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Human Rights of Refugees and Asylum Seekers in times of pandemic: Challenges and Developments in Europe

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Abstract

The COVID-19 pandemic, apart from its nature as a public health crisis, revealed a human rights crisis in Europe, especially when it comes to the rights of refugees and asylum seekers. The European human rights system had to face conflicts between rights, a disproportionate impact and restrictions to rights and find answers within the legal and policy framework.

Introduction

The COVID-19 pandemic substantially impacts people, their health and human rights, while exposing the fragility of public health care systems - especially regarding populations on the move, in precarious situations, or under detention. In addition, the reality and consequences of displacement, persecution, ongoing violence and conflict, as well as severe humanitarian contexts have worsened due to the global health crisis. The mixed migration flows in Europe during the last years have led

to a complex situation when it comes to the exercise of the rights of asylum seekers and refugees, hampered by the pandemic, the functioning of the asylum systems and the implementation of international protection.

The access to asylum procedures, and, in general, the right to asylum has been challenged by violations of the principle of *non-refoulement* following border restrictions and other repressive measures. Simultaneously, the risk of sexual and domestic violence, human trafficking, or violence against children is enormous for these populations in challenging environments. The pandemic also includes a human rights perspective with the right to health and access to health facilities in reception centers or urban areas.

The violation of human rights norms and the person's safety is a reality, and challenges for both human rights and refugee protection are considerable. Could the European human rights system's responses be considered adequate towards the impact of these challenges on the human rights norms and their national implementation?

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This brief seeks to shed light on how the vulnerability of refugees and asylum seekers, given their circumstances, is interacting with States' pandemic-related restrictions and how existing violations can come to an end through good practices and referrals to the legal framework of European human rights law.

The vulnerability of refugees and asylum seekers

In a joint statement, the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), the Office of the High Commissioner for Human Rights (OHCHR), and the World Health Organization (WHO) declared that “in the face of the COVID-19 crisis, we are all vulnerable. The virus has shown that it does not discriminate - but many refugees, those forcibly displaced, the stateless and migrants are at heightened risk”¹. This unprecedented crisis has highlighted the inconsistencies of the human rights regimes towards the vulnerability of refugees and asylum seekers and their rights as deriving from European human rights law.

The vulnerability of these populations has been underlined by the Council of Europe Action Plan on Protecting Vulnerable Persons in the Context of Migration and Asylum in Europe (2021-2025), which came at the time of an unprecedented public health crisis increasing migration distress². According to the Plan, special measures are needed to ensure healthcare access and to include such concerned groups in disaster risk reduction and emergency responses.

Another aspect that may lead to creating profiles of refugees and asylum seekers is the “wave of abuse” that may develop in several countries due to national authorities' measures that must be held accountable³.

Vulnerability can be based on several factors, such as statelessness, age, gender, socio-economic status or the violence a person has experienced, such as survivors of human trafficking or torture.

Significantly, the vulnerability of stateless persons, invisible within the legal limbo they live in, is extreme in situations like this. Discrimination on the grounds of nationality or ethnicity is a factor that affects the right to health and worsens their precarious statuses before the national authorities.

The human rights destabilisation by the pandemic

Several human rights aspects face a risk of violation in times of emergency and during the enforcement of lockdown measures. These include the right to protection of health, the prohibition of torture or inhuman or degrading treatment, the right to liberty, taking into consideration the immigration detention, the access to information, the prohibition of discrimination, women's and children's rights, rights of persons with disabilities and rights of asylum seekers, migrants, and refugees, rights of older persons and LGBTI people. Freedom of assembly and privacy rights are also considered secondary rights to the right to health, physical integrity and access to care and health facilities. Economic and social rights can further be considered another field of human rights law affected by the pandemic. Besides, the socio-economic impact of the health situation on work and education is severe for refugees and asylum seekers, who in many States may not have obtained the totality of their rights. In any case, efforts to end poverty in all its forms everywhere, as one of the UN Sustainable Development Goals (SDGs), has been blocked by the pandemic-induced poverty crisis.

¹ OHCHR, The rights and health of refugees, migrants and stateless must be protected in COVID-19 response: A joint statement by UNHCR, IOM, OHCHR and WHO, 2021.

² CoE/Committee of Ministers, CM(2021)67-final, Council of Europe Plan on Protecting Vulnerable Persons in the

Context of Migration and Asylum in Europe (2021-2025), 1403rd meeting, 5 May 2021.

