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36

Asylum in the twenty-first century
Trends and challenges

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Introduction: historical background

Refugees have always existed, the case of the Huguenots – the French Protestants fleeing France in 1685 – being a well-known example in Europe. However, an awareness of the responsibility of the international community to provide protection and a more comprehensive refugee regime emerged only in the aftermath of World War I and World War II in order to deal first and foremost with the post-war refugee movements in Europe. The Nansen Commission, established in 1921 under the auspices of the League of Nations, was the first international framework created to address refugee issues (Barnett 2002).

Modern international refugee regimes were built in three phases: a first phase of collective recognition of refugees, from World War I continuing until World War II; a second phase of transition, shortly after World War II, with the establishment of several institutional frameworks of a temporary nature, such as the International Refugee Organisation; and a third phase of individual recognition, beginning with the establishment of the United Nations High Commissioner for Refugees (UNHCR) and the 1951 Geneva Convention. Both the 1951 Convention and UNHCR were a product of the aftermath of World War II, reflecting the East-West tension and initially very Euro-centric in scope, covering only refugee movements provoked by events that occurred before January 1951 in Europe (Hathaway 1991).

The shift in refugee flows in the 1970s towards a North-South rather than an East-West focus had a major impact on the further development of the international refugee regime. While initially refugees were welcomed in many countries for several reasons – for example, refugees came in manageable numbers, their intake reinforced strategic objectives during the Cold War and they helped to meet labour shortages at the time – subsequently, host countries were less willing to receive them, perceiving them as a threat to economic and political stability (Barnett 2002). In the 1980s and 1990s, the political approach became further restrictive due to the considerable increase of refugee numbers and of mixed flows, which refer to parallel movements of persons that did not necessarily fall under the 1951 Convention definition.

While the fundamental principles of the 1951 Convention and the core mandate of UNHCR remain valid to this day, trends and challenges have evolved significantly over

these last 60 years (Goodwin-Gill and McAdam 2007). The aim of this chapter is to provide an outline of the historical, legal and intellectual developments of the international refugee regime, with a particular emphasis on the EU, which remains one of the most developed regional frameworks, as well as an overview of current and future challenges. In the first part, an overview of the international legal framework is provided. The second part deals with the Common European Asylum System (CEAS), while the third part attempts to present the main challenges for the future both at a global and EU level.

International legal framework

Geneva and beyond

Beyond a doubt, the cornerstone of the global legal framework for refugees remains the 1951 Geneva Convention, as expanded by the 1967 Protocol lifting its temporal and geographic limitations. The Convention is seen as a dynamic living instrument adapting to a wide range of socio-political contexts. UNHCR's role proved extremely helpful in that regard, in particular, via the elaboration of a Handbook on Procedures complemented subsequently by a series of Guidelines covering several areas and its Executive Committee's annual conclusions on international refugee protection.[1] Further, on its fiftieth anniversary in 2001, UNHCR launched a process of Global Consultations on International Protection in order to harmonise interpretation and stimulate thinking in new ways to ensure international protection, leading to the adoption of the Agenda for Protection and the Convention Plus Initiative (Feller *et al.* 2003).

In addition, and in order to address different challenges in other parts of the globe, two major regional frameworks were set up: the Organisation of African Unity Convention Governing the Specific Aspects of Refugee Problems in 1969, and the Cartagena Declaration adopted by ten Latin American countries in 1984. Both of these conventions have much broader definitions of a refugee, ones that reflect realities in their respective regions. Moreover, many states developed national level frameworks for temporary and complementary forms of humanitarian protection in order to respond pragmatically to certain international protection needs (McAdam 2007).

Of particular importance is the inter-relationship between international refugee law, on the one hand, and international humanitarian and human rights law on the other. Given the absence of any procedural standards in the 1951 Convention and the great number and variety of national procedures for determining international protection needs, the role of international human rights treaties becomes pivotal. Particularly in view of establishing protection standards to be accorded to persons who fall outside of the 1951 Convention, even though it is validly questioned to what extent international human rights law could or should fill existing gaps in refugee protection (Hathaway 2005). Overall, it is generally admitted that there are several categories of refugees: those recognised by the 1951 Convention and those falling under different forms of regional or global frameworks of protection (Hathaway 1991; Battjes 2006).

