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Still a beacon of human rights? Considerations on the EU response to the refugee crisis in the Mediterranean

ABSTRACT

The European Union (EU) is a political union of democracies which protect human rights and presents itself as a beacon of human rights on the global scene. This profile reviews the measures EU has introduced in response to the crisis and highlights the problems they pose from a human rights perspective. Overall, a set of five measures were adopted: (1) improving search and rescue missions in the Mediterranean and the Aegean in order to prevent loss of human lives at sea; (2) initiating military intervention to tackle networks of smugglers; (3) introducing resettlement and relocation quotas to alleviate pressure on the EU Member States who serve as entry points (Italy, Greece and Hungary) and from the countries neighbouring Syria (primarily Turkey); (4) creating a common list of safe countries to facilitate and speed up the return of failed asylum seekers and undocumented migrants; and finally (5) strengthening cooperation with countries of origin and transit to readmit migrants and to tighten border controls.. Whether the EU will be able to respond to the unfolding crisis by providing international protection to those in need while simultaneously securing its external borders will be a yardstick by which to judge its human rights commitment.

KEYWORDS:

EU, refugees, human rights, Mediterranean crisis, migration control, Europeanisation

"EU has never taken the issue of migration as seriously as we are doing now."

Federica Mogherini, EU High Representative for Foreign Affairs and Security Policy, 22 June 2015¹

The European Union (EU) is a political union of democracies which protect human rights and presents itself as a beacon of human rights on the global scene. International and European human rights treaties provide asylum seekers, refugees and migrants with specific rights, which signatory states must defend. EU member states have been among the first to ratify such human rights treaties, including the UN Convention on the Status of Refugees (1951, the 'Geneva Convention'), the European Convention of Human Rights (1950), the UN Conventions on the Rights of the Child (1989) and the EU Charter of Fundamental Rights (2007). What is more, the EU itself is seeking to accede to the European Convention of Human Rights.

Violent and prolonged conflicts in Syria, Libya, Afghanistan, Iraq and Central Africa have displaced millions of people. The largest displaced group are Syrians. The majority – 4.8 million (UNHCR 2016a) – are taking refuge in neighbouring countries, with only a minority embarking on dangerous journeys across the Mediterranean and the Aegean seas in an attempt to reach safer shores in Europe. In 2015 alone, 1,046,977 asylum seekers reached Europe by sea or by land and 3,770 people tragically lost their lives trying (UNHCR 2016b). The United Nations acknowledges that over a third of those crossing the Mediterranean Sea are children and, on average, two of them drown at sea every day (UNHCR 2016c). Equally high numbers were recorded in the early months of 2016, over 91,000 new arrivals and 413 deaths in the first two months are a testament to the fact that this is not a temporary crisis. To respond adequately to a crisis of such magnitude in terms of loss of human life and the number of people in need of international protection, the EU must put forward a comprehensive long-term solution which ensures that the human rights of migrants and asylum seekers are respected.

The recent humanitarian and migration crisis in the Mediterranean challenges Europe because it exposes one of the existential questions about the EU and its core values: does the solution

¹ Council of the European Union. Council launches EU naval operation to disrupt human smugglers and traffickers in the Mediterranean [Accessed 22 June 2015]
<http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-naval-operation/>.

put forward by the EU to the refugee crisis comply with the human rights the Union has championed globally? Accordingly, the objective of this profile is to document the set of measures the EU proposed from April 2015 to the present and briefly to discuss to what extent they ensure the human rights of migrants and asylum seekers. In what follows, this profile reviews the five measures proposed and discusses their human rights implications for migrants and asylum seekers. To substantiate the arguments presented, it builds on a series of interviews conducted by the author in the period March to May 2015 with the Administrative Director of the European Agency for the Management of Operational Cooperation at the External Borders (FRONTEX) and the UN Rapporteur for the Human Rights of Migrants.

