

From complementary to ‘primary’ pathways to asylum: a word on the ‘right to flee’

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The international community needs to move away from the prevailing discretion-based model for pathways to asylum. The ‘right to flee’ must be taken seriously.

Containment, externalisation and the ‘irregularisation’ of mobility are some of the strategies used by States to impede or deter asylum seekers’ entry into their territories so as to avoid protection-related responsibilities.¹ Despite their incompatibility with global solidarity and responsibility sharing, they have become a standard means of migration management.²

To reach a (potential) country of asylum, few alternatives exist to so-called spontaneous arrivals, that is, arrivals usually through dangerous and irregular means. The alternatives are collectively referred to as ‘complementary pathways’, which may include resettlement, private or community sponsorship programmes, humanitarian admission, evacuation schemes, protected entry or embassy procedures, family reunification, educational scholarships, or labour mobility schemes.³ These are normally small-scale and available only for persons who are deemed to qualify as refugees, who have undergone some form of status determination by either UNHCR or the officials of the State concerned, and who find themselves in a particularly vulnerable

situation or have special family or other ties to the country of destination. Additional conditions may well be imposed to ensure that only those who are perceived to be more valuable, more deserving or better able to make a net contribution to the receiving country’s economy will benefit from these initiatives. This leaves the vast majority of refugees to fend for themselves, forced to try to reach protection by their own means.⁴

However, ‘complementary pathways’ remain voluntary, and there is no legal duty for States to set them up in a systematic way. In short, there is no legally binding obligation on so-called States of destination to regulate, let alone facilitate, access to international protection. As a result, there are no refugee-specific channels to escape persecution in a safe and regular fashion and to request admission as a (yet-to-be-recognised) refugee specifically for the purpose of seeking asylum. There are no ‘primary’ pathways to international protection.

What about the right to flee?

A change of approach is required, which can be based on two key legal elements relating

to existing obligations under international human rights law – elements that tend to be too speedily dismissed. These are relevant not only to signatories to the 1951 Refugee Convention but also to non-signatory States.

Firstly, there is the right to leave any country. This right is enshrined at the global level in the International Covenant on Civil and Political Rights and, when coupled with the prohibition of *refoulement*, creates a distinct obligation on States to admit the person concerned to avoid exposure to irreversible harm. At the intersection between the two provisions (the right to leave plus the principle of *non-refoulement*), there emerges what I have called the ‘right to flee’: the right to leave any country in order to remove oneself from a situation of grave peril. This resulting composite right, based as it is on international human rights law provisions, has legally binding force. It generates not only negative but also positive duties on the part of States to be vigilant when designing policies of border management or implementing measures of migration control, whether unilaterally or in cooperation with other countries.⁵

Secondly, the right to asylum has been enshrined in the main regional instruments of human rights protection in legally binding form. The African Charter on Human and Peoples’ Rights, the American Convention on Human Rights, and the Charter of Fundamental Rights of the European Union have all configured the right to asylum as a right of the individual, rather than as a privilege conferred by States on a discretionary basis.⁶ Furthermore, the right to asylum should be understood to entail a positive obligation on signatory States to ensure that it can be effectively relied upon and exercised by those to whom the provision is addressed (that is, ‘every person’ or ‘every individual’ – as stated in these instruments – regardless of prior recognition as a refugee). It goes without saying that combining the right to asylum with the right to leave and the principle of *non-refoulement* further reinforces the ‘right to flee’, particularly in respect of countries that are parties to the relevant instruments in

Africa, the Americas or Europe. Given this, the international community ought to move away from the prevailing discretion-based model towards a rights-based paradigm. The ‘right to flee’ must be taken seriously.

This right to flee does not imply a total ban on border surveillance or migration controls. It is not a call for ‘open borders’. Rather, it requires that any exercise of sovereign power that obstructs refugees’ access to protection be abandoned and replaced with mechanisms that establish the means of safe and regular admission for the purpose of seeking asylum as a matter of right (rather than as a gift or a favour on the part of the State concerned). Refugees’ right to flee should trigger a fundamental reflection on how ‘primary’ pathways for admission are designed and implemented – prior to, and regardless of, any discussion on ‘complementary’ pathways to protection. Without the former, the latter become superfluous.

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1. Moreno-Lax V (2017) *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law*, Oxford University Press bit.ly/MorenoLax-AccessingAsylum-2017
2. Gammeltoft-Hansen T and Hathaway J C (2015) ‘Non-Refoulement in a World of Cooperative Deterrence’, *Columbia Journal of Transnational Law* issue 53 no 2, p235 bit.ly/Gammeltoft-Hansen-Hathaway-2015; Moreno-Lax V and Giuffrè M (2019) ‘The Rise of Consensual Containment: From “Contactless Control” to “Contactless Responsibility” for Migratory Flows’ in Juss S (Ed) *Research Handbook on International Refugee Law*, Edward Elgar, p8 www.unhcr.org/5a056ca07.pdf
3. UNHCR (2021) *Complementary pathways for admission to third countries* www.unhcr.org/complementary-pathways.html
4. In the European context, it has been estimated that up to 90% of those who go on to be recognised as beneficiaries of international protection reached the territory of the European Union Member States through irregular means. See European Parliament, Resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), para E www.europarl.europa.eu/doceo/document/TA-8-2018-0494_EN.html
5. For the full argument, see Moreno-Lax V (2021) ‘Intersectionality, Forced Migration, and the Jus-generation of the Right to Flee’ in Çalı B, Bianku L and Motoc I (Eds) *Migration and the European Convention on Human Rights*, Oxford University Press, p43 bit.ly/MorenoLax-Intersectionality-2021
6. African Charter on Human and Peoples’ Rights, Art 12(3); American Convention on Human Rights, Art 22(7); and Charter of Fundamental Rights of the European Union, Art 18.