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Refugee protection in Europe: time for a major overhaul?

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A number of myths surrounding refugee protection may obscure our understanding and complicate the search for solutions but there are also clear and realistic possibilities for change in the EU's body of law to enable better outcomes for states and for refugees.

Hundreds of thousands of refugees, and smaller numbers of economic migrants, are arriving on the shores of south and south-eastern Europe. Most of those arriving in Greece and Italy have no interest in staying in either of these two countries. Given the situation in Syria, Iraq, Afghanistan and Libya, and the lack of prospects for many refugees in countries of first asylum, Europe must expect much larger refugee flows. Can Europe continue for much longer with its 'business as usual' approach?

Here are a few myths that clog our understanding of the situation:

'Protection-sensitive border control is possible': The external borders of the European Union (EU), especially the sea borders, cannot be controlled in a legal and protection-sensitive way. The only means to control a sea border in practice is by extensive monitoring, rapid interception of boats suspected of carrying 'human cargo', and turning, pushing or towing them back to where one thinks they came from. However, such practices – especially towards countries not considered 'safe third countries' – are illegal, either according to the EU's body of law in relation to asylum or because these countries themselves are refugee-producing countries, and the practices may amount to *refoulement* or arbitrary return. These practices are also very dangerous for the lives of those being intercepted. Unfortunately, however, advocates and states alike prefer to maintain the narrative that it is possible to conduct protection-sensitive border control.

'Individual refugee status determination in EU law is the responsibility of Member States and is feasible (if states dedicate

sufficient resources to it) irrespective of the number of asylum seekers': Under the recast directives on asylum procedures and qualification, refugee status determination has become a very complex and expensive endeavour, because it provides for no alternative to an individual approach. It requires each asylum seeker to be registered and interviewed, and individual decisions to be taken, accompanied by many safeguards, possibilities for appeals and re-examination, different procedures for different types of cases mostly geared towards minimising abuse of the asylum system, and so forth.

Quality requirements mean that caseworkers can reasonably be expected to issue no more than a few dozen decisions a month. In addition, the individual concerned is required actually to 'apply' for asylum in order to be registered and considered as an asylum seeker, and in such a case formal registration must take place more or less immediately. On top of all this, backlogs are to be avoided at all costs. In a situation, however, where thousands of people arrive every day in a country, most of them from major refugee-producing countries like Syria, these requirements are simply impossible to meet.

For instance, Greece's Asylum Service can currently process at most 1,500 applications a month if it wishes to respect all these requirements – which is less than half of the average daily inflow of refugees on the Greek islands at the time of writing this article. Even financially powerful countries are struggling to process over a few thousand asylum applications a day.

'The Dublin system is a basic pillar of the EU law on asylum, to be defended at all costs': According to the Dublin III

Regulation, the most important criteria for the allocation of the responsibility to examine an asylum claim are the country where asylum was first sought and the country where the asylum seeker first set foot in the EU. Despite the abundant evidence that its precursor, the Dublin II Regulation, was not working well, the Dublin III Regulation maintained these basic premises, although it did introduce certain improvements by making family reunification easier.

A quick reality check, however, shows that none of the countries at the external borders of the EU could possibly process all the asylum claims each is supposedly responsible for according to the Dublin system. For instance, in 2015 Greece will receive more than 600,000 refugees coming from countries including Syria, Afghanistan and Iraq through Turkey. In addition, it has a large residual population of third-country nationals who have applied for asylum in the past and want to do so again, or never applied for asylum in the past but wish to do so now. Yet Greece could never manage to process two or three hundred thousand asylum applications per year, nor realistically integrate all those who would be granted international protection with the current eligibility rate hovering at 50%.

‘Asylum seekers must remain in the countries responsible for examining their asylum claims’: According to the Dublin III Regulation, asylum seekers are expected to remain where the EU tells them. Yet asylum seekers, like all human beings, have their own desires, their own understanding of the factors governing their lives, and their own plans. At the time of writing this article, the great majority of newcomers – Syrians, Afghans and others – refused to apply for asylum in Greece, despite the information provided to them about the Dublin system (including the family reunification clauses), and despite the risks of irregular onward travel, the fees charged by smugglers and the significant chance of obtaining protection in Greece. Instead, most are keen to move on to Sweden and Germany, hoping to make it across the next border before it is closed off. In fact, one of the reasons explaining the

very high influx to Greece during mid-2015 may have been the rush to make it across the Serbia-Hungary border in time before the border fence there was completed.