Migration governance has been high on the European agenda in the last ten years, but it rose to the top after one rather dramatic event. On April 2015, a boat carrying over 800 people, mainly from Syria, Eritrea and Somalia, sank in front of the Libyan coast. Less than a year since the shipwreck, policies in the area of migration and asylum have evolved at an unprecedentedly rapid pace. On 13 May 2015, the EU finalised weeks ahead of its announced schedule the European Agenda on Migration (COM(2015) 240); members of the Commission, the Council and the ministers of the interior of the Member States met at six different summits to agree on new measures; a separate meeting was held in November 2015 with representatives of African countries of transit and origin and finally the EU re-opened negotiations for membership with Turkey in return for an agreement concluded on 18 March 2016 which would bind Turkey to readmit asylum seekers returned from Greece – the country which hosts most of the asylum seekers heading to Europe. In exchange, the EU Member States agreed to augment resettlement of Syrian asylum seekers residing in Turkey, increase existing financial support for Turkey's refugee population and to speed up visa liberalisation for Turkish nationals.

1. EU-led search and rescue missions in the Mediterranean and the Aegean Sea

Following the shipwreck in April 2015, one of the first measures on which member states agreed was to increase the EU's presence at sea. The European Council promptly decided to direct more resources to FRONTEX to expand EU-led search and rescue missions at sea. Search and rescue missions are crucial to intercepting vessels on the high seas and thus to prevent further losses of human life. A greater presence at sea also provides greater capacity to the authorities to combat the smugglers who facilitate such dangerous journeys. FRONTEX conducts search and rescue missions in the Mediterranean, notably in the framework of the

Triton and the Poseidon operations. Of the two, Triton deals with the most difficult and tragic cases, because migrants crossing the Mediterranean by starting in Libya have a longer journey to make across the sea to reach Italian waters. In contrast, Poseidon tackles a more common route for migrants and asylum seekers starting in Turkey and ending on the Greek Islands.

In an interview the author conducted with the Administrative Director of FRONTEX, the decision to boost the funding and resources of FRONTEX were welcomed as this benefits the search rescue missions. However, the measure provided funding for and only for Triton and Poseidon – both temporary operations likely to be terminated once the crisis ends. The failure to ensure more permanent funding for FRONTEX means that its capacity to respond effectively to crises and to prevent further loss of human life – the very mantra of human rights – is limited. Furthermore, while budgets for search and rescue missions are being upscaled, their mandate or the geographical scope within which they operate are not. Triton operates missions to 30 nautical miles along the Italian coast, which means that its mission is restricted to saving the lives of those who have almost completed the journey and are far from the central Mediterranean or the Libyan shore where most deaths occur.

2. Military intervention against smugglers

Another noteworthy measure is the initiation of a military intervention whose objective is to combat smugglers. Already in April 2015, European leaders agree to launch an EU-led military intervention to destroy vessels on the Libyan shore before smugglers take on board migrants and asylum seekers. In February 2016 the North Atlantic Treaty Organisation (NATO) announced that it would join forces with the EU and intervene in the Aegean Sea. Its mission was to be gathering information to disable the networks of smugglers operating between Turkey and Greece. Because NATO does not use its resources and presence at sea to participate in search and rescue missions but only contributes to collecting intelligence on smugglers, its involvement is a missed opportunity to prevent further tragedies at sea.

In both cases however, the use of military force in this context is highly problematic. Many of the people boarding ships in Libya are asylum seekers who are guaranteed the right to claim international protection under international human rights treaties. In particular, over 90 percent of Syrian and Eritrean asylum seekers and high proportions of Afghani and Iraqi ones – the four most common nationalities – receive refugee status once they claim asylum in a European

country. Eliminating the ships would mean ending the only routes asylum seekers have to access international protection in Europe.

Not least, a military intervention of this calibre is also problematic because it marks a significant change in the strategy of managing migration in the southern EU neighbourhood. An EU-led military coalition symbolises the existence of an ‘enemy’, who in this case are civilian vessels carrying other civilians.

