Who is the New European Refugee?

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Abstract: This paper highlights the unforeseen or unintended effects of the European Union's refugee law on the world's most vulnerable refugees, those forgotten by the law. The paper focuses on those refugees automatically denied protection in Europe by being impliedly defined out of the EU's refugee definition. Not only must refugees seeking protection in Europe meet the legal definition, but they are also assumed to have the means to reach Europe. Due to the limitations on legal access routes, often only those who can afford to pay a smuggler have the chance to reach Europe. The great majority of the world's refugees remain outside Europe. Therefore, an exploration of the external policies of the EU institutions which are designed to counter the limiting affects of its restrictive migration policy is required. The paper examines the move towards the establishment of Regional Protection Programmes, Protected Entry Procedures and Resettlement Schemes as providing possible hope for enduring protection for those refugees trapped outside Europe.

INTRODUCTION

It may be said that EU refugee law generally broadens protection for asylum seekers and refugees in Europe, though when seen in the light of wider EU migration policy, it is clear that access to EU asylum procedures has been severely impaired in recent years. The result has been a change in the identity of the European refugee, whose routes of accessing the EU, having been strictly curtailed, must now possess certain characteristics such as an element of power and economic mobility in order to penetrate the European border. These individuals are by no means the most vulnerable refugees. The EU's recent moves to counter the implications of its restrictive migration policy on access to Member States' asylum procedures through the use of such measures as Regional Protection Programmes, an EU-wide Resettlement Scheme and Protected Entry Procedures, if managed effectively, may provide the beginnings of a positive step towards

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providing pragmatic and equitable protection to vulnerable refugees. The evolution of the identity of the European refugee is first explored with reference to the relevant international law and then within the framework of the EU Qualifications Directive. There follows a discussion on the nature of the European refugee in the context of the EU's restrictive migration policy. Finally, the proposals of the European Commission, designed to alleviate the negative implications of the limited access to the EU, are explored.

THE 1951 REFUGEE CONVENTION

WHO IS A 'REFUGEE'?

The primary source of international protection for those seeking refuge is the 1951 Refugee Convention. Before examining the Convention definition of a 'refugee', it

States. Article 33(1)(A) of the Refugee Convention, which prohibits *refoulement* reads:

> No Contracting 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.

Though the broadening of refugee law since the agreement of the Refugee

in for the sole purpose of creating the necessary conditions for applying for international protection'. Thus, in contrast to the situation concerning refugees, in the case of an 'asylum seeker', the implicit assumption that the individual is worthy of protection is lacking. Rather, in hand we have a *potential* refugee; an individual whose claim for protection must be assessed for credibility prior to the granting of rights under refugee law.

The phenomenon of an asylum seeker is a difficult one. Commentators have tended to use the term refugee and asylum seeker synonymously in order to emphasise the applicability of the principle of *non-refoulement* to all individuals claiming protection. The rationale prevalent among scholars in the field is that recognition of a refugee's status does not 'make him a refugee', but merely 'declares him to be one'.[11] Thus, Article 33 necessarily implies that the status of an applicant is to be determined by the State in which she lodges her claim before any deportation can legitimately take place. Failing this, a State could not be certain that it is adhering to the principle of *non-refoulement*. In theory, therefore, all asylum seekers may be said to benefit from a '*presumptive refugee status*' whereby 'an applicant has the same [Article 33] rights as a refugee unless and until his or her non-refugee status has been established'.[12] On this interpretation of the law, the principle of *non-refoulement* applies to all individuals regardless of the country from which they originate or any circumstances surrounding the credibility of their claim to protection. The response from States has been to limit the number of individuals fulfilling the status of an asylum seeker in order to cope with the demands of the principle of *non-refoulement* on this absolute interpretation. One way in which States have responded is with the introduction of the 'safe country' concept in the administration of their asylum regimes; a procedural measure designed to reduce the amount of asylum claims to be determined. If an individual lodging an asylum application in a destination State is found to have originated from, or passed through, a so-called 'safe country', her claim may be left undetermined and she becomes liable to return to that 'safe country'. A country is presumed 'safe' on consideration of a number of factors, including its human

