

What demands EU law to assist and integrate refugees and asylum seekers?

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I. Refugees and asylum seekers in national(istic) perception and international law

1. Migration and national sovereignty

“The EU demands too much from the Member States, when it comes to support refugees and asylum seekers”- such view is widespread among many EU Member States’ governments; this perception corresponds with the prevailing thoughts of most EU citizens in all EU countries. They feel uneasy about EU- and international law, as the states by virtue of their sovereignty and as democracies should be free to decide to take refugees and asylum seekers and if so, how many and under which conditions. If democracy is alleged, it is supposed that the citizens shall have the last say about the composition of the population living in a country.

Under the auspices of international and EU law it is, however, a misrepresentation, that migration issues are strict and exclusive national ones. Also the protection of migrants does not fall in the realm of national discretion and generosity. Thus, under international and EU law a host state cannot decide freely on whether, to which extent and under which circumstances refugees or asylum seekers should be accepted and welcome, because both international and European law lay binding legal obligations on the states¹. Thus, the alleged position is to be rebutted, as states are not islands existing in an isolated world and, hence, marooned, but as more or less small geographic entities surrounded by their neighbour states and as members of EU and UN caught in limbo of these organisations. These organisations give not only rights to their members, but they impose to the latter also duties.

¹ Guy S. Goodwin-Gill, The international law of refugee migration, in Qasmiyeh/Loescher/Long/Sigona (Eds), The Oxford Handbook of Refugee and Forced Migration Studies, Oxford University press, 2014, 36 et sequ.; ibid, The Refugee in International Law, Oxford (Clarendon), 1983; James C. Hathaway/Mireille Foster (Ed.), The Law of Refugee Status, Cambridge University Press, 2014.

It is noteworthy that refugees and asylum seekers have an international status - established and directed towards their protection under international law. This status makes the states responsible and within the EU this responsibility falls upon EU legislation², it establishes rules for their Member States. The EU is not an alien force, but stands for the Member States in their entirety. If the EU demands to assist and integrate refugees and asylum seekers, this means albeit to comment on the international commitments emerging for each Member State from international human rights. These international human rights laws to protect refugees and asylum seekers create obligations for states. They are to be unveiled and depicted as they make all states committed as to refugees and asylum seekers. In this view, EU rules determine how the Member States have to concur with their own obligations to the vulnerable groups, upon which they agreed under international law.

2. Refugee and asylum seeker - an international Status

The status of a refugee or asylum seeker is neither to be determined, nor was it ever established by national law, but this status was created and is defined by international law³. Refugees and asylum seekers are staying and living outside their state of origin and are unable to return therein or to avail themselves due to the persecution (or encounter the well-founded fear thereof) they are exposed to as to their race, religion, nationality, membership of a special social group or political opinion⁴. They are vulnerable groups, as they are deprived of human rights by their state of origin. The status of a refugee or asylum seeker is constituted by the lack of an adequate human rights' protection, which ticks along in their state of origin⁵. Due to this deprivation international law fills the gap in human rights' guarantees and protects these groups specifically!

International human rights are elaborated above all in the Geneva Convention on Refugees⁶. It endows refugees and asylum seekers with the human rights, they deprived of in their country of origin. Such acts of national legislation or administration violate the international human rights' legislation. As to the lack of available or accessible protection under the law of the state of origin international guarantees gain an edge on the fundament of a human

²Clayton/Sawyer/Toner/Fifth/ Wray(Eds.), Immigration and Asylum Law, Textbook, Oxford University Press, 2014(6th edition), p.138 et sequ.;Huber/ J. Eichenhofer/ Endres de Oliveira ,Aufenthaltsrecht, 2017 (1.Auflage), Kap. 4

³ Guy S. Goodwin-Gill, N.1 , 36-39; *ibid.*, The Refugee in International Law, Oxford (Clarendon),1983; S. Goodwin –Gill/Jane Mc Adam, The Refugee in International Law, Oxford University press , 2011 (3rd edition),47 et sequ. p. 47 et sequ. James C. Hathaway/Mireille Foster (Ed.), N.1, 21; Megan Bradley, Refugee Repatriation, Responsibility, and Redress, Cambridge University Press, 2013, 36 et sequ.

⁴ Guy S. Goodwin-Gill, N.1 ,38

⁵ *Ibid.*

⁶ Refugee Convention Geneva 28th July 1951, in force 1954,189 UNTS 150

rights' legislation, which is about embedding national human rights into an international order.

