

PROVIDING THE RIGHT TO HEALTH OF INVOLUNTARILY DISPLACED PERSONS

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ABSTRACT

Introduction: The article deals with the issues of international law concerning defense of the right to health of involuntarily displaced persons. As a result of the study, it has been demonstrated that providing of the right to health is essential as a requirement for countries, which, in turn, stem from consensus on international cooperation and general support for migrants. The latter are undeniably protected in accordance with documents proclaiming human rights, but for the sake of a more detailed explanation of their rights and the substance of the state's obligations towards such persons, the international community has created a solid foundation in the form of specialized refugee documents that further emphasize the need protection of the latter as persons who, as a result of their movement, are vulnerable.

The aim: To elucidate the international mechanisms for the protection of the right to health of involuntarily displaced persons.

Materials and methods: The study used a set of general-philosophical and special-legal methods of scientific research, in particular, dialectical, historical, socio-political, formal-legal and comparative legal methods of scientific research. The historical method of scientific research has been used in the analysis of tendencies of the regulation of the refugee problem from the beginning of the 20th century. The comparative legal method is used in the analysis of the legal regulation of involuntarily displaced persons' rights by international treaties and conventions, rules of national legislation of Ukraine and foreign legislation.

Review: Authors analyze the issue of a migrant's (social, medical etc.) rights under the principle of equality of refugees' and citizens' rights. Reviewing the mechanisms of guarding such rights under treaties it is obvious that these mechanisms have legislative and institutional features. Closer look is taken on the Council of Europe's mechanism for protecting the rights of refugees with its own normative and institutional features.

Conclusions: As a result of the study, it has been demonstrated that migrants' rights, including right to health, stem from consensus on international cooperation and general support for migrants. The latter are undeniably protected in accordance with the documents proclaiming human rights. In order to provide a more detailed explanation of their rights and the nature of the state's obligations towards such persons, the international community has created a solid foundation in the form of specialized refugee documents, which further emphasize the need to protect the latter as persons who, as a result of their displacement, are vulnerable.

KEY WORDS: right to health, human rights, migration, refugees, asylum, international law, obligations, highest state bodies decision-making

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INTRODUCTION

Today, the assessment of migration processes in the world is based on a clear understanding that the transboundary movement of people for forced reasons is inevitable in a coherent society. It is clear that strengthening the protection of involuntarily displaced persons, especially providing their right to health, is an important task of the states, but subject to close international cooperation in this sphere. International cooperation to promote the protection of migrants' rights lies both in the interaction in specific cases, and in the active discourse and the development of international law rules.

According to WHO, there are an estimated 60 million refugees or internally displaced persons worldwide. Their displacement circumstances vary greatly, from those temporarily displaced by conflict or natural disaster to those who spend years in camps or urban areas far from

home. About two thirds live in "situations of seemingly unending exile".

While becoming a refugee changes many things, it does not change the human right to the highest attainable standard of health and well-being. All people regardless of race, ethnicity, sex, age and country of origin have health needs and specific vulnerabilities – and these are often exacerbated when they are forcibly displaced. For example, as refugees on the move, women and children may have problems accessing even basic services, such as care at the time of delivery, postnatal check-ups for mothers and babies, routine vaccinations and family planning. This leaves them exposed to common illnesses and often unable to plan their families [34].

Principle 19 of the "Guiding Principles on Internal Displacement" of the United Nations prioritizes the care of the displaced persons with disabilities, infectious diseases, and

women, especially in the field of sexual and reproductive health (SRH) [35]. The World Health Organization (WHO) [36] mentions that the public health should avoid inequities between the displaced population and the host population regarding the health condition and access to HS. It states that health rights should be ensured without discrimination and any obstacles for preventive and curative interventions that reduce excess morbidity and mortality and minimize the consequences both on community health and cohesion should be removed [25].

In a message dedicated to the International Migrants Day on December 18, 2017, UN Secretary-General Antonio Guterres noted that “worldwide, unfortunately, hostility towards migrants is increasing” [30]. On September 19, 2016, the New York Declaration on Refugees and Migrants was adopted [9]. The Declaration contains a list of the commitments undertaken by States to save lives, the protection of the human rights of migrants and the equitable sharing of responsibilities at the global level in addressing various migration-related issues.