The main problem concerning the principle of *non-refoulement* is its absolute nature. It is not only impossible in practice, but also unwise to attempt to implement generally an absolute principle of any kind, including that of *non-refoulement* under the traditional interpretation of asylum advocates that it gives rise to a presumptive refugee status applicable to every person claiming protection no matter from where she originates. In order to illustrate this point it is possible to explore the application of a procedural measure such as the 'safe country of origin'. Claims originating from designated 'safe countries of origin' are treated as *a priori* inadmissible and applicants are precluded from protection, unless they can rebut the presumption against their claim. Concerns as to the use of the concept of a 'safe country of origin' have been raised by a number of commentators.[13] Goodwin-Gill has asked, 'How can we be sufficiently sure that even the most reputable of regimes has not, just this once, produced a refugee?'.[14] Van Selm has likewise noted that any State's safeguards against persecution 'might fail a tiny minority' who would then be precluded from seeking protection elsewhere.[15] Although such arguments are valid theoretically, their implication is the adoption of a 'one size fits all' approach to the examination of claims, which, for example, would see a claimant originating from the Democratic Republic of Congo arriving in France, treated in the same way as an individual coming from Germany. This cannot be a prudent or a just allocation of resources considering a common sense evaluation of the situation in these States of origin.

The principle of *non-refoulement* was devised at a time when States knew the nature of the individuals arriving at their borders. It was designed to work in conjunction with the definition of a refugee. By defining a refugee, States claimed to know their characteristics and to accept the obligation of providing them with protection. However, with the emergence of the *potential* refugee or the asylum seeker and the subsequent burden on asylum administrations, States were compelled to devise a new notion of *non-refoulement*. It is possible to conceive of the 'safe country' concept as precisely this. By using this measure, States are purporting to know who counts as a refugee before they have arrived and, just as before, only grant a right to *non-refoulement* to those pre-identified as having a claim to protection. This is the same method and reasoning that was used to distinguish a refugee from a non-refugee at the time of the negotiations on the Refugee Convention. States merely responded to circumstances prevailing at the time of its agreement, just as States have done over the previous decades. However, the

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[13] See for example, C. Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *EJML* 50; J. Van Selm, 'Access to Procedures: "Safe Third Countries", "Safe Countries of Origin" and "Time Limits"', (Paper commissioned by UNHCR and the Carnegie Endowment for International Peace, 2001) 37; J. Allain, 'The *jus cogens* nature of non-refoulement' (2002) 4 *IJRL* 13, 549; R. Byrne and A. Shacknove, 'The Safe Country Notion in European Asylum Law' (1996) 9 *HHRJ* 192.

[14] G. Goodwin-Gill, 'Safe Country? Says Who?' (1992) 4 *IJRL* 242.

[15] J. Van Selm, 'Access to Procedures: "Safe Third Countries", "Safe Countries of Origin" and "Time Limits"' (Paper commissioned by UNHCR and the Carnegie Endowment for International Peace, 2001) 35-6.

effect has been an increasing number of restrictive measures preventing asylum

substance cannot be found solely through reference to the Convention. Rather the significance of the refugee definition is located in the meanings attributed by the EU Member States to 'persecution', and in the grounds of persecution they have drawn up in the Qualifications Directive. According to the Directive, the definition may in fact, in a number of respects, be seen as broader than that found in the Refugee Convention in its consolidation of the developments in refugee law since the time of the agreement of the Convention.

'Acts of persecution' and 'Reasons for persecution'

It is clear from Article 9 on 'acts of persecution' and Article 10 on 'reasons for persecution' that an element of discrimination must be present in any case made for asylum. The substance of these provisions reflects the growing intolerance of certain forms of discrimination in Europe.[19] These provisions fall under Chapter III of the Directive on 'qualification for being a refugee'. The unacceptability of

nature',[21] neither of which are found in the Refugee Convention though the law has developed gradually in recognition of the need to protect individuals from return to such treatment.[22]

Article 9(3) of the Directive recalls the requirement in the Refugee Convention for a link between the reasons for persecution and acts of persecution. Under Article 10 Member States are obliged to take a number of factors into account when assessing the reasons for persecution. These include 'the concept of race…colour, descent, or membership of a particular ethnic group',[23] 'religion',[24] 'political opinion',[25] 'nationality'[26] and membership of 'a particular social group'.[27] In contrast to the Refugee Convention, the Directive usefully provides a definition of a social group by stating some of the possible characteristics of such a group:

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different from the surrounding society.

