

Fixing the Refugee Crisis: Holding the Commission Accountable

Cathryn Costello

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In his first State of the Union address on 9 September 2015, President Juncker gave the issue of the ‘refugee crisis’ top priority. Arrivals of refugees in Europe need not signal a political crisis, but when they (out of necessity) arrive in small overcrowded rubber dinghies on the shores of Greek islands in large numbers, the scale and visibility of arrivals generated the events by then already deemed a ‘refugee crisis.’ (Of course, most refugees remain in the immediate neighbourhood of conflict and in the Global South, Europe’s ‘crisis’ is political, rather than relating to its material protection capacity.) Reflective of its high political salience, the key players in the Commission’s response to the refugee crisis were not only Commissioner Avramopoulos, who held the asylum and migration portfolio, but also Vice-President Timmermans and High Representative/Vice President (HR/VP) Mogherini.

In that 2015 State of the Union address, Juncker famously asserted that his Commission would be ‘very political’. ‘Political’ in Juncker’s words, meant facing up to challenges, not just ‘business as usual’. Rather, it was ‘time to speak frankly about the issues facing the European Union.’ In spite of this apparent rhetorical and institutional commitment, our central argument is that the Commission’s weakness during the refugee crisis meant it underperformed not only when measured against the aim of being more ‘political’ (in particular if this means correctly identifying and dealing with the sources of real political problems), but even if we envisage for it a more modest technocratic role. We briefly assess aspects of the Commission’s as policy innovator; technical coordinator; guardian of EU legality and strategic intervener in EU litigation. Across these four dimensions, its actions were underwhelming.

Concerning policy innovation, the Commission’s response to the refugee crisis, even as outlined in Juncker’s State of the Union speech, was largely ‘business as usual’, with one notable exception. On the treatment of those arriving, Juncker emphasized, rightly, the implementation of existing EU legal standards that make up the ‘Common European Asylum System.’ Combatting smugglers and rescue at sea got a mention. So too did deterring spurious asylum applications, reaching for the tried and failed (and failed again) method of using lists of [safe countries](#) to that end. The most significant novel policy move was to propose the relocation of asylum-seekers (with strong claims, on the assumption they would warrant recognition as refugees) from Italy and Greece across the EU.

A [closer look](#) at the fate of EU-wide relocation reveals the limits of the Commission's competence and capacity. Relocation was innovative as it would run counter to the logic of the Dublin System, which had 'always been more ruse than reality.'¹⁾The CEAS – Where did it all go wrong?' in *The European Union as an Area of Freedom, Security and Justice* edited collection submitted by Maria Fletcher, Ester Herlin Karnell and Claudio Matera (Routledge 2017) 263-299, 264. Admittedly, it was derisory in scale when compared to the numbers arriving, and of limited practical significance in that the people arriving were (if they were able) at that point in time, swiftly relocating themselves to Member States with decent asylum systems. But its novelty lay in commitment to share responsibility for hosting refugees in a proportionate manner, using a distribution key (modelled on that employed within Germany) which took into account States' population, GDP, unemployment rate and existing refugee population.

In some ways, this Commission proposal could be seen as classic integration by stealth – a transformative policy move (distribution in fair shares) proposed on a limited scale. It seems that a coalition of political support would be found between between the apparently overburdened (countries of first arrival, mainly Italy and Greece, from where asylum seekers generally move on anyway) and the actually overburdened (Germany, Sweden and other Northern European Member States). The transformation impact would be in laying down a distribution key, which could have provided the basis to move away fundamentally from the deeply flawed and never fully respected Dublin system. The fate of the relocation proposal illustrates that no matter how strong the rhetoric of the 'political Commission', national politics win the day, both in framing the measure and determining its implementation outcomes.

The proposal was adopted, but in the face of strong political opposition, and an almost unheard of majority vote in the Council. The political opposition of the Visegrád states led them to bring a futile challenge to the CJEU. The relocation measure was widely portrayed not as a rational distribution system, but rather as 'Europe' imposing 'unwanted migrants' on Member States who were resisting an invasion of 'others'. That framing meant that relocation could garner support as a trial run for a viable alternative to Dublin. Most significantly, its implementation was a mess, and most asylum-seekers either left Italy and Greece under the own steam, or languished in squalid conditions there.

As regards implementation, [the Commission failed](#) as technical coordinator, in particular at the outset. The voluntary sector, much engaged at the national level with integration of asylum seekers was not included in the scheme. Instead it remained an inflexible, governmentally dominated mechanism, which failed to produce results proportionate to the money invested. Had the residential choices of asylum seekers and the capacities of the voluntary sector to find solutions been included, the system might have had some chance of success. Avramopoulos was at the heart of approving a system which was doomed to failure and brought the

Commission into disrepute as regards its capacity to deliver in the area of refugee protection.

With relocation a modest failure, operationally and politically, the Commission was effectively sidelined as national governments scurried to take whatever unilateral, bilateral or group measures that would stem arrivals, and meet domestic political demand for a 'response' to the crisis.

