

(In)humanity at borders

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Abstract

Subject of research: International migration is complex transnational phenomenon. In the context of migration, States have both sovereign rights and responsibilities. The precarious humanitarian situation at European's borders is creating what seems to be an irresolvable tension between the interests of European states to seal off their borders and the respect for fundamental human rights. This paper focuses on issue of the admissibility of limitation of human rights in order to protect international borders.

Purpose of research: Aim of the paper is to show that international borders are not zones of exclusion or exception for human rights obligations. States are entitled to exercise jurisdiction at their international borders but they must do so in light of their human right obligations – full respect for human rights for each migrant, also to those who are in irregular situation.

Methods: study of literature and international jurisprudence, analyze of legislative materials and other documents

Keywords: human rights, border control, Frontex.

Introduction

There was a period of heated debates on the migration process in 2015. The discussions were held not only in the scientific or political field but also in the media field. In September 2015 the whole world was shocked by the story of Osama Abdul Mohsen and his son. They fell down after being kicked by Petra Leszlo, a camera operator from the Hungarian TV station N1TV. The media eagerly published photos of border guards who turned their back on migrants asking for help. On the other hand the same media, just next to the shocking pictures showing human tragedy published, titles and watchwords that manifest enmity and hatred of migrants. Also a few headlines in Polish newspapers were: 'Refugee from Syria make demands!' or 'NO! For migrants.' The public debate has turned into a strife for better

arguments showing stronger words and more shocking pictures. It seems that the simple truth was forgotten – the central point of the discussion should be the human being values such as human dignity, life, security or freedom. The examples mentioned above have set up a few questions: Do migrants have any rights? Are states obligated to obey the rights? Are national borders zones where human rights are limited or forgotten?

1. Migrant or refugee?

The phenomenon of migration and refugee is currently one of the issues to be taken into account at the national and international level. Therefore defining a migrant and a refugee seems to be essential at this stage, especially now when it has become increasingly common to interchange the use of these terms. It may be highlighted that both terms have distinct and different meanings and, due to this, a different protection is granted by international law (Edwards, 2015). Detailed analysis of these terms is not the subject of this paper, however, it seems reasonable to analyse briefly the definitions.

For the purpose of this paper it was assumed that migration is defined as a crossing states border mobility. Any person that crosses the state border (with the exception of a person visiting for tourism, leisure and business) is considered a migrant. International Organization for Migration (IOM) strongly emphasises that to recognise someone a migrant is not dependent on one's legal status, causes and length of migration. Moreover, migration does not depend on the fact whether the movement is voluntary or compulsory (*Glossary on Migration*, 2011). It should be noted that there is no legal definition of migrant that is widely accepted by an international community, however, there is a common definition of a refugee.

Predominantly, a refugee is a migrant that, for certain reasons, has decided to leave a country of birth or residence. According to The Convention Relating to the Status of Refugee 1951 (Refugee Convention) and to The Protocol relating to the Status of Refugees 1967 (New York Protocol) a refugee is a person who, because of fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.

Lots of documents, addressed to the issue of refugees, have been adopted at forums of different international organizations of regional character, such

as African Union (AU), replacing the Organization of African Unity (OAU), and the Organization of American States (OAS). In 1969, OAU adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa. In the latter document the definition of a refugee is broader than in the Convention Relating to the Status of Refugee 1951. According to Article 1 of the OAU Convention, the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

A similar solution has been undertaken by the Organization of American States. In 1984, OAS adopted the Cartagena Declaration on Refugee. The definition is built upon the OAU but adds to it the threat of generalized violence, internal aggression and mass violations of human rights. Unlike the definition adopted in the refugee convention of the African Union, however, a refugee must show a link between herself or himself and the real risk of harm.

In Europe, for many years, there was neither any unitary refugee practice, nor regional binding standards that would complement or expand regulations from the Convention Relating to the Status of Refugee 1951. For this reason, the overall mechanisms of human rights protection have played an important role in protecting refugees’ rights (Kowalski, 2005, p. 199). The most noteworthy is the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (ECHR). This document, despite the fact that it refers to refugees’ rights on the general basis, has great importance for tackling issues.

