International Legal Aspects of Migration: African and European Perspectives

14 October 2016, The Hague

Conference Report

André Nollkaemper (President of European Society of International Law) and **Olufemi Elias** (Secretary-General African Association of International Law) opened the conference by emphasizing the conference's aim of bringing together different perspectives in the approach to current migration issues and expressing appreciation for the collaboration between the ESIL and AAIL.

Kees Riezebos (Director Migration Policy at the Ministry of Security and Justice of the Netherlands) reiterated enhanced knowledge sharing between African and European countries for purposes of strengthening national and regional migration strategies and judicial cooperation as one of the main pronounced aims of the Valetta EU-Africa Summit on Migration. Riezebos reiterated that the international community must offer security and protection to people in need, and individual states, including the Netherlands, all have their share in a global responsibility to save lives, fight smuggling networks, better manage borders and address root causes of irregular migration. At the same time, for the credibility and sustainability of the asylum system, it is important that those not permitted to stay return to the country of origin.

Panel 1 – Foundational Issues

Maya Sahli Fadel (Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa, African Commission on Human & Peoples' Rights) calls for a contextualisation of migration both in historical and terminological terms, not overlooking the fact that Africa has been (at least since the decolonisation years) a continent characterized by strong movements of populations, not only towards Europe but also internally. While causes of a political nature (conflicts, both internal as inter-State, as well as generalised human rights violations) are of particular relevance in the migration route originating in the east of the continent, the one traversing the west is primarily prompted by dire socio-economic conditions (poverty, unemployment, drought and other environmental processes). The 1969 OAU Convention is to be applied as a complement to the 1951 Refugee Convention and meant to address intra-African flows. The broad OAU refugee definition is influenced by the fact that intra-African migration flows often takes place in the form of massive waves of human displacement. Beyond the OAU Convention (and its sometimes-problematic implementation), the African Union has recurrently addressed the issue of both internal and external migration from which a Common African Position on Humanitarian Effectiveness has emerged. This shared position has provided African States with a distinctive voice in *fora* such as the 2016 UN Global Forum on Migration and Development, and stresses the responsibility borne by the countries of origin and transit as well as the importance of cooperation with the EU. In line with the objectives of the 2016 UN Global Forum, Fadel underscored the importance of a more integrated logic in the African-European handling of migration issues. Transforming the paradigm of mostly informal cooperation and collaboration into a more stable and formalized model of partnership will provide a more effective and stable basis for addressing structural causes of migration flows.

Tom Syring (UNE / Norwegian Appeals Board) proposes to address not only the root causes underlying current migration flows but also the 'roots of the root causes'. The September 19th New York UN General Assembly Declaration for Refugees and Migrants explicitly stating that focus is needed on underlying root causes (and making a number of proposals towards that aim) is a statement in the right direction, but few of the proposals if ever also look at the *underlying* root causes of those problems. While drivers of irregular migration are usually connected to cases of standard armed conflict, political violence, economic crises, lack of opportunity, unemployment, or general hopelessness, it must not be overlooked that these factors are all interrelated and can have adverse effects on each other. There is an urgent need to look behind the obvious root causes at more structural ways in which states are run (for example, perpetual presidencies). To do so is in the

hands of these states themselves, but the EU could play a role in reminding states of their accountability towards existing constitutional provisions, or push for electoral observation missions.

Ralph Wilde (University College London) addresses the question of drivers of irregular migration in light of the situation of dangerous sea crossings at the Mediterranean, observing that states have generally resisted calls for involvement in rescues. Arguably, rescues encourage irregular migration (forming a 'gateway' to a longer-term protective commitment on the part of the state) and reduce the cost of risk-taking by smugglers, thereby incentivizing and enabling the smuggling industry. Wilde observes that the general logic of these arguments does not only apply to the extra-territorial obligations of *refoulement* but also to its operation in the territorial context. The distinguishing feature of extraterritorial rescues therefore is the extenuation of risk that individuals face and the efforts that smugglers have to make, by making the journeys shorter. Key causal factor in creating conditions for smuggler enabled sea crossings are the migration law-enabled non-entrée measures (such as strict immigration controls, including border checks, visa restrictions, and the posting of extraterritorial immigration officials) of those states that individuals wish to obtain protection from, foregrounding partial culpability of these states. Wilde holds that issues of causation are complex and usually not a question of either/or. Root causes in certain areas do not mean that other states are exempted from responsibility; broader historical structures, such as climate change, food insecurity and the legacy or continuing effect of the involvement that some of these states have in certain regions, tie states to the ultimate root causes. In an acutely interdependent and unequal world, it is naïve to regard the phenomenon of forced migration as not in one way or another structurally linked to the actions of developed states and their economic, military or geopolitical activity in certain regions. Instead of foregrounding relatively marginal issues, the starting point for critical analysis should be these structural links and the various ways in which international law nurtures them.