Main points of debate

During the 60 years of the international refugee regime, one of the recurrent questions causing a heated debate is whether the refugee definition should be expanded to meet protection needs not foreseen in 1951 and what should be the balance between the original

Georgia Papagianni

UNCHR's mandate with increasing *de facto* demands. Since 1951, the refugee definition was either *de jure* or *de facto* expanded at a national and regional level in order to take account of political and social contexts. New definitions emerged as a result and UNHCR also changed its perceived mission several times. Hence, it was highly debated whether the appearance of new definitions and statuses undermines the consistency of the regime or leads to a more responsive international environment (Feller *et al.* 2003; McAdam 2007; Gilbert 2013; Toscano 2013). Another point of debate had been the distinction between refugees and internally displaced persons (IDPs), and more specifically, what justifies the difference in protection offered to those people who cross an international border and those who do not.[2]

Further, the territorial scope – territory over which it applies – of the Geneva Convention was also highly debated. The obligation to provide effective access to protection and the compatibility of state offshore actions with refugee and human rights law have been and remain widely discussed. Of particular importance is the principle of *non-refoulement*,[3] whose extraterritorial application is rejected by certain countries, the case of the US Supreme Court in the *Sale v. Haitian Centers* Council case being the most cited.[4] The opposite conclusion is drawn by the European Court of Human Rights (ECtHR), the landmark judgment delivered in the *Hirsi* case concerning the Italian push backs to Libya being of primary importance. In his concurring opinion, Judge Pinto de Albuquerque, further proclaims the prohibition of *refoulement* to be a principle of customary international law and a rule of *jus cogens*, that is, a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted. Undeniably, the exercise of 'effective control' over an area in foreign territory or over persons abroad – exercised either *de jure* or *de facto*, or through a combination of both – constitutes the trigger of state responsibility. Therefore, the principle of *non-refoulement* applies everywhere a state has jurisdiction whether within its borders, another state's territory or on the high seas. Of particular importance is the fact that the same rules should continue to be binding when responsibility under international law is transferred to third coastal states by means of operational cooperation and forward displacement of immigration controls (Moreno-Lax 2011; Fischer-Lescano 2009).[5]

Interpretation of the core provisions of the 1951 Convention also triggered wide debates centred upon the following issues. First, on the concept of fear, and in particular on whether there was a need to demonstrate both the asylum seeker's *subjective* emotion of fear and the *objective* factors which indicate that the asylum seeker's fear is reasonable or solely the latter. A second major debate centres on the accountability and protection theories – for instance, whether refugee status should be limited to those who fear persecution by groups for whom the state is accountable, or whether showing the inability of the state to protect asylum seekers is sufficient. The issue of persecution by non-state actors was central in that debate.

As to the grounds of persecution, the ones that have been highly debated, even though many of them are often overlapping in practice, are religion and the concept of a 'particular social group'. The distinction between the public and the private sphere and between traditional and non-traditional religious beliefs, on the one hand, and the distinction between the concept of 'protected characteristics'[6] and that of 'social perception'[7] on the other hand, being central for the former and the latter respectively (Hathaway 1991; Zimmermann 2011). Finally, debate focused also more recently on the interpretation of the 1951 Convention's exclusion clauses,[8] and in particular, on the balance between protection and the fight against terrorism (Guild and Garlick 2010).

The Common European Asylum System

Rationale and overview of legal framework

The CEAS is beyond doubt the most developed regional system, even though its rationale was, and still remains, somehow distinct from that of the international legal framework on refugees. The primary EU concern had been the successful functioning of the internal market and combatting the security implications of the abolition of internal border controls rather than international protection of refugees or asylum seekers. The main objective of the first EU asylum legal instrument, the so-called Dublin Convention, was to prevent the phenomenon of asylum shopping by establishing a mechanism of designating a single country as responsible for the handling of an asylum application. The objectives of the so-called London Resolutions – on safe countries of origin, safe third countries and on manifestly unfounded applications – that were also adopted in the 1990s, were also moving in a security-oriented direction (Battjes 2006).

