

The Syrian crisis has exposed multiple shortcomings in contemporary responses to large scale refugee movements, which make the current system of international and regional refugee law and policy unsustainable.

What characterises the flow of migration as a result of the civil war in Syria has been the mass influx over the same time span of asylum seekers not only from Syria but also from North Africa and the Middle East. The contemporary response is a reflection of international and regional law and policy. It is therefore fair to ask whether that law and policy is sustainable. Considering international and regional law, in particular the EU, and analysing the reactionary and preventive policies in and of itself demonstrates that the law has developed incrementally to cope with large scale refugee movement and is therefore sustainable subject to a shift in policy. However, Refugee Law must not be critiqued in isolation because the application of that law is reactionary to events that are governed by other areas of international law such as the Law of Armed Conflict coupled with foreign policy. The continued progress of Refugee Law, therefore, not only demands a change in policy but also requires its application to be seen in the wider context of International Law.

What is unique to Syria

Appave observed that the majority of migration flows were intra rather than inter regional¹. The Syrian crisis has proved this narrow observation to be incorrect. It is true that inter-regional migration was prevalent before the Syrian crisis with 20,000 people having died crossing the Mediterranean between 1994 to 2014². There are also reports in 2005 of hundreds of migrants attempting to reach the Italian island of Lampedusa having transited through Libya³.

What complicates the Syrian conflict is the increasing number of foreign fighters and factions, including the Free Syrian Army as well as jihadist groups such as Jabhat Al Nusra and ISIS which has had a regional impact in countries such as Lebanon, Turkey, Jordan and Iraq⁴. The effect has been astronomical. As at 7 November 2016 there were 4,810,216 registered Syrian refugees with the UNHCR and 1,015,078 arrivals by way of crossings over the Mediterranean, 26% of whom were Syrian nationals⁵ although other reports report a figure of 49%⁶. There were reports in early 2015 of a 1600% increase in the number of migrants drowning in the Mediterranean compared to early 2014⁷. By 2016,

¹ Appave G, "Emerging Legal Issues in international migration", in Opeskin et al., *Foundations of International Migration Law*, (Cambridge University Press, 2012), 416

² Basaran T, "Saving lives at sea: Security, law and adverse effects" (2014) *European Journal of Migration and Law* 366

³ Amnesty International, "EU Regional protection programs: Enhancing Protection in the region or barring access to the EU territory?" September 2015

⁴ UNGA "Protection and Assistance to Internally Displaced Persons: situation of internally displaced persons in the Syrian Arab Republic" UN Doc GA/A/67/931, 5

⁵ Endres-de-Oliveira, Slide presentation SOAS, 2 December 2016

⁶ <http://www.unhcr.org/uk/events/conferences/56f29f579/global-responsibility-sharing-factsheet.html?query=syriaglobalfocus>

⁷ Selanec N, "A critique of EU refugee crisis management: on law, policy and decentralisation", (2015) *Croatian Year Book of European Law and Policy* 75

57% of the 4.4 million refugees in Europe were Syrian and the report of the UNHCR noted that this tested the Common EU Asylum System with regard to the facilitation of transit through member states, the closure of borders and criminalisation of entry and detention⁸.

Who is responsible

Gammeltoft-Hansen and Hathway take the view that shared responsibility for internationally wrongful acts should apply where: international human rights are breached due to combined action; independent actions culminate in a common wrong; or states collaborate through a single entity (i.e. the European Union)⁹. This will be explored further below.

Absence of coherent co-ordinated framework for global governance

1. International Law

a. The law

Refugee Law consists of international, regional and transnational treaties and bilateral agreements.¹⁰ Refugee Law consists of three treaties: The Convention Relating to the Status of Refugees (1951) amended by its 1967 Protocol (the “**Refugee Convention**”); the Agreement relating to Refugee Seamen; and its Protocol¹¹. There are three main components to the Refugee Convention: the definition of refugee under Article 1A(2) as one in need of international protection due to “well founded fear of persecution” based on race, religion, nationality, membership of a particular social group or political opinion; the principle of non refoulement under Article 33 which prohibits states from returning refugees to territories where their life or freedom would be threatened; and minimum standards of treatment and rights once a an asylum seeker is granted refugee status¹².