The Global Compact for Safe, Orderly and Regular Migration was signed in December 2018 in addition. It contains the most relevant and progressive approaches to migration: human dimension, international cooperation; the principle of recognition of the state’s discretion of conducting a national migration policy, while applying all possible instruments in all areas of public administration; the principles of the rule of law and the principle of due diligence in public administration. The treaty is enshrined in the Sustainable Development Agenda of 2030 and is based on the recognition that migration is a “multidimensional reality”.

Thereby, a human rights-based approach, clearly defined in the Global Compact, has already shown a steady tendency towards the extension of the general provisions on human rights to displaced persons. Under such circumstances the legislation of some European states appears to be xenophobic. For example, the law adopted in Hungary summer, 2018 provides criminal penalties for the provision of assistance to migrants, the dissemination of information relating to migrants, the provision of advice to migrants and the control of what is happening at the border [31]. Thus, the urgent issues of mutual assistance between the European Union countries in overcoming the difficulties and increasing the control of migration within the framework of the Central-Mediterranean, East and West-Mediterranean routes became key at the meeting of the European Council on June 28, 2018. The European countries’ leaders focused on developing concrete efforts: stopping migrant smugglers, supporting Italy on migrant acceptance matters and migration control; on developing a concept for regional landing platforms for people rescued at sea, reviewing and improving EU Asylum Rules [32].

THE AIM

To elucidate the international mechanisms for the protection of the involuntarily displaced persons’ right to health.

MATERIAL AND METHODS

The study used a set of general-philosophical and special-legal methods of scientific research, in particular, dialectical, historical, socio-political, formal-legal and comparative legal methods of scientific research. The historical method of scientific research has been used in the analysis of tendencies of the refugee problem’s regulation since the 20th century. The comparative legal method is used in the analysis of the legal regulation of involuntarily displaced persons’ rights in the international treaties and conventions, rules of national legislation of Ukraine and foreign legislation.

REVIEW AND DISCUSSION

The issue of medical rights of a refugee, which is guarded under Art. 24 of the Convention on the Status of Refugees and establishes the principle of equality of rights of refugees and citizens in matters related to social security due to sickness, disability, etc.

Currently, processes of cross-border movement of persons occur predominantly as “medical tourism” in the western and eastern directions [22]. However, even if migrants arrive in the host country in relatively good health conditions, their health status appears to decline over time. Financial barriers emerged as a fundamental and serious obstacle to healthcare for migrants or ethnic minorities. User fees and dental care represent the two most frequently mentioned barriers [23, p. 78].

The main challenges are the intersectoral, participatory, and integral approach (with emphasis on mental health and sexual and reproductive health), ensured accessibility to health services, the need for a reliable registration and information system of the population displaced by violence and its characteristics, and the addressing of the biopsychosocial problems of the different groups, especially women, persons with disabilities or infectious diseases, adolescents, children, ethnic minorities, older adults and the lesbian, gay, bisexual, transsexual, and intersexual population [25].

Challenges of health services related to the population displaced by violence in Mexico

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The outlined problems are of great importance for Ukraine. As the analytical study of the Delegation of the International Organization for Migration in Ukraine states, “since the introduction of democratic freedoms, in particular freedom of movement,” since 2013, the transboundary mobility of the Ukrainian population has grown rapidly mainly due to crossings of the western border” [27].

Undoubtedly, the annexation of the Crimea and military actions on the East of Ukraine in 2014 – 2015 significantly influenced external involuntary migration. The number of asylum applications filed by Ukrainian citizens in European countries (most notably in Italy, Germany, Spain and Poland) exceeded 22 thousand applications in 2015, which was one third more than in 2014, and more than 20 times in 2013; in 2015 the status of refugee in the countries of

the European Union in accordance with the Geneva Convention of 1951 was acquired by 415 Ukrainian citizens, an additional form of asylum for humanitarian reasons – by 1150 people; in 2015, for different reasons, there were 1 million more of Ukrainian citizens registered in Russia than in 2014 [27].