³ A. Donald & P. Leach, Human Rights and COVID-19: Forging Recovery After a Pandemic of Abuses?, *Verfassungsblog on Matter Constitutional*, 10 April 2021.

On the other hand, seeking asylum is a human right found in different instruments of international and European human rights law, such as article 14(1) of the Universal Declaration of Human Rights and article 18 of the EU Charter of Fundamental Rights. Because principles of non-refoulement, access to territory and asylum have been challenged by the borders management of different States, their interpretation in human rights case law before the European Court of Human Rights is of high importance, especially when considering the links between the vulnerability of refugees and asylum seekers and the challenges mentioned above.

The right to health in a pandemic context can further be found between an individual and social approach. There is a need to look after oneself, but also to ensure the health of the community by not spreading the disease and working together with one another. This pandemic showed that States and authorities need to be ready to identify such indicators of health conditions, to offer access to quality health facilities, to guarantee the right to health without exclusion and inequalities, and to not discriminate in prevention resources such as vaccination. No vulnerable populations, such as persons with disabilities, should be excluded or discriminated against in such a context.

The Council of Europe Committee on Bioethics has made several recommendations on equitable access to vaccination, drawing particular attention to persons in vulnerable situations having difficulties in accessing health services, such as persons with physical disabilities, mental health problems, persons living in poverty, persons without residence or with uncertain legal status (e.g. refugees, asylum seekers, and undocumented migrants)⁴.

⁴ CoE/Committee of Bioethics, COVID-19 and vaccines: Ensuring equitable access to vaccination during the current and future pandemics, 22 January 2021, p. 2.

Conclusion: European human rights law and the post-pandemic world

The world changes in the post-pandemic context and potential positive developments need to reach vulnerable persons, such as refugees and asylum seekers, to give prominence to a new approach already featured in the mechanisms of the European human rights legal system.

On the one hand, international cooperation between States, EU institutions and agencies (e.g. the European Union Agency for Asylum (EUAA), FRONTEX, the Fundamental Rights Agency), the Council of Europe, the Organization for Security and Co-operation in Europe, UNHCR, the United Nations Children's Fund, IOM, and the International Committee of the Red Cross must be a primary focus to design effective responses based on both best policy practices and principles. UNHCR and EUAA can monitor the impact of the pandemic on asylum procedures, while FRONTEX can control the implementation of fundamental rights in border zones and during returns. On the other hand, close local cooperation between national authorities, humanitarian actors in the field, such as refugee-specific NGOs and human rights institutions, can change the monitoring and compliance of human rights standards in policy execution. National authorities, for instance, should cooperate with UNHCR and IOM⁵ in order to develop fairer asylum and migration systems, as well as practical mechanisms of responses for the human rights of refugees and asylum seekers in times of crisis.

The European Committee of Social Rights underlines that in times of pandemic, during which the life and health of many people are under serious threat, guaranteeing the right to health protection is of crucial importance, and governments should take all necessary steps to ensure effective compliance. At the same time,

⁵ UNHCR, COVID-19 and mixed population movements: emerging dynamics, risks and opportunities, 14 May 2020.

it recalls that this provision complements the fundamental rights enshrined in articles 2 and 3 of the European Convention on Human Rights (ECHR)⁶. The 2020 annual report of the Group of Experts on Action against Trafficking in Human Beings (GRETA) is an example of the impact of the pandemic on the measures taken by States to tackle human trafficking⁷.

The European human rights system and law are under constant consideration and scrutiny. First, the main lessons learned focus on a good governance approach, with the recommendation that refugees and asylum seekers need to be empowered and not discriminated against during health crises. This means that the policy perspectives between forced migration and pandemics need to aim to erase inequalities and to take appropriate and immediate public health measures. This approach includes considering States' obligations, the derogation clause of article 15 of the ECHR as well as balancing relevant measures and restrictions.

Difficult times have not passed, as the challenges remain in the context of migration and asylum. The recovery from the COVID-19 era will probably be slow, but the main aspects to consider are equality and human rights. Post-pandemic responses and stability by the European human rights system form the human rights framework and can strengthen it.

⁶ ECSR, Statement of interpretation on the right to protection of health in times of pandemic, 21 April 2020.

⁷ CoE/GRETA, 10th General Report on GRETA's Activities covering the period from 1 January to 31 December 2020, April 2021.

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