⁸ UNGA “Report of the United Nations High Commissioner for Refugees” A/71/12, 3

⁹ Gammeltoft-Hansen T and Hathaway J, “Non refoulement in a world of Cooperative Deterrence” 53 Columbia Journal of Transnational Law 244

¹⁰ Trauner F and Wolff S, “The negotiation and contestation of EU migration policy instruments: A research framework” (2014) 16 European Journal of Migration 6

¹¹ Chetail V, “Sources of International Migration Law”, in Opeskin et al., *Foundations of International Migration Law*, (Cambridge University Press, 2012), 62

¹² Chetail (n 11), 59, 60

Significantly, the Refugee Convention does not outline procedures for the determination of refugee status. This procedural task is left to the domestic law of state parties to the Convention and international instruments concluded by states¹³. It is this deficiency that allows for a disjointed framework to the global governance of Refugee Law and its consequent dependency upon good policy.

b. Regions

Refugee Law therefore differs from region to region and embraces different definitions of the class of person regarded as a refugee. The Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) extends to those fleeing from a portion or the whole of the country¹⁴ but, although providing a mandatory requirement to grant asylum in solidarity, state practice is lacking¹⁵. The Cartagena Declaration on Refugees (1984) covers those fleeing from foreign aggression, internal conflicts and a violation of human rights.¹⁶ Applicable regionally in Asia is the 1966 Bangkok Principles on the Status and Treatment of Refugees.¹⁷ With a view to harmonising procedures across member states, the European Union's Directives detail the content and procedures for protection, such as "subsidiary protection" discussed below.¹⁸ Furthermore, Article 18 of the EU Charter of Fundamental Rights guarantees the right of asylum and Directive 2004/83/EC enshrines the principle of non refoulement¹⁹. Regional law therefore has advanced in embracing a wider context in which refugee movement occurs.

¹³ Hoffmann R and Lohr T, "Administrative Measures, Introduction to Chapter V: Requirements for Refugee Determination Procedures" in Zimmermann et al., *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, (Oxford University Press, 2011) 7

¹⁴ Hathaway J, "Refugees and asylum", in Opeskin et al., *Foundations of International Migration Law*, (Cambridge University Press, 2012), 180

¹⁵ Turk V and Garlick M, "From burdens and responsibilities to opportunities: The comprehensive refugee response framework and a global compact on refugees" (2016) 28 *International Journal of Refugee Law* 662

¹⁶ Hathaway (n14), 180

¹⁷ Wallace R, "The principle of non refoulement in international refugee law" in Chetail and Bauloz *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 422

¹⁸ Hathaway (n14), 180

¹⁹ Wallace (n 17) 422

It has been noted that the African and Latin American definition of refugee is humanitarian and pragmatic in responding to the reality of regional conflicts²⁰.

c. Non refoulement

The obligation of non refoulement is a qualified limitation on the sovereign right of a state to determine who may enter its territory.²¹ The duty provides a state with two options: to admit the asylum seeker or remove him to a safe third country which equally respects the duty not to refoule²². Chetail notes that “these solutions may be of a legal nature...but also of a political nature.”²³ This shows that policies can dictate the law. Hathaway notes that many states have adopted non entrée policies such as the interception of vessels at sea²⁴, discussed below. The Syrian crisis has earmarked this chapter and juncture in Refugee Law illustrating that a further decline in policy does not bode well for the future of the law. If the law is a reflection of policy, then it is not the law but the underlying policy that should be analysed so as not to prejudice the development of the law.

d. Ambit

The UNHCR has recognised that the Refugee Convention applies “wherever a state exercises jurisdiction, including at the frontier, on the high seas or on the territory of another state²⁵ and Zimmerman concludes that its application extends “wherever the state has effective control over the person involved.”²⁶

2. European Union Law

²⁰ Popp K, “Regional Processes, law and institutional developments on migration”, in Opeskin et al., *Foundations of International Migration Law*, (Cambridge University Press, 2012), 386

²¹ Chetail V, “Are Refugee Rights Human Rights? An unorthodox Questioning of the Relations between Refugee Law and Human Rights Law”, in Rubio-Marin, *Human Rights and Immigration*, (Oxford University Press, 2014) 31

²² Id.38

²³ Id.

²⁴ Hathaway (n14), 180, 195

²⁵ Weissbrodt D and Divine M, “International Human Rights of Migrants”, in Opeskin et al., *Foundations of International Migration Law*, (Cambridge University Press, 2012) 168

²⁶ Sabel R, “Book Review The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary” (2012) 45(3) *Israel Law Review* 49, 562

The original aim under the Treaty of Rome 1957 was to establish an economic community²⁷ and the “communitarised” Schengen Agreement framed immigration as a matter of internal borders.²⁸ The Syrian crisis has compelled the EU to include migrants from outside the Union. It has done so with: the Revised Asylum Procedures Directive (“**RAP**”) to quicken the rendering of decisions for asylum; Revised Reception Conditions Directive (“**RCD**”) dealing for example with housing and detention; Revised Qualification Directive (“**RQD**”) improving access to rights; the Revised Dublin Regulation (“**Dublin**”); and the EURODAC Regulation providing for the fingerprinting of asylum seekers to investigate serious crimes.²⁹

Article 15 of the QD provides for subsidiary protection of an asylum seeker and has been criticised for blurring refugee status determination.³⁰ It is arguable, however, that such status at least provides some protection for asylum seekers.