For Ukraine, significant changes in migration regulation have taken place since the adoption of the new wording of the Law of Ukraine “On the legal status of foreigners and stateless persons”, the Law of Ukraine “On refugees and persons requiring additional or temporary protection”, the adoption in 2012 of the Law of Ukraine “On the unified state demographic register and documents confirming the citizenship of Ukraine, certify the person or its special status”, as well as the Law of Ukraine “On Foreign Labor Migration” in 2015.

It is worth noting that the Association Agreement between Ukraine and the European Union (2014) aims to strengthen dialogue on the basic principles of solidarity, mutual trust, joint responsibility and partnership, and cooperation on migration, asylum and border management, using a system approach and paying attention to legal migration and cooperation in the fight against illegal immigration, human trafficking and effective implementation of the provisions (see Preamble to the Agreement). Aspects of migration policy are contained in various articles of the Agreement such as: Article 16 – Cooperation in the field of migration, asylum and border management (counteraction to illegal migration, study of legal migration, illegal transfer of persons across the state border and human trafficking, as well as the inclusion of problem issues in the field of migration to national strategies for economic and social development of regions from which migrants originate); Article 18 – mobility of workers; Article 19 – movement of persons, increase of citizens mobility and further progress in visa dialogue; etc. [8].

Aforementioned protection of the rights of displaced persons is primarily ensured through the use of universal human rights instruments. It is concerning those provisions that point to the equality of all people and the obligation of states to guarantee the rights of all with no exceptions. Thus, the Universal Declaration of Human Rights of 1948 proclaims that “all men are born free and equal in their dignity and rights” (Article 1), and that “every human being must have all the rights and freedoms proclaimed by this Declaration without any differences” (Article 2). Undoubtedly, the right to health is the most important. Besides, other rights also play significant role, such as stated in Article 14 of the Declaration, that for the first time enshrined the right of every person to seek asylum from persecution in other countries and to use shelter¹. The International Covenant on Civil and Political Rights,

proclaiming the human right to life, liberty, and personal integrity, in Article 12, focuses on guarantees for everyone “who is legally in the territory of any State” within this territory, on the right of “Free movement and freedom of choice of place of residence”, as well as the right of everyone to leave any country, including its own. The circumstances which may justify the restriction of these rights are: state security, public order, health or morals of the population or the rights and freedoms of others, if such circumstances are compatible with other rights of this Covenant. Article 13 of this Covenant also prohibits the unjustified deprivation of people right to enter their own country. An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority, while respecting all guarantees of human rights in expulsion (right to a fair trial) etc. [1].

While the demands for assistance are reaching all-time highs, the resources available for food, shelter, and health services are failing to keep pace. Added to the traditional programmatic demands facing providers of refugee assistance are new political challenges that have arisen in recent months. A particularly momentous question concerns the provision of aid to internally displaced persons in the face of official governmental disapproval of such intervention in the country’s internal affairs [37].

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, in its Article 3, states that “no State Party shall send, return or release any person to another State, if there are serious grounds for believing that she may be subjected to torture”; the state must take into account all circumstances relevant to the case, including, where applicable, the existence of a constant practice of brutal and massive human rights violations in that State” [2]. The world community seems to have reached the necessary consensus that recognizing the equal and inalienable rights of all members of the human community is the foundation of freedom, justice and universal peace” [19]. The report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, issued in early 2018, states that today, approximately 258 million people or about 3% of the world’s population, live outside their place of residence origin or habitual residence and therefore may be called (international) “migrants” regardless of their personal status. Thus, about 10% (about 25 million people) fled from their country as refugees, and another 40 million people are forcibly displaced to other countries and may well become migrants in

¹ Later, in 1967, the Declaration on the Territorial Asylum, adopted by the UN GA Resolution, confirmed the right of persons who had the right to refer to Article 14 of the Universal Declaration of Human Rights, the right to seek asylum and to use asylum, with the exception of those persons where are serious grounds for believing that they have committed a crime against peace, a war crime or an offense against humanity in the context of those international acts that determine the composition of these crimes.