The EU-led military mission proposed builds upon the expertise of European Union Naval Force Atlanta (EU NAVFOR). EU NAVFOR was founded to counter Somali-based piracy and armed robbery at sea near the Horn of Africa and in the western Indian Ocean. However, the skills and strategies EU NAVFOR developed in dealing with piracy on the African Coast have little in common with tackling networks of smugglers who facilitate the transport of asylum seekers. The transfer of personnel and thus of skills between the two missions indicates a shift towards further militarisation of the southern external frontier of the EU without first ensuring that those in need have access to appropriate channels to allow them to apply for protection.

2. EU quotas for resettlement and relocation

The third and perhaps most controversial and visible EU measure in response to the current crisis has been the introduction of EU quotas: a resettlement quota and a relocation quota. Taken together, these two schemes aim to redistribute 160,000 asylum seekers among the EU’s 28 member states. The EU relocation quota is the opposite of the resettlement one: the former means a distribution among Member States of persons in clear need of international protection. This quota seeks to reduce pressure inside the EU from the states which have received the majority of the migrants and asylum seekers since the start of the crisis, Italy, Greece and Hungary, to the remaining states. Under the Dublin Regulation 604/2013, known as ‘Dublin III’, Italy, Greece and Hungary are required to offer reception to migrants and asylum seekers, to process asylum claims where the migrant chooses to apply and, finally, to provide international protection in case the application is successful (or initiate repatriation procedure for the ones failing to qualify for asylum).

On 27 May 2015, the Council adopted a relocation quota to relocate 40,000 individuals in ‘clear need of protection’ to other member states (COM(2015) 286 final). After an Extraordinary Justice and Home Affairs Council, the quota was supplemented with another 120,000 asylum

seekers: 15,600 from Italy, 50,400 from Greece and 54,000 from Hungary to other Member States.

The resettlement quota refers to the transfer of 22,000 individual displaced persons in clear need of international protection, on a submission of the United Nations High Commissioner for Refugees and in agreement with the country of resettlement, from a third country to a Member State. It seeks to alleviate the pressure in the countries neighbouring Syria: primarily Turkey but also Jordan, Lebanon and including Iraq, which hosts Syrian refugees but is also a country of origin for a significant number of asylum seekers. Syria's neighbours host more than 4.8 million Syrian refugees. An initiative of the EU in this direction is needed, even if it is a symbolic one, because the EU and all of its Member States have made strong commitments to protect the rights of the refugees. Prior to the resettlement agreement, the EU focused on helping Syria's neighbouring states provide for their refugee population through the Madad Trust Fund (December 2014) and the Regional Development and Protection Programme for refugees and host communities in Lebanon, Jordan and Iraq (December 2013). However, both these measures sought to increase the financial aid to the region rather than to share the need to provide protection to these refugees. In contrast, Jordan, Lebanon and Iraq are not signatories of the Geneva Convention. Turkey is the sole exception, having signed and ratified the convention and its 1967 Protocol. However, Turkey applies a geographical limitation to Europe, making non-European not eligible for refugee status.

Initially, the Commission had hoped for an unproblematic agreement on quotas for asylum seekers but many Member States voiced concerns regarding their share and demanded more flexibility. For example, France, Spain, Germany and most Central and Eastern European states contested their quotas, invoking very different reasons. France, Germany and Spain claimed that they were already sharing the burden, while the newer Member States in Central and Eastern Europe argued they are not the preferred destination for asylum seekers. Hungary, Slovakia and Poland had reservations about admitting refugees of Muslim faith. Slovakia even proposed to select only Christian asylum seekers and along with Hungary, challenged the competence of the EU to introduce mandatory quotas. Slovakia and Hungary challenged the EU on this matter at the European Union Court of Justice in December 2015 and their cases are pending a decision.

To sweeten the deal, in September 2015 the EU identified EUR 718 million to be made available to the Member States to accommodate refugees arriving through the relocation quota.