The Dublin Regulation provides that the asylum procedures are dictated by the member state in which the asylum seeker first enters.³¹ It has been described as ineffective because it has had the effect of shifting the “burden” to member states on the external borders of the EU.³² For example, in 2014 five member states dealt with 72% of all asylum applications EU wide.³³ It is clear that the policy that informs this legal arrangement is not sustainable and is discussed below.

Interestingly, there is a Temporary Protection Directive³⁴ which provides for temporary protection in the event of a mass influx of displaced persons requiring the transfer of persons to member states pursuant to a quota system.³⁵ The effectiveness of this binding instrument has been called into question by the fact that in 2015: 76 out of 116,000 refugees sought asylum in Italy; 8 out of 211,000 refugees sought asylum in Greece; 145,000 refugees passed through Hungary; and 465,000 refugees passed through Croatia.³⁶ Clearly the law does not

²⁷ Johns M, “Post accession Polish migrants in Britain and Ireland: Challenges and obstacles to integration in the European Union” (2013) 15 EJ of Migration and Law 31

²⁸ Kocharov A, “Governance of Migration in the EU: Home Affairs or Foreign Policy?” (2013) 15 European Journal of Migration and Law

²⁹ https://ec.europa.eu/home-affairs/what-we-do/policies/irregular-migration-return-policy_en

³⁰ Gil-Bazo M, “Asylum as a general principle of International Law”, (2015) 27 International Journal of Refugee Law 4

³¹ Selanec (n 7) 85, 86.

³² Id. 85,86

³³ Commission “A European Agenda on Migration” COM (2015) 240

³⁴ 2011/5/EC of 20 July 2001

³⁵ Selanec (n 7) 94, 96, 98

³⁶ Id. 102-103

have the desired effect of equitably sharing the responsibility for refugees in the EU, a matter discussed below.

Although the EU has been criticised for focussing on its borders rather than on refugees in neighbouring states to conflicts,³⁷ it cannot be denied that the EU has adapted to a policy of inclusion from migrants outside the EU. There is a disjoint in the coherence of the EU framework, however, with countries such as Germany granting 99% of applicants with refugee status between 2013 and 2016 and providing more elaborate schemes such as a resettlement programme, humanitarian admission, private sponsorship and family reunification programmes.³⁸

3. Elements

a. Persecution

The drafters of the Refugee Convention did not define “persecution”³⁹ but is now understood to mean a combination of serious harm and failure of state protection.⁴⁰ The QD adopts a human rights interpretation of “persecution,”⁴¹ however Costello notes that the European Convention on Human Rights (“ECHR”) grounds reflect a political rather than a humanitarian conception of asylum.⁴²

The International Covenant on Civil and Political Rights (“ICCPR”) has been used to expand upon the meaning of “persecution” with reference, for example, to the risk to life and cruel, inhuman and degrading treatment or punishment.⁴³ The High Court of Australia in *Chen Shi Hai* (Aus. HC 2000) found that “denial of access to food, shelter, medical treatment...constitute persecution⁴⁴”. It begs the question, therefore, as to why refugees from Syria and Afghanistan are experiencing difficulty in gaining status.

³⁷ Gilbert G, “Why Europe does not have a refugee crisis”, (2015) International Journal of Refugee Law

³⁸ Endres-de-Oliveira, Slide presentation SOAS, 2 December 2016.

³⁹ Hathaway J and Foster M, *The Law of Refugee Status*, Second Edition (Cambridge University Press, 2014), 182

⁴⁰ Id. 184

⁴¹ Costello C, *The Human Rights of Migrants and Refugees in European Law* (Oxford University Press, 2016), Chapter 5, 6

⁴² Id.

⁴³ Hathaway and Foster (n 39)

⁴⁴ Id.

It must be that the policy driving the application of the law in the EU, for example, is what needs to be addressed.

b. Non refoulement and the Human rights approach

Chetail argues that states have both a negative and positive obligation with regard to respecting human rights⁴⁵ and that this is reinforced by the fact that the preamble of the Refugee Convention recognises the UN Charter for the Universal Declaration of Human Rights.⁴⁶ Internationally, the American Commission for Human and Peoples' Rights, Inter American Commission for Human Rights and the African Charter for Human and Peoples' Rights recognise the right of asylum⁴⁷ in addition to Article 19 of the Charter of Fundamental Rights of the EU coupled with its recognition of non refoulement in Article 19.⁴⁸

Promising for the recognition of refugees and expanding the narrow scope of the Refugee Convention and its silence on the obligation to provide asylum⁴⁹, the area of Human Rights Law adds strength to Refugee Law internationally and regionally such that the two areas are regarded as interdependent⁵⁰ and giving the cause of displacement a human rights context.⁵¹ The merits of this approach in enhancing the sustainability of Refugee Law is explored below.