the future. The report states that today's increasingly restrictive and burdensome migration laws, policies and practices have led to an increase in the number of migrants displaced outside formal procedures and, as a result, in corruption, violence and abuse; many states have created mechanisms to prevent the arrival of new people, the criminalization and detention of illegal migrants, the separation of families, inappropriate conditions for admission and medical care, delaying procedures for determining the status, or expulsion in the absence of mechanisms for recognizing such status; many states began to physically prevent the arrival of illegal migrants through the closure of the border, the establishment of fences, walls and other physical barriers, often in cooperation with other states or even non-state actors [33].

The article 22 of The Convention on the Rights of the Child of 1989, establishes the state's responsibility for taking the necessary steps to ensure that a child who wishes to receive refugee status or who is considered a refugee, is adequately protected and given humanitarian assistance in the exercise of his rights; promoting the protection of such child and assisting him in finding parents or other family members of any refugee child for family reunification. In cases where parents or other family members cannot be found, this child is given the same protection as any other child deprived of a family environment" including right to health.

It should be noted that at the beginning of the XX century the international community began to pay attention to the problem of refugees as a matter of responsibility for the protection and assistance to refugees: the League of Nations adopted a number of international agreements for the protection of refugees, as referred to in Article 1 of the Convention relating to the Status of Refugees (1951). Thus, instead of special agreements adopted in connection with specific refugee situations, a document containing the general definition of a refugee was proposed [26]. The meaning of this Convention is as follows: (1) the general definition of the term "refugee" (Article 1) is given; (2) provision of minimum standards for the rights of refugees, non-discrimination in the treatment of refugees, freedom of religion, and the guarantee of social, economic and political rights; (3) securing the ban on the expulsion or forced return of refugees; consolidating the foundations of naturalization and assimilation of refugees. As Laura Thompson, Deputy Director-General of the International Organization for Migration emphasizes, the main element in the concept of "refugee" is persecution and impossibility / unwillingness to take advantage of the protection of their state [21]. The Protocol Relating to the Status of Refugees of 1967 abolishes the geographical and time constraints set out in the original version of the Convention on the Status of Refugees, the scope of which is not limited to States Parties to the Convention.

It should also be reminded that often refugees are under the control of one of the parties of the international armed conflict: in this case they are protected by the rules of international humanitarian law and international refugee law [18]. From the point of view of protecting refugees, the Geneva Convention for the Protection of Civilian Persons in the War of 1949 and the Additional Protocol I to the Geneva Conventions of August 12, 1949, concerning the Protection of Victims of

International Armed Conflict, are important instruments of international humanitarian law. The Convention states that any detaining state should not act hostile to refugees who are not actually protected by any government solely on the basis of their legal affiliation with the State of the adversary (Article 44). The Additional Protocol states that persons who, before the beginning of hostilities, were treated as stateless persons or refugees, are protected under all circumstances and without any discrimination [5].

The explanatory report to the ECHR notes that the system of human rights' protection under the ECHR "may be useful additionally to the existence of a non-judicial preventive mechanism, which tasks include studying the treatment of persons deprived of their liberty, if necessary, strengthening the protection of such persons from torture or inhuman or degrading treatment or punishment" [7]. At the same time, according to Article 17 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment indicates that it "does not adversely affect the provisions of national law or any international agreement providing for more reliable protection of persons deprived of their liberty"; moreover, nothing in this Convention can be interpreted as limiting or violating the powers of the bodies provided for by the European Convention on Human Rights or as allowing itself to derogate from the obligations assumed by the Parties under the said Convention". For example, according to the results of the inspections of illegal migrants' places of detention, the CPT formulated three basic rights that detained illegal migrants have been using since the beginning of their detention: (1) the right to have access to a lawyer, (2) the right to have access to a doctor, and (3) the right to be able to inform a relative or a third person of his or her choice of taking into custody [28].