The Treaty of Amsterdam, which extensively revised the relevant provisions of the EU founding Treaties in 1999, is the unquestionable turning point; providing for a fully-fledged EU asylum policy in terms of minimum standards. Subsequently, in 2009 the Treaty of Lisbon – the latest revision of EU Treaties – provided for the establishment of uniform rules in full compliance with the 1951 Convention. Indeed, EU asylum policy was built in two phases: between 1999 and 2005, the first minimum standards package was adopted, whereas following an evaluation of the first phase legislation and the entry into force of the Lisbon Treaty, the Commission presented the so-called 'recast' proposals providing for uniform rules. CEAS is based on two basic sets of rules. First, it has a mechanism of determining the member state that is responsible to examine the asylum application. This is decided on the basis of a series of predetermined hierarchically placed criteria provided in the so-called Dublin Regulation, and supported by a database for comparing fingerprints of asylum seekers, the so-called Eurodac database. Secondly, there is a set of substantive and procedural rules determining the criteria and the procedure for granting the refugee and subsidiary protection status and the rights of asylum seekers and refugees.

In June 2013, the recast EU asylum *acquis* package was completed. It includes several elements: (1) the revision of the Dublin Regulation, which provides the detailed criteria of the designation of the EU member state that is responsible for the examination of the asylum application; (2) the revision of the Eurodac Regulation, which provides for the establishment of a database for the comparison of fingerprints for the effective application of the Dublin Regulation; (3) three directives that regulate in detail the substantive and procedural aspects of the EU asylum framework – the standards for the qualification of third-country nationals as beneficiaries of international protection and the content of the protection-granted; the standards for the reception of applicants for international protection and common procedures for granting and withdrawing international protection.[9] Furthermore, three additional legal instruments – the 2001 Temporary Protection Directive, providing for a mechanism of temporary protection launched in cases of mass influx of refugees;[10] the extension to refugees of the Long Term Residents Directive, providing for the movement of third country nationals within the EU;[11] and the establishment of the European Asylum Support Office[12] – complement the EU *acquis* on asylum. The aim of the recast package was to enhance the level of harmonisation of asylum law in the EU and increase the level of protection for asylum seekers and refugees. However, this has only partly been met (AIDA 2012/2013).

Georgia Papagianni

Undoubtedly, the recast Qualification Directive is the cornerstone of EU substantive asylum law. It is the legal instrument that sets the criteria for granting the refugee status and basically incorporates and interprets the 1951 Convention. Moreover, it approximates to a large extent the benefits and rights of refugees and those of beneficiaries of subsidiary protection. Despite the improvements compared to the previous 2004 Directive, the recast Directive does not address a number of concerns that had been raised both by UNHCR and NGOs and which are at odds with the 1951 Convention, such as the provisions on exclusion, the definition of particular social groups and non-state actors of protection. The extent of progress is also contested as regards the recast Reception Conditions Directive, even though it undoubtedly brings progress with regard to the most criticised provisions of the previous legal act, such as the provisions on detention, the low level of material reception conditions, access to the labour market and the lack of a system of recognition of vulnerable persons (AIDA 2012/2013; Toscano 2013; UNHCR 2013).

On the contrary, the recast Procedures Directive is definitely an improvement with respect to the 2005 version, which constituted, to a large extent, a collection of national practices rather than a solid set of minimum standards common to all EU member states. Ensuring more robust determination of status in the first instance, 'frontloading', is further enhanced through a higher level of procedural safeguards, the access to an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, and a list of ten grounds for the use of accelerated procedures is provided. Yet, access to legal assistance is based in certain cases on a merits test, and the concept of safe countries of origin and safe third countries remains via the possibility of using relevant national lists, even if the reference to a common EU safe countries list is deleted (AIDA 2012/2013; Toscano 2013; UNHCR 2013).