c. Sovereignty

Dauvergne notes the sovereign right of individual states to allow entry⁵² which entails a reinscription of national identity.⁵³ Chetail in citing the UN Commissioner for Refugees Antonio Guterres rightly argues that "the global economic crisis brought

⁴⁵ Chetail (n 21) 35

⁴⁶ Id. 27

⁴⁷ Cantor D, "Reframing Relationships: Revisiting the Procedural Standards for Refugee Status Determination in light of recent Human Rights Treaty Body Jurisprudence", (2015) 34 Refugee Survey Quarterly 16,20,27

⁴⁸ Araujo A, "The qualification for being a refugee under EU Law: religion as a reason for persecution" (2014) 16 European Journal of Migration 535

⁴⁹ Harvey C, "Time for Reform? Refugees, Asylum-seekers, and Protection under International Human Rights Law" (2015) Refugee Survey Quarterly 49

⁵⁰ Chetail (n 21) 68

⁵¹ Harvey (n 49), 49

⁵² Dauvergne C, *Making People Illegal: What Globalisation means for Migration and Law* (Cambridge University Press, 2008) 46

⁵³ Id. 170

with it a populist wave of anti foreigner sentiment albeit couched in terms of national sovereignty and national security...[which] highlights the need to prevent economic crisis from being a protection crisis at the expense of refugee rights.”⁵⁴ This cascade is explored further below with respect to the policies adopted by the EU.

d. Regions

The difficulty with the regional approaches to Refugee Law in Africa, Latin America and Europe is that the African Union and Economic Community of West African States, Common Market of the South (Mercosur), Central American Integration System, the Caribbean Community (CARICOM), the Association of South Eastern Nations and the European Union all have as their underlying tenet economic aims⁵⁵. Regional processes and policies have therefore been criticised as isolationist.⁵⁶

The more persuasive view is that co-operation must begin regionally because migration occurs in regions. The Syrian crisis challenges this notion, however, the Joint EU-Africa Declaration on Migration and Development in 2006 (Tripoli Process) shows that trans-regional migration was not unforeseen. Omelaniuk notes that Regional Consultative Processes foster global migration governance by providing workable cross border cooperation on migration management.⁵⁷

e. Syrians as Refugees

The Handbook and Guidelines for Procedures and Criteria for determining Refugee Status states that the Refugee Convention’s stipulation of the inability of a person to avail himself of protection within his country of origin implies state of war or civil war⁵⁸ and that foreign invasion or occupation of all or part of a country can result in persecution.⁵⁹ There is no requirement that a persecutor be a state actor⁶⁰ and this is

⁵⁴ Chetail (n 21) 19

⁵⁵ Popp (n 20), 368-376

⁵⁶ Popp (n 20), 388

⁵⁷ Omelaniuk I, “Global Migration institutions and processes”, in Opeskin et al., *Foundations of International Migration Law*, (Cambridge University Press, 2012), 358

⁵⁸ UNHCR “Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status” (December 2011) 20

⁵⁹ Id. 33

⁶⁰ Id. 95

reiterated regionally by Article 6 of the QD. The QD goes further providing subsidiary protection where a civilian's life is threatened by reason of indiscriminate violence in situations of international or internal armed conflict⁶¹. This provision lacks a counterpart in international law⁶² which shows that legal regional efforts in the EU to deal with the Syrian crisis have been exemplary.

f. UNHCR

Alienikoff notes that there is no established mandate of the UNHCR⁶³ and Kagan emphasises that UNHCR status determination implies partial government failure⁶⁴. It has been argued that the actions of the UNHCR, lacking in procedural safeguards and rendering negative decisions, can amount to de facto refoulement⁶⁵ and that negative responsibility under the Refugee Convention places a limitless burden on the UNHCR whilst absolving states of their obligations.⁶⁶ Kagan argues that the UNHCR ought not to operate in countries which have ratified the Refugee Convention,⁶⁷ however, fails to take account of the capacity of member states, as evidenced by the impact of the Syrian refugee crisis in European member states. It is suggested that the UNHCR ought to supervise state function and review those applications which are rejected and make recommendations.

