

Envisioning a Common European Asylum System

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A bolder approach is needed if the European Union is to overcome fragmentation and manage refugee movements effectively and in accordance with international obligations. Imaginative moves in this direction could also advance the global refugee protection regime.

Europe continues to attract people facing persecution but the responsibility for receiving them is not shared equally amongst Member States. While Germany and Sweden together host nearly half of all asylum seekers in the European Union (EU), the countries on Europe's borders receive the highest number of arrivals, who then move onward.¹ Fragmented and inconsistent responses to this situation by individual States and the absence of a common response have resulted in tremendous suffering. The daily plight of those who try to reach the EU's southern borders, frequently via treacherous journeys, with thousands drowning in the attempt, has captured the public's attention in a way that the situation of many others who have sought protection in the EU in less dramatic circumstances has not.

An often heated public debate about asylum and migration has painted the current situation in popular and political rhetoric as a crisis of numbers, when what is really at stake is a crisis of accountability and solidarity. We have witnessed an incredible outpouring of public sympathy and concrete people-to-people solidarity for those on the move but what has often been missing is a calm space for reasonable debate.

Serious thought should now be given to the development of a supranational arrangement exercised by EU rather than individual state institutions as a means of overcoming fragmentation in approaches to managing these movements effectively and in accordance with international obligations. There is room for this kind of creative and forward-looking thinking. Europe did this before on a much larger scale in the formation of the EU. Within the EU there remains a widely held political consensus on the importance of preserving the institution of asylum. This is not only

a result of history but also part of the very nature of the EU, which was founded on the value of respect for fundamental rights, as well as the principles of responsibility, solidarity and trust between Member States.

The EU has been at the forefront of developments in refugee law in its quest to harmonise the asylum laws and practices of its Member States. The particular nature of EU regional law-making and codification has been of great value in strengthening standards for the treatment of refugees. As a result, the Union has over the last twenty-five years developed what is in effect a regional asylum system. This has been bolstered by the establishment of a European Asylum Support Office, as well as visible progress towards greater EU engagement in resettlement schemes which enhance the EU's role globally in providing essential comprehensive solutions for refugees.

Gaps and shortcomings

The implementation of the agreed standards varies widely, however, and current intra-EU solidarity mechanisms do not have enough teeth. They have not created the necessary trust and willingness for the system as a whole to function properly. In dialogue between the United Nations High Commissioner for Refugees (UNHCR) and the EU over many years, we have shared our observations and concerns related, in particular, to a tendency towards exceptions and even derogations from established standards, as well as the considerable room allowed for discretion leading to varying interpretations. Likewise, the quality of implementation of the agreed standards varies widely, with differing recognition rates between different States for people of the same nationality.

Another area of concern has been the tendency by some States to resort to granting 'subsidiary protection' rather than refugee status. In doing so, States recognise that a need for international protection exists for certain claimants, but they are unwilling, for a variety of reasons, to extend refugee status to them. This may be justified in some instances but not in others under the 1951 Convention, its 1967 Protocol and the broader international protection regime which govern such matters.

Today's situation has more than ever painfully revealed the shortcomings and dysfunctionality of the current system. Temporary protection, for example, was adopted in the EU as a provisional protection response to situations of mass influx when individual refugee status determination becomes impracticable. Yet the EU's Temporary Protection Directive has not been activated for the thousands of refugees we see arriving on a daily basis.

Redressing the shortcomings

In view of today's exceptional situation, exceptional measures and a new vision are urgently needed in order to develop a larger, more effective, coherent and comprehensive approach. It should, for example, address the pressure placed on certain individual States' asylum systems. It should help address irregular onward movements within the EU and thus limit its scope. Its implementation should also resolve the vast divergence in practices that currently exists and that is accompanied by a host of problems in terms of inadequate regional cooperation, onward movements, protection issues, and situations such as those in Calais. The following ideas could underpin the building blocks of the future.