Those definitions of a migrant and a refugee indicate the complexity of the terms. The issue of the protection afforded to the people is also very complex. Migrants’ rights are largely defined by the status that will be given to them and by the reasons underlying migration (Grant, 2005). In discourse certain terminology is used to categorize people who migrate. Some examples might be: “unaccompanied or separated children”, “migrants in irregular situations”, “smuggled migrants” or “victims of human trafficking”. It should be noted that contemporary mobility has very complex reality due to which it can be difficult to neatly separate people into distinct categories as people may simultaneously fit into several categories. Moreover, the category may change from one to another in the course of journey (*Recommended Principles and*

Guidelines on Human Rights at International Borders, 2014, p. 3). However, regardless of the type of migration and the legality of a person's whereabouts on a specific territory, States are obliged to follow the international law regulations.

2. Migrants' rights – Freedom of Movement

An analysis of international law allows to indicate numbers of documents both, general and of a special nature, which establish some minimal standards for protection of all human beings. The specific instruments providing the basis for migration laws, policies and practice have been elaborated in a few branches of international law:

- 1) international human rights law,
- 2) international labour law,
- 3) international refugee law,
- 4) international maritime law.

All the above mentioned branches of international law establish some rights and obligations addressed to migrants. International maritime law might be an example. Within this law (except from the UN Convention on the Law of the Sea 1982) there are many instruments adopted under the auspices of the International Maritime Organization (IMO). These include a number that are of particular relevance to the rights of migrants: the International Convention for the Safety of Life at Sea 1974 and the International Convention on Maritime Search and Rescue 1979. It is also worth mentioning, that there are a number of non-binding documents, such as the Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases 1997 (revised 2011) (*Guidelines on the Allocation of Responsibilities to Seek the Successful Resolution of Stowaway Cases*, 1997), Interim Measures for Combating Unsafe Practices Associated with the Trafficking or Transport of Migrants by Sea 1998 (revised 2001) (*Interim measures for combating unsafe practices associated with the trafficking or transport of immigrants by sea*, 2001), and Guidelines on the Treatment of Persons Rescued at Sea 2004 (*Guidelines on the Treatment of Persons Rescued at Sea*, 2004).

In this paper attention has been mainly focused on the international human rights law. The obligation to respect and to protect human rights is consistent in many points with migration. Although international regulations (within the international human rights law) do not refer *expressis verbis* to

migrants, their rights are fully protected (*Recommended Principles...*, 2014, p. 3). The primary right that arises in the context of migration is a freedom of movement. Some authors present in their thesis that the right to choose a resident country constitutes other freedoms (Kędzia, 1991, p. 443). The freedom might be understood very widely (Zięba-Załużka, 2013, p. 35). According to article 13 of the Universal Declaration of Human Rights:

”1. Everyone has the right to freedom of movement and residence within the borders of each State.

2. Everyone has the right to leave any country, including his own, and to return to his country.”

The International Covenant on Civil and Political Rights (ICCPR) 1966 in article 12 also refers to the freedom of movement. The latter is composed of two aspects: internal and external. The internal aspect refers to the freedom of movement within home country (art. 12.1). The external aspect refers to the freedom of movement between different countries (art. 12.2), and comprises right to leave one’s own country and, on the other hand, right to enter one’s own country. It should be mentioned that both internal and external aspects of the freedom of movement are connected with different groups of entities and different values. In addition to the freedom of movement, the United Nations Human Rights Committee adopted in 1999 CCPR General Comment No. 27, it was highlighted that this freedom is an indispensable condition for the free development of a person. Moreover, it interacts with several other rights enshrined in the Covenant.

Freedom of movement has been also included in a number of special international acts. As the examples:

- ⇒ The Convention on the Rights of the Child (UNCRC) 1989 (art. 10),
- ⇒ The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990 (art. 5, 8, 39),
- ⇒ The Convention on the Rights of Persons with Disabilities 2006 (art. 9, 18).

Also regional instruments of human rights have provided the freedom of movement: art. 12 of the African Charter on Human and Peoples’ Rights or art. 2 of Protocol No. 4 to the Convention of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and the First Protocol. In Europe,

except of the European Convention of Human Rights, development of freedom of movement is important and it is highlighted in the Charter of Fundamental Rights of the European Union as well. According to article 45(2), freedom of movement is not limited to EU citizens, but it may be granted, in accordance with the Treaties, to nationals of third countries legally resident in the territory of a Member State.