The Dublin Regulation is beyond doubt the most strongly criticised EU legislation in this field. The premise of existence of equal standards across the EU and the inconsistent practice among member states in the way they apply the criteria provided in the Regulation, leading to separation of families, were considered as the biggest problems. While the obligation for an interview and the suspensive effect of appeals against a transfer decision are expected to contribute in the correct application of the Regulation, there is still intense debate on the degree of the progress achieved (AIDA 2012/2013; UNHCR 2013). Additionally, Dublin remains a major source of tension between frontline and other EU states, with the member states situated at the periphery of the EU requesting repeatedly its revision, due to the fact that they face considerable pressures because of their geographic position, and other member states pointing to the fact that they receive in absolute numbers the heaviest burden.

Although these flaws were well-known at the time of the recasting, the opportunity was not taken to review the underlying principles in the Dublin Regulation and the intrinsically flawed premise that equal standards of protection apply across the EU. Revision focused rather on increasing the system's efficiency, while ensuring higher protection standards. Indeed, the recast Dublin Regulation improves the level of protection for asylum seekers with regard to the provisions relating to the personal interview, their right to information, access to an effective remedy and safeguards with regard to vulnerable groups. Further, shorter time limits for determining the responsible member state and carrying out the transfer were also provided.

The sole major novelty is the new early warning preparedness crisis management mechanism provided for in Article 33, which was established following two landmark rulings from the ECtHR and the European Court of Justice (ECJ) issued in 2011. The *MSS* and *NS* rulings respectively – as a result of which member states were requested not to transfer

asylum seekers to the 'member state responsible' under the Dublin Regulation in case the systemic deficiencies of the asylum system in that member state would result in a breach of Article 3 ECtHR. Obviously, such a mechanism is not an alternative to the temporary suspension mechanism initially envisaged by the Commission. However, it is expected to assist in identifying, at an early stage, pressures on member states' asylum systems and addressing those pressures and possible protection gaps through a series of actions (AIDA 2012/2013).

Last, the EU has also paid special attention, first, to the need to enhance the capacity of non-EU countries to better deal with refugees and to enable durable solutions via the funding of the so-called Regional Protection Programmes (RPPs), and second, to resettlement, with meagre results on both (Guild and Moreno-Lax 2013).

Main points of debate

The compatibility of the CEAS with international refugee law is heavily criticised. First and foremost, the presumption that equal standards of protection apply across the EU is refuted, not only by reality but also by the ECJ in its recent *NS* judgment. Further, despite its proclaimed aim to establish high standards of protection and ensure that similar cases are treated alike and result in the same outcome, regardless of the member state in which the asylum application is lodged, there is a general perception that the EU objective is to control migration rather than ensure protection. Visa requirements, carrier sanctions and inadequate safeguard clauses in readmission agreements are among the most explicit blocking mechanisms, whereas joint resettlement programmes and offshore processing plans are strongly criticised as being mere actions to move asylum obligations elsewhere. Overall, finding the right balance between control and protection is considered a major challenge for the EU (Guild and Moreno-Lax 2013).

Furthermore, the compatibility of the substantive provisions of the CEAS with the international refugee regime, and in particular, the provisions on accelerated procedures, border procedures, detention measures and the safe third country concept, were strongly questioned as well (Battjes 2006; Guild and Moreno-Lax 2013).

Of particular importance is the issue of sea border controls. The compatibility of FRONTEX Guidelines on operations at sea and EU practices of extraterritorial border controls with international law of the sea and human rights instruments was strongly questioned. In addition, EU operational cooperation with third states is further perceived by many as a way to transfer responsibility to third countries by means of operational cooperation, while it should be clear that neither international cooperation nor extraterritoriality release EU member states from their international obligations (Moreno-Lax 2011; Fischer-Lescano 2009).