It is worth noting the positive effect which international policy is having as evidenced by the Regional Refugee and Resilience Plan which the UNHCR is spearheading in response to the Syrian crisis. It coordinates two hundred partners in providing humanitarian and development resources to support national response plans for refugees in Egypt, Iraq, Jordan, Lebanon and Turkey⁶⁸

⁶¹ Battjes H, "Subsidiary protection and other forms of protection" in Chetail and Bauloz *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 551

⁶² Id. 551

⁶³ Alienikoff T, "The Mandate of the Office of the United Nations High Commissioner for Refugees" in Chetail and Bauloz *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 389

⁶⁴ Kagan M, "The Beleaguered Gatekeeper: Protection Challenges posed by UNHCR Refugee Status Determination", (2006) 18(1) *International Journal of Refugee Law* 1

⁶⁵ Id. 22

⁶⁶ Id. 17

⁶⁷ Id. 26

⁶⁸ UNGA "Report of the SG: In Safety and Dignity: Addressing large movements of refugees and migrants"

g. In context – Global Conflict

The Syrian crisis and the policies surrounding the global reaction to it must be considered in context. In 2013 an arms embargo was lifted allowing EU countries to supply arms to any Syrian actor in the conflict.⁶⁹ This fuels the causes of displacement and it is noteworthy that the decision of the United Kingdom to sell arms to Saudi Arabia, a known supplier of arms to rebels in Syria, is currently the subject of a judicial review.

Furthermore, the crisis must be viewed in the context of transnational austerity measures across the European Union and the near economic collapse of Greece in 2015 coupled with the terrorist activities across Africa, the Middle East, Europe and the USA⁷⁰.

Lack of durable solutions

1. Human Rights

Dauvergne argues that bringing human rights into the equation will lead decision makers to conclude that some human rights abuses can be tolerated.⁷¹ Chetail and Celinebauloz argue that application of International Human Rights Law may result in protecting a person that would currently fall outside the protection of the Refugee Convention under Article 33(2) and will focus incorrectly on the gravity of the violation.⁷² It is suggested that these observations are merely a reflection of the functioning of the law and the need to differentiate. If the application of Human Rights Law has the effect of enlarging the scope of protection for refugees then there is merit in this approach.

2. Labels influence responsibility

A/70/59, 12

⁶⁹ Trombetta L, "The EU and Syrian crisis as viewed from the Middle East" (2014) Italian Journal of International Affairs 27

⁷⁰ Kersch A and Mishtal J, "Asylum in crisis: Migrant Policy, Entrapment, and the role of Non Governmental Organisations in Siracusa, Italy" (2016) Refugee Survey Quarterly 97

⁷¹ Dauvergne (n 52) 63

⁷² Wallace (n 17) 437, 476

Cameron notes that policy makers create “deviant groups” so as to maintain the status quo resulting in making refugees a problem of the developing world thereby ignoring the social and political processes which forced their movement.⁷³ The very people that influence policy have adopted a prejudicial view. As Greenhill points out David Cameron talked of a “swarm of illegal migrants”; the former Prime Minister of Poland warned that Muslims would bring parasites and diseases; and the leader of the Sweden Democrats declared that “Islamism is the Nazism and Communism of our time.”⁷⁴ This highly inflammatory rhetoric has been the underlying sentiment behind the policies of some of the EU member states and does not bode well for the sustainability of the law.

The press have reported that the rise in popularity of nationalist, protectionist and xenophobic political statements and policies concerning the migrant crisis was a decisive factor in the “Brexit” referendum in which the UK electorate voted to leave the EU.⁷⁵

The choice of media outlet, namely the Daily Mail and The Sun, that was used to cover the initial issue of Polish migrants was a reflection of the target audience in which the media was seeking to instil fear with headlines warning of the Polish population multiplying from 75,000 to 500,000 in eight years and emphasising the strain on social services.⁷⁶

3. Equitable responsibility sharing

The Report of the UNHCR 2015-2016 notes that 86% of the world’s total refugee population is hosted by developing regions and that only five countries have undertaken responsibility for hosting over nine-tenths of refugee from Syria, namely Egypt, Iraq, Jordan, Lebanon and Turkey.⁷⁷

⁷³ Cameron B, “Reflections on Refugee Studies and the Study of Refugees: Implications for Policy Analysts” (2014) 6(1) *Journal of Management and Public Policy* 7, 9

⁷⁴ Greenhill K, “Open arms behind barred doors: Fear, hypocrisy and policy schizophrenia in the European Migration Crisis”, (2016) *European Law Journal* 318

⁷⁵ “European Migrant Crisis”, Salem Press Encyclopaedia, January 2016

⁷⁶ Johns (n 27) 29

⁷⁷ (n 8), 18

The Centre on Migration reports that in 2004 Africa hosted one third of the global refugee population⁷⁸ and that this may shift responsibility from the country of first asylum to countries of origin.⁷⁹ In citing Young the report notes that the policy prevails because “externally imposed political and economic liberalisation [have subjected] African states to a comprehensive superstructure of international accountability.”⁸⁰

This policy of transferring responsibility has recently, however, been improved by the EU-Turkey Statement from 18 March 2015 which provides that for every Syrian national returned from Greece another will be resettled from Turkey to the EU.⁸¹ This has had the effect of reducing migration flows across the Aegean Sea⁸². Whether the law can be used to challenge this policy is thought provoking. For instance, Article 40(3) of the Vienna Convention on the Law of Treaties 1969 provides that “every state entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended”. As a candidate for accession to the EU, it is questionable whether Turkey can use this argument to seek to be involved in the negotiations of the amendment to EU treaties as a consequence of the trigger of Article 50 of the Lisbon Treaty by the United Kingdom.