Language, family ties, the existence of diaspora communities, social benefits or simply the myth surrounding the integration possibilities in some countries create the web of factors that asylum seekers consider when deciding which country they want to reach. Even in countries like Austria and France some asylum seekers will refuse to apply for asylum, and will do what they can to avoid the mechanisms in place that would oblige them to remain in a country not of their choosing. And even if they cannot avoid them, they know that the chances that their transfer will be enforced are minimal, as the rate of actual transfers under Dublin is very low.

As a result of insisting that the above are realities rather than myths, tensions arise between Member States, with some insisting on enforcing what should be done rather than what realistically can be done. Continuing to insist that the way things were planned years ago continues to be the right way in the face of rapidly changing circumstances is obstructing rational and realistic planning.

What might be done?

Here are a few ideas that may be worth exploring. None of them are new, yet they continue to be disregarded because of their implications for governments and societies:

Build a working hypothesis around an annual ‘refugee quota’ for Europe as a whole that would take into account the number of refugees in the world and Europe’s comparative strengths in receiving them. Since actual quotas for refugees are prohibited under international refugee law, the Europe-wide quota would serve as a planning tool rather than an actual ceiling to the number of refugees to be allowed to enter Europe in a given year. That would help the continent make plans in terms of reception and processing capacity; without minimal planning, systems simply collapse and then the blame game begins.

Regularise secondary movements of asylum seekers and refugees through the adoption of massive resettlement and relocation schemes from first countries of asylum such as Turkey, Jordan and Lebanon, and from EU Member States at the borders. The objective would obviously be for European governments to undertake the role that smugglers currently play and which serves the smugglers financially yet which is very dangerous and often fatal for the refugees. Massive resettlement and relocation schemes, as advocated by UNHCR in particular, would require going much further than the 120,000 relocation and especially the 20,000 resettlement places over a period of two years pledged by EU Member States after lengthy deliberations.

If, however, it is taken as a given that Europe is to accept on its territory a certain number in a given year, it would be much easier to incorporate these higher resettlement and relocation quotas in the planning and in public debate. It would also allow the EU to conduct a more convincing dialogue with countries of first asylum, such as Turkey, which in principle are safe for millions of refugees, and to enforce readmission agreements.

Adopt quotas for each EU member state: All Member States must engage in some way in solidarity, not only solidarity among themselves but also with countries of first asylum in regions of origin. Political leaders should engage in a protection-oriented narrative that explains Europe's obligations towards refugees and the necessity for all countries to participate equally in refugee protection efforts. The European Commission has adopted a number of creative proposals in recent months, despite heavy opposition by many EU States. The current arguments put up by several Member States – that are neither countries of first entry nor desirable destinations for the majority of refugees – serve only to shrink protection space in countries that receive refugees in numbers much larger than they can realistically cope with.

Adapt the EU body of law on asylum in a manner that will allow *prima facie*

recognition of protection status, at least for persons coming from major refugee-producing countries. Such a simplified mechanism is provided for in the Temporary Protection Directive which, however, has never been enacted. The Temporary Protection Directive is currently being evaluated, and should possibly be re-drafted so that it becomes an effective protection tool in situations where the influx into the EU vastly exceeds the existing capacity of asylum systems. However, the whole EU body of law on asylum should also be reviewed, so that individual Member States are allowed to adopt *prima facie* recognition of protection status so as not to require the cumbersome, lengthy, expensive and ultimately unrealistic individual status determination procedure currently prescribed.

Create meaningful management plans and budgets for refugee protection in the EU as a whole, rather than expecting individual Member States to do so on their own. It makes little sense to harmonise laws but not budgets, on the assumption that all countries have the same resources for receiving asylum seekers, processing asylum claims, integrating refugees and effecting return of those not granted refugee status. The EU financial instruments need to be connected to this broader exercise, rather than be perceived by the Commission and Member States as separate tools to enable implementation of policy. While transfer of know-how through Frontex and the European Asylum Support Office is an important tool of solidarity as well, it cannot make up for a fair distribution of financial and human resources.

Ultimately, the EU's Member States must start to perceive Europe as a single asylum space with a common European asylum status and work towards these goals. Until then the dominant attitude will continue to be 'not in my back yard', forcing states and refugees alike to adopt irregular practices.

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