In the follow-up **discussion**, questions were raised on the protection of IDPs. **Maya Sahli Fadel** addressed the 2009 Kampala Convention, dealing with internal migration fluxes, and observes that the African Union has undertaken several initiatives facilitating the adoption of the Convention by states. George Didel (Nigerian Embassy in the Hague) underpinned the importance of socio-cultural practices (such as homosexuality or female genital mutilation) to be taken into consideration in the debate on push and pull factors. Fadel mentioned the persecution of LGBT persons and human rights activists more generally as a most relevant push factors in certain states. **Johan Rautenbach** (Legal Counsel International Organisation on Migration) observes that the natural consequence of the proposition by Wilde (holding that dangerous sea crossings are a result of non-entrée measures) would be that everyone has a right to migrate. Wilde responded that it is paradoxical that states that invoke non entrée and resist rescuing individuals, nonetheless accept that those individuals who satisfy the refugee definition are entitled to protection; the logic of that is to accept the legitimacy of the right to escape human rights abuses. The question then is where people are entitled to go, and this is where the distinction between refugees and economic migrants falls down (obviously, for people fleeing Syria having reached Lebanon or Turkey but moving onwards, economic considerations are blended into the rest of the journey). Hans van Loon (former Secretary-General of the Hague Conference on Private International Law) raised the issue of circular migration as a necessity for (aging) Europe and as a more hopeful perspective of migration. For this, a global framework regulating circular migration would be needed, as well as mechanisms to accompany migrants back and forth and the facilitation of cheap remittances.

Panel 2 – African and European Perspectives on recent "safe (third) country" debates.

John Oucho (Population Studies and Research Institute, University of Nairobi) observes that all the treaties and frameworks to which African countries are parties are very well crafted but that very little is happening on the ground. One of the main problems is that all these frameworks and

processes, as well as funding, come from outside (for example, African free movement protocol has a very Eurocentric flavour). It is observed that African institutions are not well resourced. Access to technology is substandard and links between academia and policy-makers are not well established. Oucho recommends to strengthen capacity building and collaboration so that African countries become more proactive. At the same time, Oucho points out that we cannot run away from antecedents such as slave trade and colonialism; protracted conflicts, population pressure, ecological degradation and land grabbing in the continent and settlements have all had their part to play in establishing contemporary paths of both regular and irregular migration. Most importantly, we need more intangible measures in implementing frameworks and declarations and a follow up to evaluate progress in implementation.

Kees Wouters (United Nations High Commissioner for Refugees) observes that while the overall number of refugees will not soon come down, asylum space in the world is shrinking (both in the EU as in Africa). Further, Wouters observes that the 1969 OAU Convention governs specific aspects of refugee problems in Africa and has a broad and inclusive refugee definition; while refugees have generally been welcome and given refugee status, their rights in African states are limited. An opposite situation exists in Europe, having a long standing tradition of non-entrée and deterrence measures, but when asylum seekers reach Europe they have access to a range of rights. Restrictive policies quickly implemented by states in the summer of 2015, however, led to a restrictive interpretation of the refugee definition and an expansion of cessation practices. Regarding the concepts of 'safe country of origin', 'first country of asylum' and 'safe third country', Wouters observes that a problem lies within defining 'safety'. Regarding 'safe country of origin', it is required that people coming from that country do not have a well-founded fear of persecution or risk of serious harm. And although a situation may generally be safe, this does not mean all persons are free from persecution. Regarding 'first country of asylum' or 'safe third country', it is presumed that a refugee could have found protection in that country, both legal as in practice. This means that the refugee can access the asylum procedure and is granted a safe haven. It is observed that many countries (both within Europe as in Africa) apply these concepts without looking at the systems that are in place in the respective countries. Finally, looking at the Refugee and OAU Conventions and the fact that it calls upon states to share the burden of refugee protection and settle refugees, Wouters points out that it is inconsistent to apply these 'safe country' concepts under these legal instruments.