Importantly the Directive recognises that 'a particular social group might include a group based on a common characteristic of sexual orientation'. However, a limitation is placed on the application of this provision: "Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States."[28] With regards to gender, the Directive provides that: "Gender related aspects might be considered, without by themselves alone creating a presumption for the application of this Article."[29]

Teitgen-Colly points out that the limitation attached to the basing of an asylum claim on grounds of one's sexual orientation represents the 'limits of the

harmonization exercise'.[30] Importantly however, the inclusion of this proviso seems also to reflect the true limits of refugee law, i.e. that it may not develop further than the host society itself has developed in terms of the acceptability or otherwise of limits on rights and freedoms. It is clear from the above provisions on sexual orientation and gender as reasons for persecution that the approach taken in the Qualifications Directive towards defining the scope of refugee law is one based on the development of the Member States' societies. So for example, although sexual orientation can be considered a ground for determining persecution, this is limited to the extent that freedom of sexual orientation is protected in Member States. This supports the view that refugee law may only continue to develop in practice so long as it reflects the values of the host society. This can also be seen in Article 2(h) on the definition of 'family members', which includes:

> - the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, *where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens* [emphasis added].

This constant checking by host States of the breadth of their refugee law to ensure that it does not go beyond the scope of their own national standards of protection demonstrates the clear limitations attached to the potential widening of the scope of refugee law.

In many respects therefore the Qualifications Directive goes further in its scope of protection that the Refugee Convention. This is unsurprising considering the development over time of host societies and the increasing unacceptability of certain human rights violations. However, this broadening of refugee law is not

resources. In any case it has always been required that the applicant's fear of persecution be 'well-founded'.

It has been asserted that an 'atmosphere of circumspection' surrounds the approach of the Qualifications Directive towards asylum applications.[32] It is submitted however that this is neither surprising nor wholly undesirable considering the way in which refugee law has developed over the years. Rather, such 'suspicion' with regard to asylum applications is to be expected in light of the shift from the idea of a known refugee to an unknown asylum seeker. The presumption of credibility might have been justified when States knew the make-up of the individuals claiming protection at their borders, but this has disappeared as the nature of European asylum law has changed drastically with the permanent flow of applications caused by continuous conflict across the World as well as the

have aside from those explicitly required by law? How do they differ from those refugees who never reach European shores?

These individuals are essentially those who find some way to circumvent, either legally or illegally, the EU and the Member State's restrictive control measures designed to deflect asylum seekers. That this is the design of these measures is no secret. Take for example the UK, where a Home Office Asylum Statistical Bulletin of 2006 includes a section entitled 'Key changes to reduce the number of asylum applications'.[34] A list of measures designed to prevent the arrival of asylum seekers follows, including the introduction of non-suspensive appeals, safe countries, restricted access to socio-economic support for asylum seekers, accelerated procedures and new visa requirements. All these measures, alongside existing restrictive instruments such as carrier sanctions, have facilitated the limitation of regular access to UK asylum procedures.

The recent events concerning the Iraqi interpreters who help the British forces in Iraq being unable to apply for asylum in the UK and being reduced to pleading with the British government to make an exception and allow them to make their claims from Iraq, or the neighbouring countries to which some have fled, illustrates the failure of UK asylum law to protect some of the individuals most at risk of persecution. Instead of being permitted to claim asylum directly,

requirements, a special transit visa for airports and ports was created, and French immigration liaison officers were stationed in various third country airports in order to check the documents of individuals onboard aeroplanes travelling to France after they have been checked by local officials. Belgium and the Czech Republic transposed Directive 2001/51 on carrier obligations.[38] Under this Directive those bringing individuals without the required travel documents into Member States are responsible for their return and for any cost incurred by hosting them on Member State territory. In the UK, the New Immigration, Asylum and Nationality Act 2006 contains provisions strengthening border controls by requiring the fingerprinting of all visa applicants and electronic checks are required on all people on both entry to and exit from the country.[39] The Border Guards in Finland have since 2005 had greater powers, which previously only belonged to the police, over non-nationals who they can now detain for a maximum of 48 hours and asylum seekers can be interviewed in order to ascertain their identity, travel route and means of entry.[40]

These Europe-wide restrictive measures have implications for the makeup of the European refugee. Only individuals who can overcome these obstacles in either a legal or an ill(nly.52 134.64 519.440x134.64 519.440x19.440x11533 iverincansC BTdati/Tda B000
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increasingly difficult for potential asylum seekers to seek protection through legitimate means, forcing many to resort to the use of smugglers in order to penetrate the borders of European States. Thus to leave one's country of persecution often requires money to bribe security officials and further finances for the legal or illegal journey to Europe. Most European refugees are therefore often among the most powerful, daring, well-resourced and economically mobile of the persecuted.