3. International human rights' guarantees and national politics

International human rights' guarantees are neither overblown, nor do they pay a lip service, but establish under international law individual human rights, which should become observed, respected and effectuated in and for the international sphere: In the same way as constitutions do under domestic law, at the same token international human rights impose duties for the international community, which is characterised as the community of sovereign states.

Also the international refugee law implements "the obligation of states and which are intended to ensure that no refugee in search of asylum is penalised, expelled or refouled, that every refugee enjoys the full complement of rights and benefits to which he or she is entitled to and as a refugee and that the human rights of every refugee is guaranteed"⁷. International community is not only a legal space for unrestricted economic cooperation and exchange, but at the same time it imposes to all participating states commitments due to the broad range of human rights established in a great variety of international declarations, conventions and treaties.

As the Geneva 1951 Convention is neither self-executing⁸, nor international organisations dispose of an independent executive. Therefore, they cannot act without the support of their members – i.e. the states, which do form them. International organisations and international human rights' guarantees depend in their efficacy on the support of each state of this organisation. This clue explains that states must take part in the global task to assist refugees and asylum seekers. The Geneva Refugee Convention 1951 "remains quite 'state-centric', in the sense that it represents undertakings and obligations, agreed between the parties, to respect, protect, or accord certain rights and benefits"⁹.

II. EU law and Migration of Third States' Nationals

1. EU law and Migration

Article 3 para. 3 of the Treaty of the EU (TEU) provide for that the EU has to create the "Single Market". The latter is about the establishment of a transnational economic order, in which the market assumes the form of a

⁷ Guy S. Goodwin-Gill, N.1, 36.

⁸ Ibid.,40.

⁹ Ibid., ,44; *ibid/* MacAdam, N.3,54 et sequ..

transnational economic and legal institution. The latter is built upon the four fundamental freedoms. These are the freedoms of goods, persons, services and capital established in a transnational legal and economic setting. The “Single Market” guarantees producers, distributors, workers as self-employed persons and consumers to execute transnational economic activities without any limitation by the law of one Member State and any discrimination, based on nationality.

As Article 3 para. 3 of the TEU clearly illustrates, the Single Market is much more than an economic project. It intends to increase production to achieve social goals, such as full employment, social justice, a fairer distribution of income and wealth and the improvement of living or working conditions for the many and not only for the few! This gives the EU and its Single Market perspective an internal direction and prospect with a very strong social policy component.

In this internal perspective the EU accepts and facilitates labour – driven migration in the context of the guaranteed freedom of movement for both the self-employed as employed persons and the goods and services providers, which can move freely within the EU, without being hindered in doing this by the legislation of any Member State. So, since the very beginning of EEC law internal migration was a topic of priority within EEC law.

2. Internal and external Migration

1987 the ECJ held¹⁰ that external migration is not a matter of European law. But after the primary legislation underwent by the Maastricht and the Amsterdam Treaty¹¹ a deep revision, the current primary law provides in article 79 of the Treaty on The Functioning of the European Union (TFEU), the EU is endowed with a wide range of legal competencies to regulate the status of third- country-nationals.

This new field of activities coincides with the freedom of movement introduced by the Schengen system in 1990¹² transformed the EU into an Area of Freedom, Security and Justice (AFSJ). At that time the majority of the Member States agreed on abandoning the previous system of border controls and replacing it by a European Border Regime, with other words: a system which allows each individual to cross the intra EU- border without any personal control. Since that time the external migration became an issue of

¹⁰ ECR 1987, 3245 (Germany./ Commission)

¹¹ Clayton/Sawyer/Toner/Fifth/Wray(Eds.), N.2, p.138 -145.;Huber/ J. Eichenhofer/Endres de Oliviera,N.2, Kap. 4 A 2.

¹² Clayton/Sawyer/Toner/Fifth/Wray(Eds.), N2,145-150

and for EU- legislation. Under such system one Member States' "third country nationals become those of the whole unified territory".¹³.

3. How the EU made use of these competences and what it matters for the Member States

When summarizing the legislative achievements general rules are identified. They deal with the access to a EU Member State in the context of the EU visa laws¹⁴ , the Directive 2003/109¹⁵ concerning the status of third-country nationals as long-term residents in one of the EU Member States and the Directive 2008/115/EC¹⁶ on the returning of third-country-nationals, who do not have a right to reside in one of the Member States.

In order to conserve the family unit and in this respect a fundamental human right of private and family life Directive 2003/86/EC¹⁷ on family unification was enacted. In the context of work a plethora of directives are to be noticed: Directive 2005/71/EC on the access to employment for researchers¹⁸ and Directive 2009/50/EC for highly qualified personnel (Blue-Card –Directive)¹⁹ are integral parts of the EU migration policy, which to the same degree as establishing rights to third country- nationals it imposes burdens for the Member States, to make these rights effective in each Member State.