National border closures were the order of the day. Member States tried to impede the arrival of asylum seekers in their countries, they undermined their obligations under the Schengen Borders Code. The cascade of national border closures fell to the Commission to examine. Here, the Commission as guardian of EU legality has an important role. It appears it was supine in this context, effectively rubber stamping Member States' departures from the Schengen rules. It was arguably Avamopoulos' job to reject the excuses as obviously contrived and demand that the Member States either provide lawful reasons for the re-introduction of intra Schengen border controls or lift those controls immediately. He did neither.

The problems at the heart of the CEAS go well beyond an implementation gap. Built into the design of the CEAS, including Dublin, is the assumption that refugees mainly arrive irregularly. Due largely to EU visa policies and carrier sanctions, those who are most likely to be recognized as refugees are least likely to be able to board regular ferries and planes to travel safely. At the height of the refugee crisis, the regular ferry from Turkey to Lesbos cost 15 euros. Refugees were on rubber dinghies paying thousands of euros to smugglers for the same short trip. That facet of Europe's 'migration management' has been amped up. The EU took the fight against smugglers to the UN Security Council, and in a second 'policy innovation', convinced the Security Council to support a (modest) resolution enabling action to deal with the smuggling from Libya. In that instance, it has been Mogherini who has led the way in normalizing this futile fight against smugglers, including by military means.

The other main response to the refugee crisis is the EU-Turkey deal. This deal was quintessentially political, cobbled together by national governments and Turkey. Although the Commission was keen to claim it at one point, when the matter came for legal assessment, both the Council and Commission [disowned](#) the deal's EU origins. (Legally, if it was an EU measure it was probably illegal, having been adopted without following EU constitutional requirements.) The deal aimed to ensure the swift return of any irregular arrivals to the Greek islands, based on the assumption that Turkey was a 'safe third country', together with increased EU funding to support refugee protection in Turkey. The assumption that Turkey is safe for refugees, in particular for those readmitted, is [questionable](#) to say the least. As Spijkerboer has argued, its [real impact](#) is less significant than its perceived impact. Irrespective of its ethics or efficacy, it reflects high politics over the forms of legalised cooperation that one would expect the Commission to champion. In spite of its role

as guardian of EU legality, the Commission bowed to the political crisis, failing even to anticipate middle ways where some aspects of the deal could be regarded as part of EU law.

To deal with the irregular arrivals, the [Commission would run EU hotspots](#), not places, but ‘an approach’ ‘where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants. The work of the agencies will be complementary to one another.’ Here again, the Commission has failed to demonstrate its capacity as technical coordinator. Joint decision-making is an accountability challenge, one that has not been addressed. The most pressing concerns about hotspots concern lack of suitable accommodation, and squalid living and detention conditions. Indeed, at the time of writing this blog post, the UNHCR was once again [calling](#) for action to alleviate overcrowding and inhuman conditions in the Moria camp on Lesbos, a place name now synonymous with refugee protest, and indeed death from cold. Whether these manifest failings can be directly attributed to the Commission remains to be seen, but it has a coordinating role amid the cluster of actors who are clearly failing collectively.

Finally, we consider the Commission’s role as strategic intervener before the CJEU. As the crisis continued, two cases came before the CJEU which could have been decided differently, and would have brought about greater accountability and adherence to the rule of law in this domain. Would-be refugees sought to argue that their human rights under the EU Charter should be considered when Member States made visa determinations. The CJEU [rejected](#) this argument, finding the Charter inapplicable in a strikingly restrictive manner. Secondly, the legality of the EU-Turkey deal was challenged. The CJEU [held](#) it was not an EU act subject to judicial review, in spite of its rights-changing impact for individuals with clear rights under the CEAS. In both instances, the Commission could have supported the legally transformative outcome, and would thereby have ensured greater EU legal scrutiny and scope for transformative policy change in these domains. In contrast, it seems that it supported the Council and governmental submissions. It is difficult to be sure about the internal motivations here, but certainly the path of policy transformation through the Court has not been pursued. In past eras, many Court rulings created space for Commission proposals.

Whatever its rhetoric, the Commission’s room for manoeuvre as a political norm entrepreneur on hot issues is constrained. Nonetheless, it could still have worked better, and seized the opportunity to make a success of relocation, and abandon Dublin decisively. However, it failed to shine as technical coordinator, to maintain its integrity as guardian of EU legality, or even stealthily act to maintain EU scrutiny before the CJEU. The ‘political Commission’ appears to have been politicized, in the sense of creating space for ad hoc governmental power over asylum, with all the deep divisions and disagreements that entailed. Much has been lost in that process.

References

- 1. The CEAS – Where did it all go wrong?’ in The European Union as an Area of Freedom, Security and Justice edited collection submitted by Maria Fletcher, Ester Herlin Karnell and Claudio Matera (Routledge 2017) 263-299, 264.