Ibrahim Awad (American University in Cairo) focuses how (in view of the current mixed refugee-migrant fluxes) the issue of safe third countries can be reframed so as to lead to a global consideration of the safety of refugees and international migrants. The international regime on the safety of refugees and migrants is considerably shaped by the EU Dublin Regulation and the 2001 Regulations. These policies have put pressure on the Member States located in the borders of the Union to control irregular migration fluxes and led to the surfacing of various intra-EU tensions undermining European solidarity. As a result, the concept of 'safe third country' has dramatically expanded. Awad stresses that the assessment of their 'safeness', - beyond prevailing political circumstances in each particular country -, should also include their ability to provide education, health care and other social services. In addition, the interaction of the Dublin Regulation and the 2001 Regulation has led to an increased resort to smugglers by asylum seekers and migrants alike. The cost both in human and financial terms that this evolution has provoked cannot be neglected, as it is made clear by the number of persons having died in the Mediterranean in 2016. The combined effect of these circumstances prompted a characteristic transformation of the role of safe third countries, which have on occasion turned into actual countries of destination. As a result, these countries possess a considerable power with regard to the refugee protection regime. Awad suggests a reconsideration of the Dublin Regulation and the 2001 Regulation, not only to address the external migration fluxes, but also to tackle the incipient undermining of European integration that it

has generated. In parallel, a cautious expansion of legal immigration channels is needed, potentially in the form of targeting sections of high-skill migrants (albeit trying not to block their contribution to the development of their countries of origin). Drawing inspiration from legislative schemes which were formerly in force in European countries like Italy, such an undertaking could arguably lead to a strengthening of the whole international refugee protection regime.

During the **discussion,** issues were raised on the criteria to be applied for what determines a safe country of origin and the role of the UNHCR therein. Wouters replied that the international legal framework does not set out clear criteria for what determines a safe country of origin, but that in essence, it hinges on the refugee definition that is to be followed. The problem lays with how the assessment and designation is done. Low protection rates but high case loads of asylum seekers coming from a particular country will generally trigger the 'safe country of origin' concept, shifting the burden of proof to the individual.

Panel 3 – Multilateral Dependencies and Migration Management

Aderanti Adepoju (Network of Migration Research on Africa) points out that there are three factors that cause and explain global migration streams. First, the issue of development is at the root as well as a consequence of migration. Second, demography plays a major part; while developing countries experience rapid population growth and opportunities stay behind, developed countries experience shrinking populations and require migrants to fit in the working population and sustain economic growth. Third, different levels of democracy in relation to governance and observation of human rights cause push and pull factors alike. The demographic and economic divide between Europe and Africa fuels migration. Adepoju points out that migrants can contribute enormously to economies of developed states and recommends to invest in policies that affirm the positive notes of migration. Anywhere in the world, observations that migrants are not welcome can be explained by underlying xenophobic sentiments. Further, it is observed that in all phases of the Valetta action plan, European countries have served as the primary architects, making it a 'smoke screen' for underlying European interests and objectives, such as combatting irregular migration and fastening readmission and return schemes. Adepoju recommends to increasingly collaborate on equal footing and construe dialogue between countries. Finally, Adepoju notes that migration often is conceived as a necessity in Africa, for migrants sent remittances that alleviate poverty back home. High transaction costs in Europe form a real problem, and efforts should be made to promote legally compliant and faster remittance transfers.

Siobhán Mullally (University College Cork) points out that the European response to the (so-called) migrant crisis has focused primarily on deterrence, push backs and returns to quite a significant degree. At the same time, it does not address the fact that the business model of smugglers is largely dependent on the lack of access to regular migration pathways. Mullally points to the evolving European jurisprudence in cases of collective expulsion or forced returns, providing for increased protection in terms of obligations to individually assess protection claims and restrictions on forced returns on the basis of non-*refoulement* obligations. Mullally highlights the issue of protection of unaccompanied minors and the fact that there are complete gaps between the protective mechanisms in place (such as the Convention of the rights of the Child, dealing with the appointment of guardians, time limits for the processing of claims and adequacy of pre-removal risk assessments) and situations on the ground, such as in the Greek hotspots or Calais. In the context of human trafficking, Mullally observes that here is a heavy reliance on criminalisation as a policy means to combat trafficking, creating a tension between a human rights based approach and police logic. Mullally observes a great reluctance to look in any meaningful way at the preventive element, in particular in terms of expanding safe pathways for regular migration. Further, it is observed that there is a European reluctance to address the question of demand in the labour context, as stipulated by previous speakers. To respond to that would require more meaningful engagement

with a right to enter and access to regular migration pathways. Nevertheless, selective forms of migration policy, such as employment enabled migration, must be monitored closely as a tight nature of employment risks abuse. Ultimately, Mullally observes that once an argument shifts into the terrain of rights, the sovereign rights of states to shut its borders unfortunately always tends to overshadow the rights claims of individuals.