It is important to take into account these implied characteristics of the European refugee when determining the state of European refugee law. With a clearer picture of European refugee law in the context of Europe's wider migration policy, it ought to be possible to draw some conclusions on the nature of the evolving Common European Asylum Policy (CEAS). If it is true that only asylum seekers fulfilling certain requirements over and above those contained in express refugee law, such as being economically mobile, can access the EU, then the new European refugee is by no means the most vulnerable. The fact that certain migrants are privileged over others means that the CEAS is far from an equitable regime in neither granting sufficient nor equal access to its asylum procedures. Furthermore it may be argued that the system lacks prudence as a refugee regime in dedicating scarce resources to an inefficient and stunted regime which protects the more 'powerful refugee' over the most vulnerable. In its allocation of rights and benefits to a select number of individuals in a manner that has until now paid insufficient regard to those refugees in need of protection, but who lack the capabilities to penetrate the EU's wall of restrictive measures, we are also entitled to question the normative foundation of the CEAS.

THE EU POLICY RESPONSE

One of the many questions arising from the above characterisation of the new European refugee is whether these results are intended, or an unfortunate, incidental outcome of the way in which EU migration policy interacts with its asylum legislation. It is clear from the documentation that the EU institutions and the Member States are aware of the impact of the new policies at least in so far as they act to reduce access for asylum seekers to the EU. However, the difficult question remains as to whether it is possible to counter adequately such resulting negativities whilst retaining restrictive measures on access in place. What is clear from the recent Green Paper on the future of the CEAS [46] is that the Commission's intention is to remedy the negative effects of the restrictive measures through the introduction of new measures rather than by dismantling some of the deflective aspects of the current system, such as strict visa requirements for refugee-producing countries. Accordingly, the Commission perceives the need for 'further measures' that 'could be taken to ensure that the

[46] Green Paper on the future of Common European Asylum System, Brussels, 6.6.2007 COM(2007) 301 final.

UNHCR of 15 February 2005.[62] However, there is to be no new financial arrangements for RPPs and funding will come from the AENEAS and TACIS financial frameworks.[63]

It may be that the notion of RPPs has a number of benefits for the selected regions of origin as well as refugees themselves. Some core features of RPPs include ensuring that projects improve the general situation of protection in host countries, establishing effective refugee determination procedures, improving reception conditions, ameliorating the impact of refugees on local populations by disseminating information on the positive impact of refugees, finally and perhaps most important with regard to the cooperation element of RPPs, Member States are to make a resettlement commitment, whereby they undertake to provide protection for a number of affected refugees on their own territories.[64]

The Commission's concept of RPPs has recently been launched in two pilot Programmes, in the Western Newly Independent States and in Tanzania. These

limited to selecting regions where an infrastructure for cooperation is already in place to be built upon, running smaller scale programmes for smaller regions with the hope of future expansion, and in all cases with Member State resettlement schemes running in conjunction with the RPP.[69] These projects remain at the early stage of implementation and thus their results are yet to emerge and be evaluated. The question remains whether the potential benefits of RPPs for the affected host countries in regions of origin can in anyway allow them to act as a substitute for increased equitability in access to protection in the EU?

In its 2004 Communication on managed entry of persons in need of international protection [70] the Commission discussed the possibility of the implementation of an EU wide resettlement scheme, highlighting the advantages of conveying the message that the EU is prepared to take its share of the World's refugees, the possibility of identifying those most and genuinely in need of protection prior to the arrival of individuals in the EU, the reduction of the need for those seeking protection to resort to paying smugglers for a passage into the EU and finally, with the predetermined credibility of the claims of selected individuals the69p 7aying smu9sm pe World's

CONCLUSION

The face of European refugee law is changing, and with it the character of the European refugee. In many ways, the European refugee is better treated than ever before; guaranteed wider and equitable protection in each Member State. However,