RECONCEPTUALISING SUSTAINABLE RESPONSES TO THE REFUGEE CRISIS

Timothy G. Hammond *

Introduction

Europe is seeing the entrance of an unprecedented number of refugees, and asylum-seekers will continue to flee there as long as the root causes of forced displacement in their home countries remain unresolved. The European Union (EU) is struggling to face this extra-regional challenge in a cohesive manner; however, there are dimensions to the crisis that may be immediately managed through policy reform. The loss of life at sea, the fuelling of criminal human smuggling networks, and the fragmenting of European solidarity are preventable outcomes.

This Policy Brief explores elements that are affecting the EU's ability to successfully address the refugee crisis. To increase understanding of the issue, the current crisis and the legal framework for states' responses are explained, and both are placed within relevant context. Three critical impediments are then identified and analysed. First, disunity within the union and prioritisation of national interests over integrated approaches is hindering progress and creating unsustainable imbalances. Second, a policy gap on how the rights of asylum-seekers are to be realised is being filled by criminal human smuggling networks, with lives being placed at unnecessary additional risk. Third, existing limitations in the legal definitions and criteria for refugee status are preventing states from addressing the complex forms and unprecedented scale of forced displacement and migration that have become a defining feature of the 21st century. Based on evidence supporting these conclusions, several recommendations are made that call for a reconceptualisation of refugees and states' responses.

*Mediterranean regional analyst and alumnus of the Mediterranean Academy of Diplomatic Studies

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The Refugee Crisis: Facts and Figures

Irregular migration across the Mediterranean Sea is not a new phenomenon; however, the 1,015,078 total arrivals to Europe in 2015 represented a dramatic intensification of the refugee crisis compared to the 216,054 arrivals in 2014 and 59,421 in 2013 (United Nations High Commissioner for Refugees [UNHCR], 2015a). The death toll in 2015 also surpassed previous records, with 3,580 reported persons drowned or missing at sea. Over 80% of the total arrivals in 2015 came from ten of the world's top refugee-producing countries – primarily Middle Eastern and Sub-Saharan African countries, including Syria, Afghanistan, Iraq, Eritrea, and Somalia (UNHCR, 2015a).

Considering the Mediterranean's geographic position as a convergence zone between Europe, Africa, and Asia, the situation of unprecedented asylum-seeker arrivals to Europe cannot be separated from the larger context of global displacement figures, which are at an all-time high. By the end of 2014, there were 59.5 million forcibly displaced people in the world (UNHCR, 2015b). This means that approximately one out of every 122 people on Earth is either a refugee, seeking asylum, or internally displaced. Referring to the situation, António Guterres, the UN High Commissioner for Refugees, stated, "We are witnessing a paradigm change, an unchecked slide into an era in which the scale of global forced displacement as well as the response required is now clearly dwarfing anything seen before" (UNHCR, 2015c). In the midst of this crisis, maritime migration routes across the Mediterranean are the most heavily trafficked and the deadliest in the world, and the sea has become the most dangerous border-crossing between countries not engaged in interstate warfare (Fargues & Bonfanti, 2014).

The increase of arrivals to Europe in 2015 was largely a consequence of persons fleeing war in Syria; around half of the total arrivals were comprised of Syrian nationals (UNHCR, 2015a). Since the onset of warfare in Syria in 2011, Europe has held a small share of responsibility compared to the countries neighbouring Syria, which now host over four and a half million Syrian refugees. Turkey now hosts the highest number of refugees in the world, with over two and half million

registered Syrians. Lebanon now hosts the highest per-capita share of refugees in the world, as approximately one in five persons in the country is now a displaced Syrian (UNHCR, 2015d). From April 2011 to December 2015, 38 European countries (not limited to the 28 members of the EU), received a cumulative total of 897,645 Syrian asylum applications (UNHCR, 2015e). More than half of Syria's pre-war population of around 22 million people have been forcibly displaced, and the majority, some 7.6 million Syrians as of May 2015, remain in-country as Internally Displaced Persons (IDPs) (Norwegian Refugee Council, 2015).9 IDPs remain dependent on what protection their government does or does not provide, and protracted displacement increases the likelihood for cross-border migration. In fact, 38.2 million of the 59.5 million forcibly displaced persons in the world at the end of 2014 were IDPs (UNHCR, 2014). The EU must not only address the current crisis, but organise responses for the future.