First, the future lies in developing a supranational institutional arrangement that guarantees the equitable sharing of responsibilities within the EU. For an EU-wide asylum system to be really effective, it would require giving up some aspects of sovereign power. This would mean the creation of an EU Asylum Authority that would act throughout the territory of the EU. This would include the establishment

of an independent EU Asylum Appeals Court, as well as one EU Asylum Code that would cover issues related to substantive and procedural rights and standards of treatment. It would also require an equitable distribution and compensation system across the EU, as currently exists within some States (Germany, for example) for the reception of asylum seekers based on absorption capacity and protection criteria.

This is of course sensitive for governments, at least for now. But if we look at how far we have come since the mid-1980s, there has been an impressive increase in cooperation and harmonisation. This is promising for the recognition that asylum and migration issues demand a truly cooperative regional response.

In the interim, more effective responsibility-sharing schemes within the EU could be achieved through the pooling of resources to provide for reception, decision making and solutions for asylum seekers and refugees. This could mean the processing of certain categories of asylum claims within EU, rather than national, reception centres. Those who are found to be in need of international protection in this process would be settled in participating EU Member States in accordance with agreed sharing of responsibilities, and distribution and protection criteria. Those found not to be in need of international protection and without other options for legal immigration would be returned promptly to their countries of origin under joint EU operations. These arrangements could be established in an incremental manner and eventually form part of a genuinely supranational system.

Second, the future lies in ensuring protection-sensitive entry and border procedures. This issue has raised its head in the context of arrivals by sea in Greece and Italy, as well as along the EU's eastern borders. Of course States have a legitimate interest in controlling irregular migration but how do we ensure that adequate safeguards are properly included in whatever measures States take or envisage in the broad area of freedom of movement? Making it virtually impossible for refugees and asylum

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seekers to reach countries of asylum or to effect family reunion through regular means has led to stigmatising them as people trying to circumvent the law, and has provided a market for smugglers and traffickers.

Therefore, expanding regular channels for migration for refugees is essential to ensuring their protection. Such avenues could include increased opportunities for resettlement or humanitarian admission, humanitarian visas, and 'refugee-friendly' student and labour migration schemes. In parallel, family reunification procedures need to be streamlined, and access to them along the migratory routes currently being used needs to be ensured. This may require an amendment of the EU Family Reunification Directive² to include a broader range of family members. With more regular possibilities to reach safety in Europe, fewer people in need of international protection will feel compelled to resort to smugglers and dangerous irregular movements. Also, pressures on asylum procedures would be lessened and the procedures strengthened by diverting migratory pressures into other regular migration channels.

Third, actions need to be informed by a better understanding of the broader migration context, particularly the reasons behind migratory movements. The importance of sharing responsibility with States outside the EU needs to be stressed again and again. These States often have significantly less capacity yet host greater numbers of refugees than those in the EU: 86% of the world's refugees are hosted in developing regions.³ In UNHCR's experience, refugees often move on because their basic survival and safety are threatened, and their fundamental protection and assistance needs, including educational aspirations and primary health care, are not met. If they are not allowed, or not given, the means to become self-reliant, they will move on.

Therefore, the future also lies in support for improved protection and solutions in regions of origin. Many of the measures proposed and planned in response to these identified needs would go some way towards addressing the reasons behind onward movements of refugees. Funding is needed to strengthen protection capacities in refugee-receiving countries in regions



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of origin. The EU has done a lot of work on the external dimension of asylum and refugee protection in responding to forced displacement over the years. The EU and its Member States have contributed generously to humanitarian assistance for refugees in displacement emergencies, and are increasingly taking migration and refugee needs into account in development programmes. EU Member States' donations combined comprise the second largest funding contribution to UNHCR. In addition, EU funding for resettlement has the potential to be an important contribution in this area.

The next phase of crafting a Common European Asylum System provides the heartening prospect of advancing the global refugee protection regime, while benefiting from the EU's fundamental orientations

and deep human values. At this critical juncture, it is time for the EU to rise to the occasion, on a collective basis, and call upon its history of providing refuge in times of mass displacement, to ensure that those risking everything to find safety in Europe have meaningful, safe and realistic options for doing so.

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