially in times of crisis or war.

What can be observed in the European political discourse and policy developments today is a regression of the human rights regime regarding migrants. At the political level, there is a trend towards eroding the rights of asylum seekers, refugees and migrants. Increased xenophobic behaviour towards any "foreign-looking person" has been noted in many countries. If this attitude becomes the norm, any meaningful discussion about rights, diversity and integration becomes impossible.

Courts can help migrant voices be heard

Therefore, in the absence of any kind of political support, the only real line of defence for migrants' rights is that of courts, tribunals, national human rights institutions and ombudspersons or other dispute resolution bodies which aren't swayed by the polls but are interested in the coherence of the legal system and in particular the logic of the human rights doctrine.

Systematic barriers to the right to access justice are in place in many European States. Significant resource constraints are making member States unwilling to invest in services that facilitate access to justice for migrants, such as legal aid and translation and interpretation services. Migrants' fear of detection and/or deportation if they assert their right to access justice is also a key barrier. Additionally, inconsistencies in access to justice persist, depending upon the rights at stake, the type and nationality of the migrants, and the jurisdiction. A lack of specific rules on courts' duties to apply sanctions and/or compensation for violations of migrants' human rights is another important barrier. However, concerns about access to justice have been expressed in a number of rulings of the European courts. For instance, the European Court of Justice made a significant ruling in the case of *Bashir Mohamed Ali Mahdi*, emphasising that, under European Union law, a lack of identity papers

should not be used to justify extending immigration detention and that migrants should have access to justice to challenge such detention.

I am very much counting on the European Court of Human Rights and the European Court of Justice, as well as on national courts, to resist the electorally motivated pressure from politicians to undermine how our human rights regime protects migrants, and instead to uphold migrants' status as legitimate rights holders. The value of democracy is determined by its ability to deliver on the needs of the most vulnerable members of society. If the executive and legislative powers are unwilling or unable to protect the human rights of migrants, it is for the judiciary to stand up for them.

In consequence, migrants need – and we need to guarantee for them – proper access to effective remedies, an increased sensitivity on the part of lawyers and judges to the issue, appropriate training of all involved, access to legal aid and interpretation services, and effective appeal rights. If courts deliver on this task, politicians and citizens will listen, migrants will be empowered and rights will be protected.

We need to go further in our collective understanding of migrants' rights. On many issues, migrants should not be treated differently from anyone else but should have equal protection of their rights. In order to be able to speak up and fight to uphold their rights, migrants must not be made to fear contacting the authorities. Empowering migrants to speak freely to public services such as health care, education, local police, social services, public housing, labour inspection and other public service agencies, without fear of being denounced to the immigration enforcement authorities and then detained and deported, is key to ensuring that such services are able to perform their mission *vis-à-vis* all concerned. Without such "firewalls", migrants will never report human rights violations and perpetrators will benefit from immunity in practice. There are examples of such firewalls around the world, including in Europe.

The way forward

Mobility is a natural part of human existence: it's in our DNA. Migration is not a crime, not a problem and has the potential to be part of the solution to many of our economic and social problems. Employers and the business community know how much mobility and diversity are key to their success. Governing migration – instead of restricting it – allows us to undercut the smugglers, address States' security concerns, reduce human suffering and save lives.

Migration governance thus cannot only be about keeping people out by resorting to means that violate their rights. It must also be about multiplying regular, safe, accessible and affordable migration channels, eliminating unethical labour recruitment practices, cracking down on labour exploitation, empowering migrants by clearly enforcing their human and labour rights, providing pathways to permanent residence and citizenship, promoting integration in host societies, and celebrating the current diversity of most of our societies.

Thank you for your attention.