Returning to the current law, the transient nature of the asylum seekers calls into question the efficacy of the quota system envisaged by the Temporary Protection Directive discussed above.

4. European Union – responsibility of receiving state

The case of *MSS v Belgium and Greece*⁸³ found that member states must avoid the procedural deficiencies of the Dublin system such as living conditions and poor communication between the authorities and the applicants in countries of first asylum to prevent arbitrary refoulement⁸⁴. Although wealthier countries have been criticised for embracing non entrée

⁷⁸ Betts A and Milner J, “The externalisation of EU asylum policy: the position of African States” (2006) Centre on Migration Policy and Society Working paper no. 36, 33

⁷⁹ Id. 26

⁸⁰ Id. 38

⁸¹ https://ec.europa.eu/homeaffairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_factsheet_on_relocation_and_resettlement_en.pdf

⁸² Id.

⁸³ (2001) Appl. No 30696/09

⁸⁴ Cantor (n 47) 93, 15

policies and engaging symbolically with Refugee Law⁸⁵ legal liability for such action has been suggested by extending the concept of liability for aiding and assisting countries to act in breach of the Refugee Convention and by extending state responsibility.⁸⁶ The Syrian crisis brought international attention to the interception of vessels at sea by the Italian authorities and was also illustrated in the case of *Hirsi Jamaa v Italy*⁸⁷ in which the European Court of Human Rights held that such action amounted to a breach of non refoulement obligations⁸⁸.

It has been rightly noted that non entrée policies have had the effect of encouraging other modes of irregular migration.⁸⁹ A convincing argument for a comprehensive response to the complex problem of mass migration is that a common asylum system requires coherence between different policy sectors such as development, trade, employment, foreign policy and home affairs policy.⁹⁰

5. Regions

Regional policies have been more effective and supports the view that localised approaches are sustainable. The UNHCR Report 2015-2016 notes that ECOWAS and Mercosur include refugees in schemes that promote free movement and labour⁹¹ with a view harmonising migration policies.⁹² In contrast the EU approach is driven by concerns to regulate the unwanted or “illegal” migration⁹³ which, as noted above, encourages the activities of smugglers and traffickers which necessitated in the Khartoum Process⁹⁴.

6. Readmission – Afghanistan

In citing the Committee on Elimination of Racial Discrimination, Chetail notes that returnees have the right to have their property restored to them and “participate in public affairs, have

⁸⁵ Gammeltoft-Hansen and Hathaway (n 9) 235, 240

⁸⁶ Id. 236

⁸⁷ (2012) II Eur. Ct. H.R.

⁸⁸ Gammeltoft-Hansen and Hathaway (n 9) 243, 245. 248

⁸⁹ Id. 246

⁹⁰ (n 33), 6

⁹¹ (n 8), 8

⁹² Arcarazo D and Geddes A, “Transnational diffusion or different models? Regional approaches to Migration governance in the European Union and Mercosur” (2014) *European Journal of Migration and Law* 32

⁹³ Id. 23

⁹⁴ Id. 612

equal access to public services and receive rehabilitation assistance.”⁹⁵ Hathaway equally observes that repatriation to countries of origin can only take place where there has been “a fundamental and demonstrably durable change of circumstances in the refugee’s state of origin.”⁹⁶ The UNHCR Guidelines for the determination of refugee status for asylum seekers from Afghanistan 2016 clearly indicates that this is not the case in Afghanistan. Notwithstanding this, the EU concluded an agreement with Afghanistan, following the Syrian crisis, providing for repatriation. From observations in the field, this has had a prejudicial effect on Afghan asylum seekers in Europe who, notwithstanding individual consideration of applications, face a lesser chance of being granted refugee status. The UNHCR rightly notes that being compelled to return to face instability and destitution will result in Afghans having to flee again⁹⁷.

Amnesty International also notes that reference in readmission agreements to international obligations does not effectively prevent refoulement⁹⁸ reiterating the symbolic rather than substantive adherence to Refugee Law.

Reslow refers to the incentive of visa facilitation agreements⁹⁹ and it is suggested that this “carrot and stick” approach in policy is being used to manipulate the correct application of the law. If continued, it will prejudice the sustainability of the law to deal with refugees.