Challenges for the future at a global and EU level

Future challenges at a global level

Reality and current trends clearly show that asylum will remain a major global challenge for the twenty-first century. Without doubt, much has been done over the last 60 years. Yet, the challenges for the future remain numerous.

Access to protection and in particular the issue of addressing mixed flows, will certainly remain a key challenge. While refugees had been always entering irregularly, it is clear that the rise of global irregular migration combined with, and to some extent due to, the lack of

accessible migration opportunities, presents a major challenge to refugee protection. Mixed migration movements often place serious strains on national asylum and reception systems, undermine public support – given that refugees and migrants are often confused in public minds – and generate more restrictive policies and practices and a rather restrictive interpretation of the 1951 Convention as well as a tendency to criminalise asylum seekers (Feller 2006; UNHCR 2012). Unfortunately, the economic crisis and the predominance of security concerns over the debate certainly add to that direction. Recently, states are more reticent in assuming international protection responsibilities, whereas in the post 9/11 era, several countries have also revisited their asylum systems from a security angle (Feller *et al.* 2003).

In that respect, offshore processing and push backs remain major challenges globally. Apart from the criticism against the EU's policy in that respect, Australia's interdiction of boats and offshore processing in Nauru and Papua New Guinea has been, and remains, strongly criticised. Indeed, Australia has taken some of the most drastic measures in response to asylum seekers globally, including mandatory detention, the interdiction of boats, offshore processing and refugee relocation to other countries (Provera 2013; UNHCR 2014).

Detention policies – including detention conditions, duration, proportionality, judicial or other areas of review and situation of minors – also seem to be a major source of concern due to the lack of compliance with human rights standards globally. Despite the standing presumption of national governments on their compliance with human rights standards, there is a growing body of Human Rights Committee, ECtHR and ECJ jurisprudence revealing states' non-compliance with human rights standards in relation to detention (Provera 2013). In that regard, it is worth commending the ECJ's recent jurisprudence on *NS* that stated clearly the rebuttable character of the presumption that EU member states comply with their human rights obligations.

The lack of an international supervision system or a monitoring body to receive petitions is also considered as a challenge. Indeed, the interpretation of the 1951 Convention depends very much on national systems, rendering the importance of their well-functioning vital. While this criticism may be valid to some extent, one needs not to lose sight of the fact that asylum issues are addressed in the framework of the assessment of state compliance held by international human rights monitoring bodies (Gilbert 2013).

Another upcoming challenge is forced movements due to climate change, which is predicted to be one of the biggest drivers of displacement over the next century (UNHCR 2012). The issue is extremely complex due to its multifaceted dimensions. Moreover, certain of its facets, such as the impact of climate change on subsequent crises, are for the moment addressed only in a piecemeal fashion. While it is clear that legal gaps exist, it is convincingly argued that international law retains sufficient flexibility to respond to particular scenarios through bilateral and regional agreements and that a bottom-up approach sounds safer than the negotiation of a climate refugee treaty (McAdam 2012).

Last, but not least, the need to strengthen self-reliance and local integration opportunities, especially for refugees living in protracted situations, needs to be underscored (UNHCR 2012). The eventual links between asylum and development policy could be an avenue to explore in that respect, which nonetheless, remains underexplored.

Additional future challenges at the EU level

Even though the EU receives only a small proportion of refugees compared to developing states, which are hosting many more refugees with dramatically fewer means, asylum is a hot issue for the EU, both for its politicians and its public opinion. Reaching the right balance

between its migration and its asylum policies, and between security and protection in general, is beyond doubt one of the biggest challenges for the EU. The existence of major crises in neighbouring countries and the loss of numerous lives in the Mediterranean render the issue even more pressing. In the aftermath of the Arab Spring and in the framework of the Syrian crisis, and most importantly following the Lampedusa tragedy, a heated debate was launched with regard to issues such as resettlement, relocation, joint extraterritorial processing, the concept of protected entry procedures, the opening of legal migration channels to the EU and the revision of the temporary protection system (Guild and Moreno-Lax 2013). Several of the above measures are examined within the framework of the Task Force Mediterranean.[13] It remains to be seen whether any progress in practice will be achieved. Regrettably, the recently adopted EU Strategic Guidelines on the future of Home Affairs have not lived up to the expectations they had created.