3. Human rights = migrants' rights

As mentioned above, despite the fact that international human rights law does not refer directly to migrants, the latter fully enjoy all freedoms stated by human rights regulations. Such a conclusion can be based on the universality of human rights. Each and every human being, regardless of a legal status, has some natural rights which must be obeyed always (every time and everywhere). Protection of human rights of a migrant is a matter not only of law but also of morality (*Migration, human rights and governance*, 2015, p. 41). It is primary there to protect migrants' dignity in every situation, also (or particularly) in irregular situations. Limited framework of the paper does not allow to analyse deeply all rights and freedoms, as well as all regulations. Nevertheless, it is worth to mention some of them.

Migrants, as all human beings, fully enjoy all rights and freedoms guaranteed by ICCPR and International Covenant on Economic, Social and Cultural Rights (ICESCR). Moreover, they are protected by Convention on the Rights of the Child, The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as by The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED). According to art. 2 of The United Nations Convention against Torture each State shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. Furthermore, no exceptional circumstances whatsoever, whether in a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture. It is worth to mention also article the 1 of ICPPED, which establishes the absolute ban for enforced disappearance, and obligation to ensure that enforced disappearance constitutes an offence under criminal law (art. 4).

Together with general instruments of human rights law it is possible to indicate the international instruments that guarantee special protection for

some categories of migrants. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families may be a good example. The main purpose of this Convention is to set a special protection of migrant workers by adopting appropriate standards and regulating responsibilities of States (by sending and hosting migrants). The document sets right of all migrant workers, both legal or illegal.

Some special instruments have also been adopted on the forum of Council of Europe and the European Union. Migrants, staying on the territory of any state-party of ECHR, can fully enjoy rights and freedoms set by the Convention. Additionally, under some special circumstances, migrants may fall under the scope of the provisions of the European Social Charter. In Europe migrants can also enjoy their rights under following documents: the Convention on Action against Trafficking in Human Beings, the European Convention for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment, the European Convention on Extradition, the European Convention on the Suppression of Terrorism and the European Code of Social Security.

Limited framework of the paper does not allow to analyze deeply specific rights and freedoms guaranteed by conventions mentioned above. However, the principle of equality and prohibition of discrimination deserve special attention. It is commonly accepted that no one can be discriminated because of race, colour, gender, sexual orientation, language, religion, political opinion, national extraction or social. The prohibition of discrimination is guaranteed, among others, by Articles 2.1 and 26 of the ICCPR, Article 14 ECHR, Article 1 of Protocol No. 12 ECHR, Article E ESC, Article 7 ICRMW.

The prohibition of discrimination and other rights guaranteed by international human rights law are independent of the whereabouts of the migrant, they must be respected at all times and in every place, also at national borders.

4. National borders – limitation for human rights protection?

FRONTEX

Establishing borders and fencing territories seems to be a natural and obvious process (Mikołajczyk, 2015, p. 168). It is entitled with the desire of States to guarantee themselves exclusive rights and control over a certain area (Jagielski, 1995, p. 14). National borders perform several functions. Firstly,

they define the State's territory. Secondly, national borders are connected with territorial sovereignty in both aspects: internal and external. They define the territory where there is a possibility of interference of external actors which can be limited or excluded. Moreover, national borders define territorial jurisdiction of states and range of activities undertaken by state's authorities (Balawajder, 2003, p. 44-45).

In the last few decades a number of new states has significantly increased and as a result amount of national borders has significantly increased (Mikołajczyk, 2015, p. 168). For this reason, new challenges at a border management level have appeared. Especially when it comes to control peoples' mobility and protect rights of people on move. Most countries in their national laws and constitutions undertake the responsibility to respect and to protect fundamental rights. They do not restrict their recognition of human rights to citizens or nationals only. Therefore, it should be accepted that these rights are applicable to everyone within the territory of the state or subjected to its jurisdiction which means also to people crossing (or staying) at national borders (*Migration, human rights...*, 2015, p. 41).