7. Resettlement

The Refugee Convention does envisage resettlement and requires the initial host state to coordinate that process.¹⁰⁰ The EU has made great strides in this endeavour providing Euros 50 million towards resettling 20,000 refugees.¹⁰¹ Additionally, as of 8 February 2017, member

⁹⁵ Chetail (n 21) 47

⁹⁶ Hathaway (n14), 199

⁹⁷ Statement by Volker Turk UNHCR (2016) 28 International Journal of Refugee Law 744

⁹⁸ Amnesty International’s Assessment of EU Human Rights Policy, “Human Rights begin at home” 2014

⁹⁹ Reslow N, “The role of Third Countries in EU Migration Policy: The Mobility Partnerships” (2012) European Journal of Migration and Law 397

¹⁰⁰ Hathaway (n14), 199-200

¹⁰¹ (n 33), 5

states have resettled 13,968 out of an agreed figure of 22,504 and resettled 3,098 Syrian refugees from Turkey to the EU.¹⁰² It is imperative that these figures be considered in the context of the austerity measures already faced by the EU member states in that region. As a whole, however, Selanec notes that by May 2015 40,000 refugees had been resettled with proposals to resettle another 120,000¹⁰³.

Although the policy response of the EU has been reactive, it has taken a fairly long term approach by virtue of providing a Euros 3 billion refugee facility for Turkey and Euros 200 million towards a trust fund for Syria to support refugees in Turkey, Jordan and Lebanon, in addition to committing to resettling 54,000 Syrian refugees from Turkey to Europe.¹⁰⁴ The EU has also invested in free trade agreements with Morocco, Egypt and Tunisia, security and economic development in Libya and Euros 100 million towards judicial reform and political governance in Tunisia.¹⁰⁵

8. Countries/regions of origin

The European Council called upon the Commission in 2015 to create “safe countries of origin” to enable the swift processing of asylum applications with a rebuttable presumption that they were unfounded.¹⁰⁶ It is suggested that this policy is tantamount to a blanket ban of asylum seekers and is therefore a policy that threatens the sustainability of Refugee Law. Additionally, Hathaway notes that the arrangements are “on the basis of discretionary grants that ebb and flow with the political, budgetary and other preferences of wealthier governments”¹⁰⁷.

9. Safe third country

The Dublin Convention allows for the operation of the safe third country concept and has also been enshrined in Council Directive 2005/85/EC. The case of *MSS v Belgium and Greece* shows that it cannot be assumed that the same level of protection will be afforded by all member

¹⁰² EC Press Release 8 February 2017

¹⁰³ Selanec (n 7) 87,88

¹⁰⁴ https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20170302_eam_state_of_play_en.pdf

¹⁰⁵ Id. 3,7,9

¹⁰⁶ Selanec (n 7) 83

¹⁰⁷ Hathaway (n 14)

states¹⁰⁸ and therefore serves as a plug in the lacunae which arise in the effort to harmonise regional law and policy. Vedsted-Hansen notes, however, that the rebuttable presumption inherent in the concept is difficult to ensure in practice because of the nature of the accelerated process.¹⁰⁹

10. Safe havens

In *R v Secretary of State for the Home Department, Immigration Appeals Tribunal Ex parte Anthoypillai Francis Robinson*¹¹⁰ the Court held that if well founded fear of persecution relates to only part of a country, thereby offering a “safe haven” for internal relocation then international protection is not necessary¹¹¹. This has now been enshrined in Article 7 of the QD and Article 8 of the Recast Qualification Directive.¹¹² The Syrian crisis has shown that such an arbitrary stance is highly problematic as illustrated by the fact that parts of the government held territory did not deter the regime from attacking civilians with biological weapons and could not protect against armed attack by rebel groups and terrorists.

11. Relocation

The European Commission Press Release of 2 March 2017 provided for a monthly relocation target of 3,000 refugees from Greece and 1,500 from Italy. This had not been met, with only 13,456 relocations: 3,936 from Italy and 9,610 from Greece.¹¹³

12. Mobility partnerships

The EU introduced Mobility Partnerships in 2007 as non binding political declarations between member states and the third country concerning long term migration management through

¹⁰⁸ Wallace (n 17) 434

¹⁰⁹ Vedsted-Hansen J, “The asylum procedures and the assessment of asylum requests” in Chetail and Bauloz *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 456

¹¹⁰ [1997] EWCA Civ 4001

¹¹¹ Wallace (n 17) 425

¹¹² Storey H, “Persecution: towards a working definition” in Chetail and Bauloz *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 488

¹¹³ (n 104)

bilateral and multilateral projects¹¹⁴. They have been criticised for externalising EU migration policy and furthermore without human rights guarantees, focussed instead on security related aspects.¹¹⁵

Papagianni suggests, however, that links between migration policy and internal as well as external policies concerning employment, development and foreign policy should be explored further.¹¹⁶

13. Other options

Engle and Vattel have suggested the creation of refugee zones in Syria protected by NATO and the Russian naval infantry.¹¹⁷ This is fanciful given the observations made above concerning “safe havens” coupled by the fact that humanitarian assistance has been hampered due to Syrian and Russian forces bombing civilian targets and more recently a UN Convoy despite a temporary ceasefire on 20 September 2016.