The effective implementation of the EU principle of solidarity is another hot issue for the EU. At issue, is that frontline member states are calling for further burden sharing and others are connecting solidarity with the concept of responsibility (meaning the willingness to make efforts to fulfil their own obligations before asking for support). Finding a fairer system of distributing the burden based on criteria such as economic strength, population, size and unemployment rates is a key challenge that the EU will need to address at some point.

A third major challenge for the EU is the proper implementation of the recently adopted recast EU asylum *acquis* and the elimination of different standards across the EU. The role of national courts as well as of that of the ECJ is strategic. Furthermore, the development of practical cooperation in the field of asylum, and in particular the role that the European Asylum Support Office can play in that regard, is also considered important.

Lastly, another issue of concern is the issue of transfer of protection and mutual recognition of asylum decisions within the EU. While this issue is only partially addressed at the international level,[14] it proves important for the EU as it is seen as a further step of integration.

Concluding remarks: the way forward

Complex issues require comprehensive solutions. Asylum policy should not be seen in isolation to other inter-connected policies, such as foreign policy, crisis management, overall economic and political stability aspects, development policy and new upcoming challenges such as climate change. An overall long-term comprehensive approach addressing the root causes of forced movements needs to be the key objective of all the actors involved. Cooperation among countries and all international stakeholders in that respect is vital. Given the increasing numbers of people forcibly displaced, a paradigm shift from a primarily short-term security focused approach towards a protection oriented long-term approach becomes more imperative than ever.

Notes

1 All UNHCR documents are available online at: http://www.refworld.org/protectionmanual.html (accessed: 11 January 2015).
2 For IDPs see the Guiding Principles on Internal Displacement, available online at: http://www.unhcr.org/43ce1cff2.html (accessed: 11 January 2015) and the Kampala Convention available online at: http://www.internal-displacement.org/sub-saharan-africa/kampala-convention/ (accessed: 11 January 2015).
3 According to the principle of *non-refoulement*, officially enshrined in the 1951 Geneva Convention (Article 33), no State shall expel or return ('refouler') a refugee in any manner whatsoever to the

frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

4 This case is notorious because of the conclusion that rejected the extraterritorial application of refoulement.

5 See in that regard, the *Xhavara* case where Italy bore international responsibility for border control measures taken by Italian government agencies on the high seas and in Albanian coastal waters while implementing a bilateral agreement between Italy and Albania (Fischer-Lescano 2009).

6 This term means when a group is united by an immutable characteristic or by a characteristic so fundamental to human dignity that a person should not be compelled to forsake it.

7 Is when a group shares or does not share a common characteristic that sets it apart from society at large.

8 The term 'exclusion clauses' refers to legal provisions designed to establish criteria by which individuals may be excluded from international protection. Article 1F of the 1951 Convention includes a number of exclusion clauses.

9 Regulation 604/2013, OJ L 180, 29.6.2013, p. 96 (Dublin Regulation); Regulation 603/2013, OJ L 180, 29.06.2013, p. 1 (Eurodac Regulation); Directive 2011/95/EU, OJ L 337, 20.12.2011, p. 9 (Qualification Directive); Directive 2013/33/EU, OJ L 180, 29.06.2013, p. 96 (Reception Conditions Directive); Directive 2013/32, OJ L 180, 29.6.2013, p. 60 (Asylum Procedures Directive).

10 Council Directive 2001/55/EC, OJ L 212, 07.08.2001, p. 12.

11 Directive 2011/51/EU, OJ L132, 19.5.2011, p. 1.

12 Regulation 439/2010, OJ L 132, 19.05.2010, p. 11.

13 Commission Communication on the work of the Task Force Mediterranean, COM (2013) 869 final, 4.12.2013.

14 See the 1980 Council of Europe European Agreement on Transfer of Responsibility for Refugees, CETS 107.

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