Thus, it is very important for highest state bodies to effectively implement the norms of international law in national legislation through their decision-making.

Despite attempts to legally address the protection of internally displaced persons' rights to health care in Ukraine, according to the OSCE thematic report on access to health care, the situation is ambiguous. In some areas, the provision of medical services to such persons by public health institutions is provided at the appropriate level, while in other areas access to medical care is problematic. Most of the respondents said that they did not need medical assistance yet and therefore they do not know whether there are difficulties in obtaining medical services or not. Hoping to return home soon, internally displaced persons didn't try to figure out how the system works. Several resorts provide medical care, as well as some local doctors and nurses provide them with medical services on a volunteer basis. However, internally displaced persons often need financial support to obtain the necessary medicines or to gain access to specialized medical services. Those who suffer from chronic diseases and take prescribed medications have had difficulty trying to get prescriptions for the necessary medications again. Representatives of civil society, for their part, partly solve this problem by covering medical expenses and assisting such persons in gaining access to hospital treatment [38].

Returning to the system of protection of human rights within the framework of the Convention for the Protection of Human Rights and Fundamental Freedoms, it is important to note the conclusions made by European Court of Human Rights on the consideration of complaints from persons whose rights as migrants have been violated: (1) members of the Council of Europe have to ensure that everyone under their jurisdiction, in particular refugees, has respect of their rights guaranteed by the Convention, in particular Article 2 of the Convention guaranteeing the right to life, and Article 3 prohibiting torture, punishment, inhuman treatment and punishment. Consequently, the Court confirms the principles of non-refoulement, which means that no person can be expelled where he or she is faced with a real risk (“real”, “predictable” and “personal”) to be treated contrary to Articles 2 and 3 of the Convention [10]; (2) The treatment prohibited by Articles 2 and 3 of the Convention must attain a minimum level of cruelty [11], the assessment of which must be thoroughly investigated by the sending State [12], taking into account that the person may belong to vulnerable groups [13]; (3) the host States are bound by the obligation to create appropriate conditions for the stay of asylum seekers [13].

Researchers empathize that ECHR does not guarantee the right to free medical care [24, p. 1111]. Also, in its *Wasilewski v. Poland* judgment, (No. 32734/96) Court stated, that the ECHR does not guarantee the right to any particular level of medical care or the right to access treatment [15].

ECHR in its judgment *Cyprus v. Turkey* (2001) (No. 25781/94) acknowledged that Article 2 § 1 obliges States to take appropriate steps to safeguard the lives of those within its jurisdiction; and, as it relates to the present case, a violation of Article 2 may occur when an individual’s life is put at risk through the denial of health care which a State has undertaken to make available to the population generally [14].

Though ECHR does not guarantee the right on health protection, it can be argued that it (the right) is one of the aspects of “moral and physical integrity” that may be covered by art. 8, guaranteeing the right to respect for private life, especially regarding mental health, as it seems from *Case of Bensaid v. the United Kingdom* ECHR judgment (2001) [16].

However, under certain circumstances, it is possible to refer to the responsibility of a member state provided for by the ECHR, if it is proved that the authorities of this state put the life of a certain person at risk as a result of actions or inaction, as a result of which the person is not provided with medical care provided to the rest [17].

CONCLUSIONS

Thus, the arsenal of international measures of protecting the migrants’ human rights is quite broad. It is discovered that the international documents on the human rights of refugees are mostly agreements that have no binding force. However, their value lies not only in the proclaiming the inviolability of human rights, including those of involuntarily displaced persons, but also in providing of the right to health, which expresses the duty of states in protecting and safeguarding the rights of refugees, and, therefore, specific obligations in this field. It is also important that these international

instruments provide minimum standards for ensuring the rights of migrants and the proper conditions for their stay within other states’ territories; these documents are a groundbreaking reference point for developing national approaches in this scope. However, it should be recognized that the fulfillment of these commitments largely depends on the formal aspects and internal procedures for the implementation of these standards – ratification, implementation, etc., as well as the will of the states themselves, embodied in specific policies and practices.

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