During the **discussion**, **Tom Syring** points to the difficulties in collecting data when it comes to migration management within Africa. **John Oucho** points out that one needs to adapt data collection strategies to the kind of data architecture that you find in most African countries (for example, music can provide a good basis for studying migration within Africa). **Aderanti Adepoju** explains that data is often available but not accessible, and if it is, often not published in a form that is usable. A problem also lies within the confidentiality of data, making information an arm of particular governments or policy-makers. Adepoju reiterates that knowledge is power, and proposes enhanced and less restrictive sharing of information between European and African countries. George Didel criticises the picture that migrations always take the form from Africa to Europe, while in fact there is a lot of internal movement within the African regions instead. It is argued that poor migration policies of Europe fuel irregular migration. Didel makes an unconventional proposal for the EU and AU to be merged, so as to allow free movement within the continents. Removing restriction policies will allow people to go to the resources place, go around and go back to their country of origin, taking away the desperation to go to Europe and the necessity to remain.

Panel 4 – The End of the Journey – International Legal Obligations Upon Return, Relocation and Resettlement

Johan Rautenbach (Legal Counsel International Organisation on Migration) outlines the variations and differences in the concepts of return, relocation and resettlement and how they are related to different groupings of migrants and refugees. Protection offered by the IOM is clearly distinguished from the protection offered by the UNHCR in the context of refugees (the latter having a very specific legal substitutive protection mandate, stepping in when states or the international community is unable or unwilling to provide such protection). The IOM has a more supportive function, assisting states to comply with obligations. Return programmes, being a fundamentally individually based process, must be distinguished from the group-based voluntary *repatriation* programmes (focused on refugees and led by UNHCR). Return focuses on rejected asylum seekers, rejected migrants, stranded migrants and victims of trafficking, who find themselves in a country where they have no right to remain. Individual return programmes under the IOM have the benefit of taking into account the decision of the migrants, allows for preparation, respect for human rights, avoiding stigma upon return and comes with compensating tools for reinstallation. Rautenbach emphasizes that the reintegration aspect (covering the whole spectrum of installation and community stabilisation to local development and capacity building) is an important aspect of the return programme. It is observed that that in cases of forced returns, in the absence of a mechanism to afford stabilisation, repeats tend to happen more often. Reintegration is an essential component to avoid repeat. There is a crucial link between return and humanitarian action and development, and there is need for an increased understanding and support of an integrated holistic approach in this respect.

Djacoba Tehindrazanarivelo (Vice-President, African Association of International Law) addressed international legal obligations of States upon return, relocation and resettlement. Tehindrazanarivelo observes that states have an obligation to readmit their nationals rejected by third states, based on the customary right of any individual to return to her or his home state, as reflected in various African and international instruments and several agreements on readmission whereby the States accept to receive any of their nationals on request of other States. Regarding the latter, concerns were voiced to the protection of migrants, as readmitted persons are usually not

covered by any social program and their returns considered as a mere preparation stage for their next departure attempt. Second, Tehindrazanarivelo observes that in case of voluntary repatriation, the hosting country must ensure that the conditions prompting refugee status have ceased to exist and that consent by the refugee to return is guaranteed. Contemporary African practice handled the fulfilment of such conditions by means of the provisions contained in the peace agreements subsequent to armed conflicts. Third, Tehindrazanarivelo considers that a strict obligation to resettle can only flow from particular agreements consented to, but notes such an obligation could be derived from Article 2 of the 1969 OUA Convention enshrining the principle of African solidarity and the sharing of burdens and establishing the grant of temporary asylum for the purposes of resettlement, coupled with the possibility of requesting the assistance of its fellow African Union members. Finally, Tehindrazanarivelo addresses the phenomenon of temporary protection, usually implemented in Africa through the establishment of refugee camps upon consent of the receiving State. It is observed that perpetuation of situation originally deemed to be temporary may be problematic in light of the absence of formal consideration of refugees under the status.