The EU's asylum policies are built on the foundation of international refugee law and international human rights law. To measure the applicability and efficacy of these laws for addressing current crises, their origins and contexts must be discussed.

Origins and Context of the Refugee Legal Framework
The term "refugee" is bound to a particular set of criteria that not all asylum-seekers fall under. The legal definitions of "refugees" and states' obligations towards them were codified by the United Nations (UN) in response to the displacement crisis in Europe caused by the two world wars. In 1948, the Universal Declaration of Human Rights (UDHR) recognised the right to seek and enjoy asylum in other countries (UN General Assembly, 1948).11 Building on this notion, the 1951 Convention Relating to the Status of Refugees defined "refugees" as persons outside their country of nationality or habitual residence who are unable or unwilling to return to that country owing to well-grounded fears of persecution for reasons of face, religion, nationality, political opinion, or group membership (UN General Assembly, 1951).12 Article 33 of the Convention also established the legal principle of *non-refoulement,* or the obligation of states not to return a refugee to a country where they may face persecution (UNHCR, 1997).

The original definition of a refugee in the 1951 Convention notably contained critical geographic and temporal limitations, as it specifically referred to persons who fled persecution due to the "events occurring in Europe before 1st January 1951" (UN General Assembly, 1951).14 The 1976 Protocol Relating to the Status of Refugees then expanded the definition by lifting these limitations so that it was now applicable to asylum-seekers from any part of the world. Currently, 142 countries, including all 28 member states of the EU, are state parties to both the 1951 Convention and the 1967 Protocol.

As a collective regional institution, the EU developed and applied its own policies in line with the standards and obligations established by international law. This includes the European Convention on Human Rights (ECHR), which sought to implement the rights declared in the UDHR, and the Charter of Fundamental Rights, which prohibits *refoulement* and reaffirms the right to asylum in Europe (European Union Agency for Fundamental Rights, 2014)15 Since 1999, the EU has worked to implement phases of the Common European Asylum System (CEAS) to harmonise member states' approaches to granting asylum. The CEAS established the Qualification Directive to standardise the process of identifying who qualifies for international protection (European Council on Refugees and Exiles [ECRE], 2014). Under this directive, an asylum application may be denied one of three forms of protection granted by an EU member state: refugee status (for persons fleeing their home country due to persecution), subsidiary protection (for persons already outside their home country and unable to return due to fear of persecution), or authorisation to stay for humanitarian reasons (granted by states for other reasons they may choose) (European Commission, 2015).

While states must adhere to international and EU laws, ultimately, the resources refugees require are those provided by states themselves, such as visas, work permits, and access to housing and healthcare. EU member states retain sovereign rights to control their borders and make their own decisions on the entrance of foreigners. This means that the way asylum is granted and applied varies by each country.

Disunity in the European Union

Despite the EU's attempts to harmonise member states' approaches to asylum, significant disparities and imbalances remain, creating an unsustainable scenario. In many areas, national interests appear to be increasingly prioritised over the idea of EU solidarity. This is a combined result of both the EU's own policy failures and the underlying context of nationalism in Europe.

The EU as a whole went too long without heeding calls from Mediterranean European countries for increased "burden-sharing". Southern European states faced ongoing arrivals for years due to their geographic positions, but it was Europe's Dublin regulations that held them disproportionately responsible for managing the borders of Europe as a whole. The Dublin regulations held that the country through which an asylum-seeker first entered the EU is responsible for processing asylum applications (European Union, 1990). Furthermore, a migrant discovered in another EU state without proper documentation would be sent back to the state of first entry. Notably, returns to Greece were suspended in 2011 due to ECHR findings of unacceptable migrant reception conditions (Collet, 2014). EU-led attempts to reform asylum policies and redistribute responsibility are ongoing, though little impact has been demonstrated so far.