The case law of the ECJ can at the same time showcases that these EU rules definitely matter also under national law. As the EU provisions establish palpable rights for third country nationals, which are to be protected by the Member States. In the context of the EU Visa Code the Court held, that there is no right for third country nationals to lodge an application for a humanitarian visa outside the territory of one Member State by contacting an embassy²⁰.

Further limitations exist when it comes to make a third country national return because of his/her illegal status of residence. The Return Directive makes some restrictions .A Member State is bound to prove that the person pose a risk to public policy. Therefore, it is not enough, that the resident is only suspect or even convicted for a crime²¹; likewise, before a forced return is permitted, the chance for voluntary return is to be given, and a preliminary

¹³ Elspeth Guild, in Guild/Harlow(Eds), Implementing Amsterdam: Immigration and Asylum law in the EC law, Amsterdam 2001,Oxford (Hart), 90

¹⁴ Community Code on visas (Regulation(EC) Nr. 810/2009 of 15.9.2009, O.J. L 243/1)

¹⁵ O.J. of 23.1.2004 L 16/44

¹⁶ O.J. of 24.12.2008 L 348/98

¹⁷ Directive 2003/86/EC

¹⁸ Dir. 2003/3/EC;2005/71 EC (Researcher).

¹⁹ 2009/50/EC (highly qualified personnel) "Blue Card".

²⁰ ECJ -7.3.2017 –C- 638/16 PPU, ECLI:EU:C:2017:173(X and X)

²¹ ECJ – 11.6.2015 – C- 554/13 ;ECLI:EU:C:2015:377 (Zh.und O).

right of being heard before being sanctioned is to be respected by each Member State²². An illegal resident, who is committed to leave the EU Member State, but suffers from a serious disease, is not obliged to leave the country as long as the illness persists, but this country is obliged to deliver to an illegal resident emergency health care and essential treatment of the diseases²³.

III. Status and rights of asylum seekers and refugees under EU law.

1. Legal Sources

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011²⁴ on "standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted" determines the central status of asylum seekers and refugees in current EU-law²⁵. The Directive strives to establish the Geneva Convention as the legal basis and backbone of EU law²⁶.

The Directive lays down standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection-granted (Article 1). It shall erect a Common European Asylum System. The Directive ensures common criteria for the identification of persons genuinely in need of international protection a minimum level of benefits is available for those persons in all Member States (Recital 12).

The approximation of rules on the recognition and content of refugee and subsidiary protection status should also help to limit the secondary movement of applicants for international protection between Member States, where such movement is purely caused by differences in legal frameworks (Recital 13). The Directive is not about harmonising the law of the Member States, but on safeguarding a minimum threshold of rules and principles, which are to be respected by the Member States in their entirety.

²² ECJ-11.12. 2014 -C-249/13, ECLI:EU:C:2014:2431 (Boudjlida)

²³ ECJ-18.12. 2014 -C-562/13, ECLI: EU:C:2014:2453 (Abdida)

²⁴ O.J.20.12.2011 L 337/9

²⁵ Previous rules are to be found in Directive 2004/83/EC 2005/85/EC; further rules on the Status contain Directive 2011/51/EU of May 11th, 2011, O.J. L 132/1.

²⁶ ECJ – 1.3.2016 – C- 443/14;C-444/14 ECLI:EU:C:2016:127 (Alo, Osso) Nrs. 28,30,41 et sequ.;ECJ-19.12.2012- C- 364/11, ECLI:EU:C.2012:826 No. 42(Mostafa El Karem Abden El Kott);Goodwin-Gill/Mc Adam, N.3,60

As to the social rights provided the Directive stipulates that “within the limits set out by international obligations, Member States may lay down that the granting of benefits with regard to access to employment, social welfare, healthcare and access to integration facilities requires the prior issue of a residence permit”(Recital 40). Additionally and “in order to enhance the effective exercise of the rights and benefits laid down in this Directive by beneficiaries of international protection, it is necessary to take into account their specific needs and the particular integration challenges with which they are confronted. Such taking into account should normally not result in a more favourable treatment than that provided to their own nationals, without prejudice to the possibility for Member States to introduce or retain more favourable standards”(Recital 41).

Directive 2013/33/EU²⁷ lays down standards for the reception of applicants for international protection. Applicants shall have a right to lodge a procedure of being acknowledged as an asylum seeker. They shall have a right to reside and be free of detention, unless there is no justification to be found in the procedure of assessment.