International law recognises everyone's right to movement. One should remember that the freedom of movement is not equivalent to the right to enter any country. It is not the state's obligation to allow someone to enter its territory either. The state has an exclusive right to decide who (and when) can do it. Consequently, the State has another exclusive right to define grounds for expulsion of a foreigner from its territory. This has been repeatedly confirmed by the United Nations General Assembly. According to resolution 61/165 of 2006 States have "sovereign right to enact and implement migratory and border security measures"¹.

Regardless of national law, national borders are not zones where international human rights law is limited or excluded. The State and all of its institutions (including those responsible for the border control) are obliged to exercise their jurisdiction in the light of human rights obligations (*Recommended Principles...*, 2014, p. 3). States are requested to promote and protect human rights and fundamental freedoms of all migrants, regardless of their status. Moreover, States have the duty to comply with their obligations under international law in order to ensure full respect for human rights of migrants.

Without any doubts a complicated issue arises when border control procedures and respect for human rights are combined. In 2015 year a mass

influx of migrants to external European borders has showed the difficulty and complexity of the problem. The year 2015 was unprecedented for the European Union (EU) as more than 1,8 million illegal entries, associated with an estimated one million individuals, have been noted. It is said that the situation was unique since World War II (Risk Analysis for 2016, 2016, p. 5). Last year the European States have recorded six more times the number of migrants reported in 2014 which itself was an unprecedented year. In January 2015 over 20,000 illegal detections were noted, while in the 2009–2014 the average number for this month was 4,700 detections (Risk Analysis for 2016, 2016, p. 8). In a very short period of time, thousands of migrants (with different background, nationalities and purposes) have arrived to external borders of the European Union. This was a new reality and experience for many European States. The States had to (and still have to) face new challenges, such as: widening of surveillance areas, growing the need for and the extension of search and rescue operations and the lack of facilities to receive and accommodate thousands of persons over a short time. And finally, the lack of expertise to detect nontypical travel documents, and difficulties in addressing fraudulent declarations of nationality or age (Risk Analysis for 2016, 2016, p. 8). All these problems may cause different types of abuses and unacceptable situations. Therefore, one question is very important at this stage: do States and institution controlling external borders fulfil the obligations under human rights law?

Most of the States-Members of the European Union have adopted a system of borders control which instead of the self-management of external borders recognizes a coordinated cooperation of various entities (Mikołajczyk, 2015, p. 171). The main entity is the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex). The Agency was established by the Council Regulation No. 2007/2004 in 2004. The main purpose of the Agency is to manage the cooperation between national border guards and to secure its external borders. Frontex operations aim to detect and stop illegal migration, human trafficking and terrorists' infiltration (Peers, Guild and Tomkin, 2012, p. 120). Notwithstanding, the international society has repeatedly criticized the Agency for the lack of respect for fundamental human rights. The authors of the critics were not only international non-governmental organizations² but also other EU agencies and bodies of other international organizations³.

Different questions were asked, mostly about the way that the European Union protects fundamental rights (including right to life, respect for human dignity, and non-refoulement rule) on its external borders. In 2011 the Human Rights Watch, in its report called Frontex “dirty hands of Europe” (*The UE’s Dirty Hands*, 2011). In this way the organization has expressed disapproval for Frontex’s activities regarding migrants on the coast of Greece in 2010-2011. Between November 2, 2010 and March 2, 2011 nearly 12,000 migrants entering Greece at its land border with Turkey were arrested and detained. The detention did not meet the minimum of human rights standards (*The UE’s Dirty Hands*, 2011).

Public criticism has brought to adoption of the Regulation No. 1168/2011 of the European Parliament and of the Council amending Council Regulation (EC) No. 2007/2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. According to the Regulation Frontex is obliged to fulfil all regulations of international human rights law, including Geneva Convention Relating to the Status of Refugees 1951 and international principles such as necessity and proportionality.

The obligation to respect and to protect human rights in all Frontex activities has been also included in the Frontex Code of Conduct for All Persons Participating In Frontex Activities and in the Frontex Code of Conduct for Joint Return Operation. First of the above mentioned Codes includes principles that can be brought to the following guidelines:

Know and respect law: international law, law of the European Union and national law.