One of the EU's critical challenges is to balance administration of member states in a common fashion while respecting the unique cultural, economic, geopolitical, and historical contexts of each. Many European states exemplify the notion of a nation-state in which political borders align with a majority group's shared sense of culture and identity. Europe is historically the birthplace of this form of nationalism, which plays into certain countries' willingness or lack thereof to accept and integrate Syrian refugees. Eastern European countries in particular have experienced a violent history over the struggle for autonomy and nationhood, with repeated re-drawing of borders (Friedman, 2015). Collective memories influence the social and political anxieties aroused from being asked by the EU to assist new victims with whom they share little sense of common identity. Issues of culture and identity need to be analysed and understood to enact collective policy measures.

Without a unified response, increased pressure applied to individual states will make them more likely to defensively securitise the refugee crisis. The imposition of stricter border security measures to hinder the arrival of asylum-seekers is a questionable approach that fails to distinguish between immigration and asylum policies. Broadly conflating the two issues seemingly ignores a defining characteristic of refugees – that they have rights to seek and enjoy asylum.

Securitisation tactics applied over the years have provided short-term and localised alleviation in some circumstances; however, ultimately they have neither deterred the arrival of asylum-seekers nor provided sustainable solutions. Meanwhile, many more humanitarian-based approaches have faced criticism over potentially creating a "pull-factor" for migration. Political tensions and skyrocketing operational costs ultimately led to the suspension of the Italian Navy's Search and Rescue (SAR) operation Mare Nostrum, which saved some 150,000 lives between 2013 and 2014 (International Organization for Migration [IOM], 2014). Italy's SAR operation was replaced with Joint Operation Triton, a much smaller border surveillance operation funded by the EU's border control agency, Frontex. Ultimately, scaling back rescue operations did not deter migration. Instead, the Mediterranean ended up witnessing new record death tolls from shipwreck tragedies.

There are two important lessons here. First, unilateral responses are unsustainable given the scale of the crisis; strong collective approaches are necessary to prevent tragedies and maintain order. Second, it is not the pull-factors that have increased migration to Europe, but the push-factors. Threatened by ongoing warfare and severe instability, asylum-seekers are going to continue to flee to Europe. The majority of asylum-seekers know the risks involved in irregular migration, but most consider it too risky to stay. When one migration route or another is forcibly shut off, routes generally shift and pressure is applied to new locations, increasing the likelihood to build tensions between neighbours. Over-emphasising the pull-factor argument evidences a failure to recognise the root causes of forced migration and confuses immigration and asylum policies.

The Policy Gap on Seeking Asylum

Despite international recognition of the right to asylum, there is a legal gap with regard to the means of transit from home to host country. Most asylum-seekers lack the option for regular/legal entry. While states are legally prohibited from penalising refugees for illegal entry, the EU imposes carrier sanctions on private companies for transporting persons lacking proper travel documentation (UN General Assembly, 1951; ECRE, 2015). Most asylum-seekers must therefore cross borders by irregular means. Consequently, instead of paying for affordable and legal transportation to Europe, migrants pay exorbitant amounts to criminal human smuggling networks that have arisen to fill the gap.

While the principle of *non-refoulement* prevents states from returning refugees to unsafe countries, Europe is considering some transit countries as viable end destinations as long as they are considered safe third countries. This presents a set of legal challenges that the EU needs to carefully examine. One example is the EU's negotiations with Turkey to curb the flow of irregular migration across the Aegean Sea. Turkey is a state party to both the 1951 Convention and the 1967 Protocol; however, the country maintained the original geographic limitation on the definition of a refugee (İçduygu, 2015). This means that, technically, full refugee status is only applicable for European asylum-seekers. Asylum-seekers from non-European countries may receive temporary forms of protection under Turkey's 2013 Law of Foreigners and International Protection (İçduygu, 2015). Given the likelihood of the Syrian crisis persisting well into the future, the idea that Syrians have no long-term solutions or ability to integrate into Turkish society is problematic.