2. Status of refugees and persons entitled to subsidiary protection

Article 9 of the Directive 2011/95/EU defines the core characteristics for a refugee or a person entitled to subsidiary protection. Such status is the outcome of acts of persecution within the meaning of Article 1(A) of the Geneva Convention: Such an act must be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15 (2) of the ECHR; or be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner. To envisage serious harm is as to Article 15 of the Directive the key concept to define the status of a person entitled to subsidiary protection. Serious harm consists of the death penalty or execution, torture or inhuman or degrading treatment or punishment of an applicant in the country of origin or serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

Acts of subsidiary protection are determined as acts of physical or mental violence, including acts of sexual violence²⁸. Legal, administrative, police,

²⁷ of 26 June 2013 O.J. 2013 L180/96 from 29.6.2013, substantively changing the Directive 2003/9/EC of 27 1. 2003 O.J. L 31/18 from 6.2.2003

²⁸ ECJ-17.2.209 C- 465/07 ECLI:EU:C:2009:94 (Elgafaji,)

and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment which is disproportionate or discriminatory; any denial of judicial redress resulting in a disproportionate or discriminatory punishment as acts of a gender-specific or child-specific nature. The responsibility of Member States to examine an application for being acknowledged as an asylum seeker, refugee or person with a subsidiary protection is a matter of EU law and therefore is governed by the Rules of the EU²⁹. Also in the assessment on whether a person has the status of an asylum seeker or a refugee, the Member States are bound to observe international rules and standards. The Court held that members of the military personnel are included in the protection³⁰ and a “criminalisation of homosexual acts” constitutes an act of persecution, at least if the criminal sanctions are disproportionate and discriminatory³¹. Also in the context on whether the status of a refugee or asylum seeker is to be denied because of applicant’s involvement in terroristic attacks, the Member States are required to prove, that this allegation is based on facts and that the applicant has taken individual guilt by his/her actions contrary to the purpose and principles of the United Nations³². The protection comes to an end, when the persecution is terminated³³.

Article 10 of the Directive determine elements , which are to be taken into account when assessing the reasons for persecution: e.g. the concept of race shall include considerations of colour, descent, or membership of a particular ethnic group; the concept of religion shall include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from those uttering , and , the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State; further provisions relate to assess discrimination on grounds of belonging to a social group, sexual orientation, gender related aspects or political opinion.

Before each return decision the third –country national has a right to be heard and of access to the UN institutions³⁴. Under the right to be heard each individual is allowed to express her/his point of view on the legality of her/his

²⁹ ECJ – 16.2.2017 – C- 578/16 PPP,(C.K., H.F., A.S.)

³⁰ ECJ –26.2.2015– C-462/13 ECLI:EU:C:2015 :117 (Shepherd)

³¹ ECJ – 7..1.2013 – C- 199/12 C-201/12 ECLI:EU:C:2013:720 (X,Y)

³² ECJ -31.2.2017 – C- 573/14 ECLI:EU:C:2017:71(Lounani); ECJ – 9.11.2010 -C-101/09; C-57/:EU:C:2009:285 (B, D)

³³ ECJ -2.3. 2010- joined Cases C-175/08 C-176/08 C-178/08 C-179/08 ECLI:EU:C:2008:364(Aydin Salahadin Abdulla ,Kamil Hasan ,Ahmed Adem, Hamrin Mosa Rashi ,Dler Jamal).

³⁴ ECJ – 17.6.2010 – C- 31/09 ECLI:EU:C:2010:351(Bolbol)

stay; this right implies a right of recourse against a negative decision; but it does not imply the right that the costs of an assistance is to be borne by legal aid³⁵ or the recourse should have a suspensory effect³⁶.

3. Social rights

A wide range of social rights are to be guaranteed by the Member States. They find their justification in article 2 para. 1 of the International Covenant on Civil and Political Rights which gives all residents of a State the right to equal treatment³⁷. On this basis the states shall ensure that family unity can be maintained (Article 23). As soon as possible after international protection has been granted, Member States shall issue to beneficiaries of refugee status a residence permit which must be valid for at least 3 years and renewable (Article 24). Member States shall issue to beneficiaries of refugee status travel documents for the purpose of travel outside their territory unless compelling reasons of national security or public order otherwise require (Article 25). Member States shall authorise beneficiaries of international protection to chase work and engage in employed or self-employed activities subject to rules generally applicable to the profession and to the public service, immediately after protection has been granted.

They shall ensure , additionally, that activities such as employment-related education opportunities for adults, vocational training, including training courses for upgrading skills, practical workplace experience and counselling services afforded by employment offices, are offered to beneficiaries of international protection, under equivalent conditions as nationals (Article 26). The Member States shall grant full access to the education system to all minors granted international protection, under the same conditions as nationals. They shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third- country nationals legally resident (Article 27).

