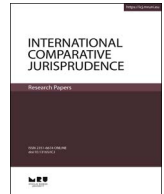


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International Comparative Jurisprudence

journal homepage: www.elsevier.com/locate/icj

EU in the face of migrant crisis: Reasons for ineffective human rights protection[☆]

Simas Grigonis

Mykolas Romeris University, Faculty of Law, Institute of International and European Union Law, Ateities str.str. 20, LT-08303 Vilnius, Lithuania

ARTICLE INFO

Keywords:

Human rights
European Union
Charter
Migrant policy crisis

ABSTRACT

Despite the fact that EU was acknowledged to ensure human rights protection level equivalent to the one ensured under European Convention on Human Rights (ECHR), it is doubtful if the EU was able to ensure human rights in time of recent migrant crisis. It is argued in the Article that, absence of comprehensive EU-level migrant policy restricted EU's ability to prevent the crisis and to mitigate its consequences as well as human rights violations. In addition, being oriented to ex post rights defense, EU's system was also practically unsuitable to defend the rights of the asylum seekers after the violations actually occurred. It is proposed that EU should address migration issues immediately by introducing major migration policy reform.

1. Introduction

There were several migrant crises in the European history already. 700,000 asylum seekers that Europe had to deal with after the fall of the Iron Curtain (Connor, 2016). Before that, 60 million refugees during and after the WWII (Rothman & Ronk, 2015). Very recently, following the emergence of war initiated by the Russian-backed separatists, 2.6 million of Ukrainian residents were forced to leave their homes in Eastern Ukraine (Gienger, 2015). It appears that migrant crises tend to recur periodically in Europe. Given the historical lessons, after the events in the Middle East emerged, migrant crisis could already be predicted, prepared for, and its consequences (including human rights violations) could be significantly mitigated. Should the European leaders have assembled sometime before the crisis (after the Syrian war began, for instance) and decided on the most important issues concerning migrant policy, the crisis could have been softened significantly. However, although it could have been predicted, crisis has come as a surprise.

While hundreds of thousands of asylum seekers travelled through EU's borders, EU leaders found themselves divided – some of them shouted of the need for extraordinary measures,¹ others threw accusations for not finding a solution at each other.² At the same

Peer review under responsibility of Mykolas Romeris University.

[☆] The term 'migrant' is used purposefully in this article as encompassing two large groups of people who arrived to Europe during the recent migrant crisis, i.e. refugee migrants and economic migrants. People in both of the groups can be referred to as migrants, yet the incentives for their migration differ. Economic migrant chooses whether or not to migrate and decide, based on the constraints set by the receiving countries, what country to migrate to (given the economic benefits of this decision). In turn, refugee migrants are forced to leave their origin countries and request for a refugee status elsewhere due to the unforeseen and immediate events putting their lives at significant danger (Dustmann et al., 2016). Considering that only part of the people coming to Europe seek the refugee status, while others come due to the economic motives, the term 'migrant' should be considered as more accurate when describing the entire group of people entering Europe. It should, however, be noted that in this Article term 'migrant' does not refer to the persons that enter EU using legal means.

E-mail address: simas.grigonis@mruni.eu.

¹ "Extraordinary times demand extraordinary measures," German Chancellor Angela Merkel said" (Chicago Tribune, 2015).

² "Till today, it was difficult to find a solution, because a series of countries adopt a stance 'Not in my backyard,' "Tsipras said." (Chicago Tribune, 2015).

<http://dx.doi.org/10.1016/j.icj.2017.01.003>

Received 28 November 2016; Received in revised form 8 January 2017; Accepted 17 January 2017

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time concerns of human rights protection, asylum and counterterrorism³ had to be taken into account. Indeed, tensions concerning security had to be managed whereas rumors that terrorists were arriving to EU together with the wave of the asylum seekers escalated. Although no evident connection between asylum seekers and terrorists was discovered (and even though evidence stating the contrary were provided by the representatives of the United Nations⁴) hostile attitudes towards the incoming asylum seekers emerged in the separate Member States leading to the internal division within EU. EU thus struggled to find a cohesive, long term solution (Ernst & Young, 2016, p. 1).

Following complicated negotiations between Member States the Commission only came up with several ad-hoc solutions to cope with the crisis. Among other things, it proposed an emergency relocation of 160,000 refugees from Greece, Hungary and Italy, creation of permanent relocation mechanism for all the Member States, creation of common European list of safe countries of origin,⁵ making return policy more effective, addressing the external dimension of the refugee crisis concerning the resolution of the conflicts in Syria, Iraq, and Libya (Press release, 2015).