The EU has used financial instruments such as the European Refugee Fund (ERF, set up for the 2008–2013 period, total budget EUR 680 million) and the Asylum, Migration and Integration Fund (AMIF, set up for the 2014–2020 period, total budget EUR 3.137 billion) to assist the Member States with the costs of accommodating refugees. For example, all the countries participating in the abovementioned relocation scheme (Denmark and UK have opted out) can apply for EU funding from the Asylum Migration and Integration Fund (AMIF).

The legal basis for the relocation is Article 78(3) of the Treaty for the Functioning of the European Union (TFEU), which establishes solidarity mechanisms in emergency situations, and Article 80 TFEU, which sets out the principle of solidarity in the area of border checks, asylum and immigration. The former is one of the novelties introduced by the Lisbon Treaty and thus is an article which has not been put into practice before. It is important to note here that in order to persuade the Member States, the European Commission used arguments about solidarity and burden-sharing in the summer of 2015. The choice of arguments is crucial because it could have invoked the obligations of EU Member States to uphold the human rights of migrants and asylum seekers. This was a missed opportunity for the EU to signal its commitment to human rights, precisely on the eve of its accession to the European Convention of Human Rights. A clear and explicit legitimization of the quotas as emerging from the EU's human rights obligations would strengthen EU's normative position globally. The preference for using arguments which resonate with solidarity and burden-sharing is a strategic choice for EU and one which proved successful in September 2015 when the Member States agreed to the quotas. This is because the EU has better developed legal competences on mechanisms of internal burden sharing, while the EU's competences in the area of human rights apply only externally, in relations with third countries.

4. A common list of safe countries

This measure seeks to facilitate the return of migrants who do not qualify for asylum to 'safe countries'. The measure presupposes that the 28 EU Member States agree on a common list of countries considered 'safe', to which failed asylum seekers can be returned. Approximately half of those arriving in Europe are Syrians, Eritreans, Afghans and Iraqis, all of whom have high asylum acceptance rates. Asylum seekers from other countries tend to have much lower rates of successful applications and a good proportion of them are ultimately qualified as failed asylum seekers or undocumented migrants. In order to tackle this problem, the Member States and the Commission have intensified their collaboration on returning these people to their

countries of origin or countries of transit. While voluntary return has been on the European agenda for some time and the Return Directive 2008/115/EC has been transposed into national legislation in all the Member States, countries are demanding further assurances and new procedures to speed up the return. To achieve this, the Commission has tabled a proposal to have a common EU list of safe countries of origin to which migrants could be returned faster and following fewer checks than migrants coming from other countries. For example, given the low acceptance rates of asylum claims for migrants from the Western Balkans, these countries are most likely to be put on the common list.

Until recently, some Member States have been reluctant to sign up to a common list of safe countries, while others declined from the start to the creation and use of such a list. Of the 28 member states, only 15 are prepared to work with a list of safe countries of origin, with the remaining Member States reviewing applications on a case-by-case basis. From the perspective of human rights norms, a list of safe countries of origin – be it European or national – is problematic. What it does is to introduce discrimination between migrants who come from countries which are on the list and those who come from countries which are not. In effect, those whose country is not on the list enjoy more safeguards when claiming asylum, while those whose countries are on the list see their chances drastically reduced because of their origin rather than because of their individual circumstances.

Furthermore, it is not clear whether the costs of putting together a common list of safe countries and persuading all the Member States to use it is matched by its benefits. If such a list were in place, it would serve to help return only a small number of migrants. The composition of the recent inflows shows that the vast majority of migrants come from Middle Eastern countries— Syria, Afghanistan and Iraq as mentioned above – none of which is on any existing list of safe countries.