Member States shall ensure equal treatment between beneficiaries of international protection and nationals in the context of the existing recognition procedures for foreign certifications of professional abilities, certificates and other evidence of formal qualifications (Article 28). Social welfare is guaranteed by the Member States shall ensure that beneficiaries of international protection receive, in the Member State that has granted such protection, the necessary social assistance as provided to nationals of that Member State (Article. 29) Member States may limit social assistance

³⁵ ECJ – 11.12.2014 – C- 249/13 ECLI:EU:C:2014:2431 (Bandjlida)

³⁶ ECJ –17.12.2015 – C- 239/14 ECLI:EU:C:2015:824 (Tall)

³⁷ Guy S. Goodwin-Gill, N.3.

granted to beneficiaries of subsidiary protection status to core benefits which will then be provided at the same level and under the same eligibility conditions as nationals. The same rule apply as to health care (Article 30), including treatment of mental disorders when needed, to beneficiaries of international protection who have special needs, such as pregnant women, disabled people, persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence or minors who have been victims of any form of abuse, neglect, exploitation, torture, cruel, inhuman and degrading treatment or who have suffered from armed conflict. An illegal resident, who is committed to leave a EU Member State, but suffers from a serious disease, is not obliged to leave the country, but this country is obliged to deliver emergency health care and essential treatment of the illness³⁸; otherwise she/he might risk an inhuman treatment³⁹. Unaccompanied minors can expect a special protection .Member States shall take the necessary measures to ensure the representation of unaccompanied minors by a legal guardian or by an organisation responsible for the care and well-being of minors (Article 31).

Access to accommodation is guaranteed under equivalent conditions as other third-country nationals legally resident in their territories (Article 32). Member States shall allow freedom of movement within their territory to beneficiaries of international protection, under the same conditions and restrictions as those provided for other third-country nationals legally resident in their territories (Article 33). In many countries social welfare recipients are exposed to a residence requirements, as social welfare is paid by local entities; in this respect a residence requirement is a means to distribute asylum seekers and refugees among the cities and counties of states, which are expected to give social assistance to the needy asylum seekers and refugees. But the Court did not accepts such a restriction as it inflicts the right of free movement within a state which is as a fundamental right also to be secured for the asylum seekers and refugees⁴⁰.

In order to facilitate the integration of beneficiaries of international protection into society, Member States shall ensure access to integration programmes which they consider to be appropriate so as to take into account the specific needs of beneficiaries of refugee status or of subsidiary protection status, or create pre-conditions which guarantee access to such programmes (Article 34). Social rights are also guaranteed for asylum seekers under the Refugees' reception Directive. Special rights are provided for families, which are to be maintained during the duration of the administrative procedure (Article 12).

³⁸ ECJ – 18.12.2014 – C-562/13 ECLI:EU:C:2014:2453 (Abdida)

³⁹ Ibid., No. 50 et sequ.

⁴⁰ ECJ -1.3.2016 – C- 443/14; C- 444/14 ECLI:EU:C:2016:127 (Alo, Osso)

Rights for medical screening (Article 13), schooling and education of minors (Article 14), employment (Article 15), vocational training (Article 16) adequate material reception in the sense of an adequate living standard, including health care (Article 17, 18)⁴¹.

IV. Consequences for the Member States

All these rules are momentous for the Member States' policies. In juxtaposition with national legislation these rules can denounce many shortcomings in national legislation, which are to be outstripped to keep the latter in pace with EU and international requirements. The dispute on whether the establishment of a "fair world order", built on international human rights, can and should pave away the sovereignty of the states was always at stake when it comes to debate on international human rights⁴².

The protection of refugees, which are deprived from human rights by their states of origin, testimonies the necessity and the relevance of international human rights. To deny or neglect the consequences for the states would constitute a pitfall for both international and EU law.

In these days, when dealing with migration issues, national legislations tend to overdrive to combat burgeoning xenophobia. International law and EU law set limits to these efforts to reduce migrants' social rights in relation to the non-migrants, to make migration less attractive. Migrants' social rights are to be conceived as equal rights, as they are human and not citizen's rights.

⁴¹ Constanze Janda, *Migranten im Sozialstaat*, 2012, 286 ff..

⁴² Philip Alston, *The United Nations and Human Rights. A Critical Appraisal*, Oxford (Clarendon) 1992, 13; Clayton/Sawyer/Toner/Fifth/Wray, N.2 , 69.