However, in their content, neither one of the proposals addressed additional safeguards of the rights of the asylum seekers while waiting for the procedures to be completed. On the contrary, part of the solutions was meant to decrease the number of asylum seekers that EU had to deal with (i.e. creation of the list of safe countries of origin, increasing the effectiveness of the return policy). The other solutions concerning relocation were only intended for logistical redistribution of people. By their very nature, these were the short-term solutions primarily aimed for making it easier for EU and the Member States but certainly not for making it easier for the actual asylum seeker.

Afterwards, the communication proposing the reform of Common European Asylum System was adopted by the Commission (Commission, 2016). Based on this communication the reform of Dublin Regulation was proposed. Yet, on December 2016 the reform regulation was still not adopted. Consequently, since the beginning of 2015 until the end of 2016 nothing substantial was done by the EU to defend the rights of the asylum seekers flowing to the EU. Thousands of asylum seekers are still held in the camps often under degrading conditions⁶ (Alderman, 2016; Willsher, 2016). In turn, the EU is still stuck in the search for the long-term solution.

Since EU was unable to provide a solution, incoming asylum seekers faced the EU immigration and human rights systems as they are. It is currently undeniable that EU aspires to be an organization protecting human rights. EU managed to achieve such a level of human rights protection, that it was acknowledged internationally, including the European Court of Human Rights (ECtHR) itself (*Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 (2005)). Already in 2005, the ECtHR managed to enumerate features of EU legal system allowing it to conclude that protection of fundamental rights by Community law was equivalent to that of the ECHR system.⁷ Despite all the positive characteristics implemented over time, EU's human rights protection system seemed to be not effective during the crisis. The purpose of this article is to assess whether the EU human rights system was able to effectively protect the rights of the arriving asylum seekers in recent period of crisis. It is firstly aimed to answer whether human rights violations were or could have been prevented or at least reduced by actions from the side of EU. Secondly, in case actual violations in fact occurred, it is analyzed whether an asylum seeker who consider his rights to be infringed, would be able to use the human rights defense mechanisms in place after the violation happened.

2. Internal disagreements – an impediment for EU to introduce safeguards of the rights of the asylum seekers

EU, bringing together 28 Member States and a population of over 500 million, is certainly one of a few powers in the world that can actually shape global governance. It has always declared its purpose to be seen in the world as a “single voice” (Postolache, 2012). Yet, being a complex organization aligning various interests of its members, EU is always in the process of searching and discovering the common position. However, it is evident that EU met the recent crisis neither having a common position, nor being united. As indicated in the report of Human Rights Watch “*European Union and its member states struggled to develop an effective and principled response to the hundreds of thousands of asylum seekers and migrants who reached Europe. Narrow government interests too often displaced sound policy responses, delaying protection and shelter for vulnerable people and raising questions about the union's purpose and limits*” (“Human Rights Watch World Report, 2016: European Union Events of, 2015”).

Since no EU level solution was adopted, Member States took the matter into their own hands. While Germany chose to invite the

³ It is no secret that following the terror attacks in Paris on November 2015, Brussels on March 2016 and Nice on July 2016, as well as other smaller incidents in various European countries, a considerable fear of terror exist among European population. It is often publicly claimed that by taking advantage of the migrant crisis terrorists easily enter the EU territory (Nabeel & Bhatti, 2016), wherefore the migrants were started to be associated with a threat to security.

⁴ “Mr. Emmerson, showed that “while there is no evidence that migration leads to increased terrorist activity, migration policies that are restrictive or that violate human rights may in fact create conditions conducive to terrorism.” (No evidence of risk’, 2016)

⁵ I.e. Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Kosovo, Montenegro, Serbia and Turkey.

⁶ According to the European Commission on June 2016 50 000 of asylum seekers were held in camps in Greece only (Commission, 2016);

⁷ ECtHR stressed that fundamental rights have become a condition of legality of Community laws, that CJEU referred extensively to the provisions of ECHR and case-law of ECtHR and that the Charter was substantially inspired by the rights protected under ECHR. The attention was drawn to the EU's intention to eventually accede to the Convention (*Bosphorus*, para. 159). It was noted that these substantive guarantees of fundamental rights were also ensured by the mechanisms put in place exactly to ensure their observance (*Bosphorus*, para. 160). First of all by CJEU's jurisdiction concerning the annulment actions and acts against Community (or Member States) for the failure to perform obligations (*Bosphorus*, para. 161). An extremely limited standing of the individuals to initiate direct actions before the CJEU was, however, noted as a drawback. According to the Court, actions initiated before CJEU by Community institutions or Member States constituted an important control of compliance with Community norms to indirect benefit of individual. In addition, the negative impact of the individual's lack of standing were alleviated by remedies awarded by the national courts in connection with the infringements of Community law (*Bosphorus*, para. 162–163). Overall, ECtHR formed a positive attitude to the EU's human rights protection system.

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