5. Readmission and incentivising stricter border controls in origin and transit countries

The fifth proposed measure is to strengthen cooperation with third countries in order to ensure readmission and to incentivise tighter border control in countries of origin and countries of transit. Extending partnerships with countries of origin and transit has been part of the EU's strategy to develop durable solutions to migration. At the Valletta Summit on Migration in Malta in 11–12 November 2015, African leaders were invited to be part of the EU's solution

to the recent crisis. In exchange for their cooperation with EU Member States and access to a generous fund of EUR 1.8 billion from the newly created Emergency Trust Fund for Africa, African leaders committed to readmit migrants, address the root causes of undocumented migration and displacement, protect the rights of migrants and asylum seekers, prevent and combat smugglers and improve return. Similarly, the deal with Turkey is complemented by a fund of EUR 6 billion. What stands out as problematic here is ensuring that once entrusted to third countries, the rights of asylum seekers and migrants are guaranteed. Violations of migrants' human rights, including those of unaccompanied minors, have been documented in return practices (Barbulescu and Grugel, 2016). Despite the fact that third countries are financially incentivised to implement human rights, there is no mechanism to monitor or, if needed, to sanction the use of the funding mentioned above by the African states and by Turkey. The EU would use of the existing procedures established in the negotiation of EU membership with Turkey and the Rabat Process, the Khartoum Process and the EU-Africa Strategy with African countries.

Some Member States have expressed the desire to extend partnerships with third countries to include offshore centres to process asylum claims. The Action Plan agreed on 11–12 November 2015 at the Valletta Migration Summit which accompanied the deal with the African states mentions the possibility of creating such centres. If the centres materialise, they fall short on delivering an effective solution, because only 10 percent of those entering the EU in recent years have come from African countries, while the majority them originate from Middle Eastern countries. The EU has weaker diplomatic relations with these countries has had little success in convincing them to join partnerships similar to those offered to the African countries. Furthermore, it is more challenging for the EU to guarantee the protection of migrants' and asylum seeker rights in centres far from its reach. In the interview the author conducted, the UN Rapporteur for the Human Rights of the Migrants (2015) had serious concerns about who would take responsibility for complying with human rights regulations in such centres: 'Who does the arrest? Is it the Libyan police, is it the Tunisian police? And how are they detained before getting to the offshore detention centres? How long will it take until they reach the detention centres? Who will staff the detention centres? What type of mechanism will there be put in place? Are the detention conditions what Europe wants? And it will be extremely costly because you will have to ship all those Europeans there in order to staff the centres in order to process applications and you have to build processing centres because I do not think that there

are any facilities out there. In my mind [this is] “an inefficient solution” because people will avoid it at all costs’.

Conclusions

The current humanitarian and migration crisis tests the limits of the EU’s commitment to human rights norms and its capacity to act as a political union of 28 countries capable of offering credible and common solutions. This profile has reviewed the measures recently introduced by the EU to tackle the crisis and discussed the extent to which they uphold human rights norms to which the EU and the Member States have signed up. On one hand, a rapid and unprecedented expansion of the EU’s role in the area of migration and asylum can be observed in the course of less than a year – April 2015 to May 2016. Since the start of the crisis, a new European Agenda on Migration has been proposed and six EU summits on migration have brought together representatives of the EU and national leaders from the Member States and third countries (Turkey and African countries) to discuss new strategies to manage migration. In the course of these summits, a set of five measures were adopted: (1) improving search and rescue missions in the Mediterranean and the Aegean in order to prevent loss of human lives at sea; (2) initiating military intervention to tackle networks of smugglers; (3) introducing resettlement and relocation quotas to alleviate pressure on the Member States who serve as entry points (Italy, Greece and Hungary) and from the countries neighbouring Syria (primarily Turkey); (4) creating a common list of safe countries to facilitate and speed up the return of failed asylum seekers and undocumented migrants; and finally (5) strengthening cooperation with countries of origin and transit to readmit migrants and to tighten border controls. This profile has highlighted some of the problems that these measures pose from a human rights perspective. Whether the EU will be able to respond to the unfolding crisis by providing international protection to those in need while simultaneously securing its external borders will be a yardstick by which to judge its human rights commitment. In its response to the current migration crisis, the EU and the Member States have demonstrated a preference for utilitarian rather than humanitarian arguments.

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