

ICJ's concerns and recommendations regarding the protection of human rights of refugees and other migrants in the EU

The ICJ is deeply concerned that the recent Home Affairs Council Conclusions from the meeting of 14 September 2015 failed to give priority to measures for effective international protection and re-settlement for refugees within the EU, and focused instead on a security agenda of border control and externalization of asylum policies to third countries. The ICJ is also concerned at proposals put forward by the Commission in its Action Plan on return, issued on 9 September 2015, as set out below. In this regard, the ICJ expresses the following concerns and recommendations:

1. The need for urgent protection measures and a truly common EU asylum system

If the European Union and its Member States are to be true to the EU's founding principles of respect for human rights and the rule of law, they cannot continue to ignore the urgent need for binding co-operative measures to accommodate asylum seekers through a common system, involving all Member States to receive significant numbers of asylum seekers. Such measures must be realistically related to the numbers fleeing persecution and serious violations of human rights, and to provide them with adequate reception conditions and effective access to international protection.

EU law already contains an emergency mechanism appropriate for this situation: the Temporary Protection Directive, which has been in place since 2001 but has never been used. This Directive sets out procedures for immediate and temporary protection in the event of a mass influx of displaced persons who are unable to return to their countries of origin. The ICJ calls on the EU institutions, in particular the European Council, to promptly activate this mechanism and put in place this procedure, at a minimum and as a first step for refugees coming from Syria. Effective protective measures should also be adopted to ensure protection for those fleeing other crises situations, including Eritrea, Ethiopia, Afghanistan.

The latest developments demonstrate once more that the present Common European Asylum System, filled with exceptions and derogations to accommodate national positions, is not fit to provide a truly common solution for refugees coming to Europe. A new effort towards common binding standards is needed. It has been clear for some time that the Dublin Regulation system, which requires asylum cases to be processed, in practice, in the first country of irregular entry within the EU, is inadequate to protect the rights of migrants and asylum seekers. The ICJ welcomes the moves towards an evaluation of the Dublin system by the Commission and the possibility to formulate proposals for its revision. Greater support for States at the borders of the EU, in particular Greece and Italy, is also needed to ensure safe and adequate reception conditions and effective asylum procedures, as well as adequate search and rescue operations at sea. Any new policy will need to also include consistent financial and capacity building resources for Western Balkans countries, which are facing an unprecedented situation.

2. Returns policy

A more stringent return policy, as set out in the Commission Action Plan on Return, will not provide an answer to the current situation, since the vast

majority of current arrivals in the EU are of people with sound claims for international protection. Most of these people simply have no safe place to which they can return. The ICJ stresses that any new expulsion procedures must respect rights to due process, the principle of *non-refoulement* and all other human rights obligations binding on EU institutions and Member States, including the right to an appeal that is suspensive of the expulsion decision.

Furthermore, under international human rights law, detention of migrants on entry or pending expulsion must be a measure of last resort, applied only where it can be justified as necessary in, and proportionate to, the individual's circumstances. The ICJ stresses that blanket policies of detention in order to facilitate returns are likely to violate international human rights obligations of EU Member States and the EU Charter of Fundamental Rights.

Finally, the ICJ considers that the Commission proposal for the agreement at an EU level of safe countries of origin for the purposes of returns, will need close scrutiny of the human rights situation in these countries to ensure that they can reliably be presumed not to put returnees at risk of violations of their human rights. For countries which can generally be considered to be safe, exceptions to the presumption of safety may need to be made for certain groups: for example LGBTI persons or those belonging to certain ethnic or religious minorities. Any list of safe countries of origin should be regularly reviewed and subject to an effective and fair procedure for the asylum seeker to rebut the presumption of safety.

3. Readmission agreements

The plans announced by the Commission, and welcomed by the Council, to focus on readmission agreements with a number of countries with extremely poor human rights records, are of serious concern. EU Member States returning migrants to these countries, without careful scrutiny of their individual circumstances in fair legal proceedings compliant with due process guarantees, would be in violation of the principle of *non-refoulement* and the right to an effective remedy.

The ICJ considers similarly problematic the centrality given by the Commission in its readmission agreements policy to clauses obliging the signatory country to admit nationals of other States who had been transiting through the country and then are subsequently expelled from EU Member States. The ICJ stresses that, even in the case some such countries can be designated as safe countries of origin for their own nationals or habitual residents, they cannot automatically be presumed to be safe for asylum seekers from other States. To be designated as safe for these purposes, a country's asylum system, its system of appeals from asylum decisions, its reception conditions and its laws and practices must be compliant with human rights and refugee law. This notwithstanding, the ICJ urges the EU institutions not to pursue this policy, which constitutes effectively an externalization of the Dublin system, which has been shown to be ineffective within the EU, and which the Commission has recognized needs urgent revision.

4. Protection of the human rights of migrants and refugees in Hungary

The ICJ is alarmed at measures being taken at national level in some EU Member States to push back or expel migrants, including refugees.

The legislative measures recently enacted in Hungary are of particular concern and warrant urgent investigation by the EU institutions to assess their

compatibility with States' obligations under the EU Charter of Fundamental Rights and principles of human rights and the rule of law.

The ICJ notes the declaration of states of emergency in several regions of Hungary, in response to increases in arrivals of migrants and asylum seekers. It stresses that certain rights, including rights to protection against *refoulement* to torture and ill-treatment, and protection against collective expulsions, are non-derogable. The present practices in Hungary include criminalization of irregular entry, a policy of systematic detention of migrants, fast-track asylum proceedings without due process guarantees or a right of appeal, and a policy of collective expulsion of all migrants having travelled through Serbia regardless of their country of origin. Such practices serve to impair or undermine the right to *non-refoulement* to face torture or other serious human rights violations, the prohibition on collective expulsions, and the right to asylum. They also have serious consequences for the rule of law, in particular for integrity and fairness of the justice system and for access to justice.

The severity and systematic nature of the human rights and rule of law violations threatened in Hungary under the new law, and associated operational measures, warrant urgent investigation to assess whether proceedings under article 7 TEU, under the Commission's Rule of Law Framework, should be launched. The ICJ urges all EU institutions to monitor the situation closely with a view to initiating such proceedings.