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Mandeville Lecture: *'Current Migration Challenges: A Human Rights perspective'*

Navanethem Pillay.

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I am deeply honoured to receive an Honorary Doctorate from Erasmus University Rotterdam. I thank the Bernard Mandeville Foundation for nominating me and the Executive Board, the International Institute of Social Studies in the Hague and Erasmus Law School of Law for their endorsement of the decision.

I understand that the Bernard Mandeville Foundation in which the Rotterdam business community and the University work together, presents the award periodically to individuals who have demonstrated dedication to social justice, a principle championed by the Foundation. I view the award as an indication of the priority placed on human rights and values by the University community and am doubly gratified.

The Netherlands has been a home to me for close to six years while I served as a judge on the International Criminal Court in the Hague. I want to pay special tribute to the people of this country for hosting many International Institutions, and embracing the cause of justice and human rights so generously. As you know I was born and grew up in Apartheid South Africa. I am a descendent of workers from India, who were taken as indentured labourers by the British Government to work in the sugar cane fields of South Africa. My parents were born in South Africa. If there was one thing that we were grateful for, and that the Dutch-descendent Afrikaaners resented most, it was the consistent refusal by the Netherlands to give its support for apartheid. As I applied my mind to the subject of Migration Challenges, especially now, in Europe, I recall the long tradition of respect for values and principles in your society.

Today, there are more than 232 million international migrants in the world, with refugee flows mounting. If they came together to form a country, it would be the fifth most populous country on the planet. Yet, this remains a largely invisible population. Many migrants, particularly those who are in an irregular situation, tend to live and work in the shadows, afraid to complain, denied rights and freedoms that citizens take for granted, and disproportionately vulnerable to discrimination and marginalization. Even worse off are those restricted from taking up meaningful employment. A group of Syrian doctors among the refugees in Europe wrote to me requesting my support for them to practice as doctors.

In 2010, under the leadership of the Office of the High Commissioner for Human Rights, the International organisations making up the Global Migration Group expressed their deep

concern about the human rights of international migrants in an irregular situation in a landmark joint statement. The group observed that migrants in an irregular situation were more likely to face discrimination, exclusion, exploitation and abuse at all stages of the migration process. They often face prolonged detention or ill-treatment and, in some cases, enslavement, rape and murder. They are more likely to be targeted by xenophobes and racists, victimized by unscrupulous employers and sexual predators, and can easily fall prey to criminal traffickers and smugglers.

Rendered vulnerable by their irregular status, these men, women and children are often afraid or unable to seek protection and relief from the authorities in countries of origin, transit or destination. Clearly, the irregular situation in which international migrants may find themselves should not deprive them either of their humanity or of their human rights.

The starting point for a discussion on migration is to recognize that all human beings are entitled to human rights. International Human Rights law provides that everyone, without discrimination, must have access to the fundamental human rights provided in the International Bill of Rights. Where differential treatment is contemplated, between citizens and non-citizens or between different groups of non-citizens, this must be consistent with International human rights obligations, undertaken for a legitimate objective, and the course of action taken to achieve this objective must be proportionate and reasonable.

Migrants in an irregular situation are not criminals. The evidence shows that they do not migrate with the objective of cheating the social security system or misusing the services of the country of destination. They are more likely to be working in a hospital than unfairly using its facilities. They tend to work in sectors that are often dirty and dangerous, often doing jobs that local workers are unwilling to do. Indeed, Governments have an interest in promoting and protecting the human rights of all migrants, including irregular migrants, because no society can develop to its true potential when legal, social and political barriers prevent entire sectors of that society from contributing to it.

There is a need to challenge common assumptions about the entitlement of migrants in an irregular situation to such fundamental human rights as the right to health, to education, to an adequate standard of living and to just and favourable conditions of work. They are entitled to human rights, including economic, social and cultural rights.

Hundreds of thousands of men, women and children are making hazardous journeys across deserts, and high seas, at great risk and trauma, fleeing for their lives and that of their children. They have no choice when their homes are shelled, cities are under siege or when armed rebel groups force them to convert to their brand of religion, or die. They are fleeing from crossfire, conflict and persecution, hunger, deprivation and discrimination. People who have no choice but to flee to safe places are extremely vulnerable. It stands to reason that where people have food and water, are safe from falling bombs have security, education, jobs and freedom and hope they are not likely to take the risk of exposing their families to dangerous crossings to an uncertain future in detention camps. In other words, human rights violations of persecution, unrelenting poverty, environmental degradation compel migration. Whether they gain refugee status, within the definition of the 1951 Convention or not, even migrants who are not refugees have rights that need to be protected.

An alarming tendency of what has been called the " migration crisis" in Europe is the xenophobia, inhuman rejection, suspicion and aggressive push-back. We are all appalled at television footage of the use of violence against refugees, the use of high-powered water hoses against them and the barbed wire fencing imprisoning them.