Marjoleine Zieck (University of Amsterdam) addressed the question whether the traditional means that have been developed to realise 'the end of the journey' in fact do so, approaching the durable solutions from a more critical angle. The end of a refugee's journey signifies the restoration of a broken bond between the country of origin and the refugee, as well as the corresponding enjoyment of protection, usually referred in terms of human rights. The first durable solution concerns voluntary repatriation, encompassing a return home, made possible by the promise of a disappearing root cause of flight. Although conditions in the country of origin may justify a voluntary repatriation operation, they do not yet warrant a cessation of refugee status. Any beneficial change of circumstances in the country of origin should be of a durable and lasting nature; as long as the cessation clauses do not apply, the prohibition of *refoulement* applies and only the refugee himself can decide to return. In practice, voluntary repatriation often signifies internal displacement (recent example is Afghanistan). Situations of second and third generation refugees may have the effect that the link to the country of origin of one's ancestors becomes increasingly tenuous, both in fact and law, and with the passage of time may entail that return ceases to be an option. The second durable solution concerns local integration, and will result in the end of the journey only if the refugee obtains nationality of the country of refuge. There are no corresponding obligations for hosting states to naturalise refugees, but by virtue of Article 34 of the Refugee Convention they are asked to consider doing so, and many states do naturalise refugees after a certain period of time. The third durable solution concerns resettlement, which is an ambiguously defined solution considering it allows admission as a refugee on the one hand and providing permanent residence on the other. In Zieck's opinion, resettlement is problematic as it lacks procedural guarantees for refugees and is wholly dependent on goodwill of states. Resettlements in principle take place on the basis of the UN Vulnerability Criteria, but states add their own criteria (such as integration potential, nationality, health status, marital status) as if resettlement is identical to migration. In strict legal terms it is not, as refugees do not lose their refugee status upon resettlement and Zieck condemns these practices as they result in 'cherry picking'. Zieck observes that both resettlement as voluntary repatriation have become rather marginal in terms of numbers, and concludes that the traditional durable solutions fall short, both in law and fact.

In the subsequent **discussion, Maya Sahli Fadel** underscores the urgent need of addressing the question of the granting of nationality of the States to the refugees they host. Considering that (particularly in the African continent) refugee hood might chronically extend for a decades-long period, Fadel calls for an integrated approach in the handling of refugee issue and the question of statelessness instead of only addressing younger generations born in refugee camps and lacking any identity documents. In that regard, she stresses the relevance of the on-going initiatives within the framework of the African Union that aim to address that issue. Martin Wies (IOM the Netherlands)

notes that the distinct treatment of the durable solutions disregards an important linkage. Wies asserts that national asylum systems are heavily pressured by applications from completely different categories of asylum seekers (originating from Albania, Kosovo, Serbia and Morocco) undermining resettlement activities, and strongly believes this needs to be urgently addressed at higher level. **Djacoba Tehindranazarivelo** made some remarks concerning the foundations of the obligation to resettle, which cannot flow but from casuistic agreements, and stressed the specific contours of the right to asylum in the African legal orders, derived from its grounding in the principle of the sharing of burdens enshrined in Article 2 of the 1969 OAU Convention and its inclusion in several national constitutions. **Ibrahim Awad** notes to appraise the critical notes offered in relation to durable solutions, but wonders what would be ways to go forward according to the view of **Marjoleine Zieck**. Zieck suggest that in the first place, a (unsatisfactory) solution would be to limit the application of the sixth cessation clause pertaining to changed circumstances when there is no ability to return. Second, Zieck suggest that in terms of burden sharing, a solution, albeit difficult, would be to initiate a rereading of the Refugee Convention, which in its preamble contains an observation that states can be unduly burdened by reason of their geographical proximity and refers to responsibility sharing among state parties. If all states have an equitable share, it would not be too much of a burden to resettle the global refugee population. Finally, the international community should continue to engage in solving the root causes of flight in a very active way.

Closing remarks

During the **closing remarks**, **Maya Sahli Fadel** stressed the importance of the establishment of a forum gathering both African and European perspectives. The fruitful exchanges that it has brought about might continue to provide a basis for cooperation of actors of both origins. Addressing the issue of the increasing handling of migration phenomena from a criminal law perspective in Europe, Fadel underscored the dangers of handling migration matters jointly with other matters as the fight against terrorism, and suggested a reappraisal of the Schengen framework in a relatively softer direction. Above all, she underlined the importance, both for Africa and Europe, of a common reflection on the global issue of migration and asylum, which might lead to a reassessment of the conventions in force in order to adapt to the rapid global developments. Finally, Fadel reiterated how intra-African cooperation on issues such as the respect of human rights, good governance and stability could hardly be overestimated as a useful tool to address the roots of migration flows.