1. Respect human dignity and fundamental rights of all human beings, regardless sex, race, language, religion, beliefs, age, disabilities or sexual orientation.
2. Inform migrants about their rights as well as instruments and procedures protecting their rights.
3. Respect ethical standards.
4. Fairness and impartiality in every undertaken action.
5. Inform proper bodies about any kind of abuses.

Furthermore, the cooperation between Frontex and The European Union Agency for Fundamental Rights is very important. Cooperation

arrangement between the European Agency for the management of operational cooperation at the external borders of the Member States of the European Union and the European Union Agency for Fundamental Rights was signed in 2010. Its main purpose is to strengthen the protection of fundamental rights in case of different actions undertaken at external borders of the European Union. The obligation to respect human rights was also highlighted in Work Programme for 2016 that was adopted on Frontex Consultative Forum on Fundamental Rights. One of the most important priorities for 2016 is to organize all Frontex actions with full respect for fundamental rights. What's more, the Agency is obligated to organise trainings on fundamental rights for its workers.

Legal regulations and proposals mentioned above are intended to ensure that all Frontex activities will be undertaken with full respect for fundamental rights of all human beings. However, recent events raised doubts about the effectiveness of these mechanisms. A few uncertainties appeared: are legal regulations followed in practice? or maybe legal regulations are only a trick that the European Union uses in order to reassure the public opinion? This and other doubts are caused, among all, by the agreement between the EU and Turkey that was signed in March 2016. European institution representatives ensured that the agreement would be accomplished with full respect for EU law and international law (*EU and Turkey agree European response to refugee crisis*, 2016). Time will show whether the EU fulfil its promises.

5. Conclusions

Migration is an integral part of the globalization process. Currently millions of people enjoy their freedom of movement. World leaders need to face an uneasy task – to ensure that migrations are carried with full respect for human rights. It must be guaranteed that fundamental rights are fully respected and protected at national borders. Despite all regulations, it is still a big issue that needs to be solved. Why is it still such a problem? There are few reasons. First of all, there is no reliable information and statistics about human rights violations at the borders. The lack of cooperation between different institutions controlling borders constitutes another difficulty. And finally, there are no clear regulations concerning the responsibility for potential violations.

As a conclusion there could be one general postulate – the primacy of human rights. This postulate contains three aspects:

1. The State should fulfil all its international obligations with good will and with full respect for human rights.
2. The State should ensure that human rights standards are a reference point during a border control.
3. The State should fulfil all its human rights obligations on the whole its territory, including borders.

National borders are not zones where human rights law are limited or excluded. Right to freedom of movement is not only a difficult problem to solve, but first of all, it is human right. A migrant, finally, is a human being whose dignity should be protected.

Summary

The year 2015 was unprecedented for European Union as more that 1,8 million illegal entries have been noted. In a very short period of time, thousands of migrants have arrived to external borders of the European Union. This new reality created tensions between the interests of European states to seal off their borders and the respect for human rights. States are entitled to exercise jurisdiction at their international borders but it must be done in the light of human rights obligations. States are requested to promote and protect human rights and fundamental freedoms of all migrants, regardless of their status. The obligations are addressed also to any bodies that control external borders, eg. The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union. National borders are not zones where human rights law is limited or excluded. Migrant is a human being whose dignity should be always protected.

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Endnotes

- ¹ The sovereign right has been also confirmed in following documents: UNHCR: Executive Committee on the International Protection of Refugees, Conclusion No. 97 (LIV) – 2003; *Amuur v. France*, ECHR, Application No. 19776/92, Judgment of 20 May 1996, para. 41.
- ² Examples: Amnesty International: *We Are Foreigners, We Have No Rights: the Plight of Refugees, Asylum-Seekers and Migrants in Libya*, 2012; S.O.S. *Europe Human Rights and Migration Control*, 2012; PRO ASYL: *The Truth Is Bitter, But It Must Be Told; the Situation of Refugees in the Aegean and the Practices of the Greek Coast Guards*, 2007.
- ³ Examples: Parliamentary Assembly of the Council of Europe: *Lives Lost in the Mediterranean Sea: Who is Responsible? Doc. 12895*, 2012; Committee on Migration, Refugees and Displaced Person. (PACE), *Frontex: Human Rights Responsibilities, Doc. 13161*, 2013; FRA: *Fundamental Rights at the Europe's Southern Sea Border*.