We must challenge assumptions underlying rejection of migrants, by upholding human rights values, codified in International Human Rights law, International Humanitarian Law, Refugee law and the Law of the Sea. These have been around for some time, proudly embraced by societies. They are as relevant during crises as they are in peacetime; in fact more so.

What are some of the misunderstandings and unfounded mis-perceptions that are painfully coming to the fore?

\*That push factors of conflict, suffering and deprivations are the burdens of countries of origin and not the concern of receiving states

\*That migrants are terrorists and security risks

\* That migrants cooperate with smugglers, armed groups and traffickers.

\*That if we stop rescuing migrants at sea, they will stop coming and if we close our borders, they will go away.

\*That there are sufficient legal channels open to migrants to apply for entry. The reality is that this is not an option for refugees fleeing in their thousands; or for low skilled persons mainly from developing countries. Refugees are often unable to access fair and effective asylum channels. In the same vein, harsh border controls and law enforcement measures lead to them falling prey to smugglers and traffickers.

Criminalisation of irregular migrants leads to unnecessary detention and exposes them to the risk of a wide range of human rights violations.

The only effective way to manage migration crises is to follow the principles of human rights that have proved the test of time and have grounded societies in inclusiveness and respect for dignity.

The Guide for lawful migration policy is provided by International Human Rights law and standards set out in core treaties and complementary standards set out in International Humanitarian law, Refugee law and the law of the sea..

- International law requires rescue of migrants at sea.
- The right to individual screening and determination of status.
- No one should be subjected to prolonged or arbitrary detention, discriminatory or arbitrary decision-making, unlawful profiling, deprivation of humane conditions and respect for privacy and dignity.
- Children must not be placed in detention.
- The principle of non-refoulement must be respected.
- Special protections should be provided for vulnerable groups such as persons with disabilities, the elderly, pregnant women and sick and wounded persons.

States have sovereign authority over border control but this power is not absolute and carries the mandate to protect every human being found at its borders. It should not exercise this authority at the expense of ignoring international obligations such as exclusion, denying asylum altogether or curtailing migration at any cost.

OHCHR points to lessons learned from other policy areas, from responding to illicit drug trades, to countering terrorism and fighting trafficking, a disproportionate and overly narrow focus on enforcement, without due regard to the complexity of the issue, its causes and the humanity of its actors will not lead to solutions. Rather, as history has shown, it is likely to lead to more problems. Properly understood, the solution is not to be found in measures to prevent movement or migration at all. Migration is not a problem to be solved. Rather it is a normal and inevitable feature of the human experience. Human beings have always and will always move in search of opportunities for a better life.

( footnote OHCHR " Recommended Principles and Guidelines on Human Rights and International Borders.")

The UN High Commissioner for Human Rights , Zeid Ra'ad, as well as Amnesty International and Human Rights Watch have expressed criticism of the recent agreement between the European Union and Turkey. Concerns relate to arbitrary detention of refugees and migrants, and lip service to proper individual assessments in light of the declared aim of return of refugees. The recent reports of forcible returns, amounting to refoulement from Turkey add fuel to the concern,

The EU- Turkey agreement calls for cases to be processed under the EU's Asylum Procedures Directive and requires migrants who have not applied for asylum or whose applications have been found to be unfounded or inadmissible, to be returned to Turkey. This flouts human rights law obligations which requires states to consider arguments over and above refugee law from special needs individuals such as children, LGBTI persons, persons with disabilities and those at risk of torture.

I share the concern expressed by UNICEF and UNHCR at the use of detention for all new arrivals in the Greek Islands, including children and other vulnerable persons, that appears to be in contradiction to International and EU human rights laws and standards, including the principle of "the best interests of the child" and that detention should be a last resort measure. Furthermore the agreement covers "one for one" resettlement alone, not providing for other regular channels of entry, other humanitarian pathways and regulated labour migration in response to market needs.

There are calls for the EU to act in accordance with its own well-established and respected laws and principles. Non-conformity with International obligations sets a bad example.

It is important to counter the negative misconceptions spread about migration; that it poses a threat rather than a benefit to existing communities. Suspicion and hatred against the other, exploitation of the current migration flow for political and election gains, escalating divisiveness and xenophobia all contribute to inhumane rejection of people in desperate need of a safe place.

Migrants bring value. Europe has historically benefited from migration. Its dwindling population has received a boost. Migrants strengthen economies, bring in labour resources and provide diversity and revitalization.

The policy on migration adopted by Canada is worthy of note as an appropriate conclusion to this lecture:

Justin Trudeau announced that Canada " will embrace diversity and the new ideas that spring from it while simultaneously fostering a shared identity and shared values in safe, stable communities that work."