Limitations of the Legal Framework

Many displaced persons and asylum-seekers today fall outside the established framework of international refugee law and the EU refugee *acquis.* Conventionally, two interconnected dimensions heavily influence the differentiation between an asylum-seeker with legal rights to refugee status and an illegal migrant. The first dimension is a distinction between voluntary and forced migration, which centres on the notion of choice (Roman, 2015). The second dimension is the

understanding of persecution as the cause of a refugee's displacement, as defined in the 1951 Convention. For example, did the asylum applicant choose to emigrate due to financial incentives, or were they forced to flee threats of persecution? The answer to this question was fairly straightforward in the post-WWII case of displaced Europeans; now, however, the distinctions are less clear. Perceiving migrants as either illegal economic migrants on one end or refugees fleeing war on the other has created an over-simplified image of forcibly displaced persons.

Today, despite the relative lack of interstate warfare, worldwide displacement has reached an all-time high. The root causes of forced displacement and migration in the 21st century involve a multifarious range of factors including civil and proxy warfare, repressive and failed governance, terrorism and violent extremism, and environmental degradation. In all of this, many persons are forced to cross borders due to extreme deprivation or a combination of reasons; however, fleeing deprivation does not carry the same legal protection under the 1951 Convention as fleeing persecution (Betts, 2013): This issue contributes to a large degree of legal interpretability and variance of approaches, hindering the EU's attempts to harmonise asylum policy across member states. This is a challenge even in processing the claims of asylum-seekers from the same country. For example, in 2012, 59.1% of Afghan asylum-seekers were granted refugee status in Belgium compared to 6.8% in Greece (ECRE, 2014).

The notion of choice as a primary indicator for irregular migration is now a more convoluted concept. At what point are socioeconomic or environmental conditions so deplorable that emigration is no longer a choice but a necessity? Where is the line drawn between an asylum-seeker's legal rights under fleeing persecution versus fleeing deprivation? What forms of protection are set aside for these migrants, and how might they be labelled? Questions such as these challenge the structural integrity of the conventional refugee architecture and confuse state responses.

Implications and Recommendations
Developing effective, balanced, and sustainable responses to the refugee crisis requires a reconceptualisation on multiple fronts. The world faces not only a

humanitarian crisis, but also a strategic crisis calling for idealists and realists alike to act. A failure to manage the situation would be due to a lack of will and understanding, not a lack of capability. Such a failure would be looked back upon as a disgraceful moment in history.

Europeans should revitalise solidarity and employ collective approaches to the refugee crisis. The strengthening of solidarity requires a larger emphasis to be placed on educating the public on the crisis and focusing efforts on integration programmes. EU decision-makers should more transparently take the historical and cultural contexts of various European regions into consideration. Such a payment of respect while working toward common goals will help mitigate political polarisation. Redistribution programmes should occur at a greater level than has been demonstrated so far. To achieve equity, responsibility-sharing agreements should not focus on the number of accepted migrants alone, but also the country's economic situation, geographic capacity, political environment, and strength of non-governmental initiatives on the ground.

The EU should enhance interoperability with Mediterranean neighbours and the UN to manage and organise migration flows. A combined effort should be made to position emergency asylum registration facilities in Turkey, Lebanon, and Jordan. Consular officers should work to process claims here, issue special humanitarian visas, and open safe, legal paths for direct transit to a host country. This will give Europe a head-start on the asylum process, prevent tragedies from occurring at sea, undermine criminal human smuggling networks, and alleviate pressure applied through the Western Balkans migration route. In working with its neighbours, the EU should take careful consideration of the actual status of refugees in safe third countries to ensure the standards established by international law are upheld.

The UN should aid refugees and states' response efforts by creating a supplemental legal framework designed to address today's unprecedented displacement crisis and those of the future. Migrants fleeing extreme deprivation are often in analogous situations to refugees fleeing persecution, and the UN

should further explore the rights of these persons, establish new labels referring to different forms of migrants, and define states' obligations (whether long-term or temporary) according to each type. From a state perspective, while this means accepting refugees, it also means following-through on deporting migrants who do not qualify for any form of protection, freeing up resources for those with legally recognised asylum rights. The 1967 Protocol addressed the limitations of the 1951 Convention; in 2016, a new supplemental framework is required to address worldwide displacement and migration crises.

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