14. Can Global North continue to dictate framework of refugee migration

Persuasive in suggesting that continued influence of wealthier nations in the Refugee Law regime internationally is necessary, is the argument that the global south has an interest in enabling emigration if it brings economic benefits¹¹⁸ and that careful orchestration is therefore essential to control the increasing refugee flows that would threaten global security and the economic and political stability of the industrialised states.¹¹⁹

This fixation on economic concerns, however, is demonstrative of what underlies the policies that, in turn, influence the symbolic adherence to Refugee Law, thereby threatening the sustainability of the law.

¹¹⁴ Reslow (n 99) 393-394

¹¹⁵ Papagianni G, “Forging an external EU Migration Policy: From externalisation of border management to a comprehensive policy” (2013) *European Journal of Migration and Law* 283, 294-295

¹¹⁶ *Id.* 298

¹¹⁷ Engle E, “Humanitarian intervention and Syria” (2013) *Barry LR* 163

¹¹⁸ Hampshire J, “Speaking with one voice: The European Union’s global approach to migration and mobility and the limits of international migration cooperation” (2016) *Journal of Ethnic and Migration Studies* 574

¹¹⁹ Gammeltoft-Hansen and Hathaway (n 9) 240

Policy reactive rather than preventive

1. Openness/economic

Dauvergne notes that “Refugee law...[in] a less globalised past...was understood in terms of opening borders rather than closing them.¹²⁰ The poor implementation of policies by member states has been criticised as being a strategy for resisting EU governance due to weaker economies of southern Europe having to endure austerity measures as well as a disproportionate responsibility of migrant reception.¹²¹ Regarding austerity, Dauvergne notes that “among the meanings that have been accredited to globalisation, a common theme is economic”.¹²² Perhaps it is this single dimensional view of facilitating migration for economic ends that has exposed the weakness of wealthier nations to deal with large scale refugee movements.

The UNHCR recognises¹²³ that “Economic uncertainty and the perceived negative impact of globalisation are likely to continue to fuel a nationalistic reflex and a range of social and political concerns that will also influence migration and asylum policies”. This fuels the idea of “illegal immigration” and encourages other modes of irregular migration¹²⁴ contributing to the business of smugglers and traffickers.¹²⁵ On the other hand, experience in the field has shown that amongst those seeking asylum, for instance in what was the “Jungle” in Calais, are hardened criminals, though not terrorists. Policing the entry of such applicants is justifiable but is seldom the reason that is given by policymakers.

2. Surrogacy

Article 1C(5) of the Refugee Convention envisages that protection will end when conditions in the country of origin that led to the risk have been resolved.¹²⁶

¹²⁰ Dauvergne (n 52)

¹²¹ Kersch and Mishtal (n 70) 118

¹²² Dauvergne (n 52) 29

¹²³ UNHCR Strategic Directions 2017-21 “A world in disarray: causes and consequences of forced displacement”

¹²⁴ Gammeltoft-Hansen and Hathaway (n 9) 246

¹²⁵ UNHCR “Addressing security concerns without undermining refugee protection” 18 December 2015

¹²⁶ Dauvergne (n 52) 57

This reinforces the fact that the rationale behind the Refugee Convention is one of surrogate protection and this may be seen as justifying many of the policy responses of the wealthier global north.

3. Shared responsibility

The case of *MSS v Belgium and Greece* in respect of the application of the Dublin Convention discussed above is a very positive development of the law and the EU has shown itself as acting in the best interests of asylum seekers once admitted to EU territory. On the other hand, member states have sought to evade their responsibilities by equating geographic proximity with their duty of non refoulement.¹²⁷ This has been evidenced, for example, by the move of migration controls to outside the territory of member states such as the ports of Belgium and France.

4. “Crimmigration”

Stumpf argues that immigration and enforcement now resemble criminal law presenting expulsion as a natural solution “perceived [as] the need to protect the community”.¹²⁸ Linked to this is terrorism¹²⁹ and Hathaway notes that the US decision to detain asylum seekers from a list of mainly Muslim countries on the grounds of national security was a breach of the duty of non discrimination.¹³⁰ More recently US Executive Order 13769 suspended entry to the USA of foreign nationals from seven Muslim majority countries including Syria.¹³¹ Crepau highlights the fact that migration has been analysed in security terms against the backdrop of terrorist attacks from 9/11 to the London bombings in 2005.¹³² Unfortunately the United Nations itself has endorsed this view by stating that states should adopt measures to ensure that asylum seekers have not participated in terrorist acts.¹³³

¹²⁷ Durieux J, “The duty to rescue refugees” (2016) *International Journal of Refugee Law* 640

¹²⁸ Stumpf J, “The Crimmigration Crisis: Immigrants, Crime and Sovereign Power”, (2006) 56(2) *American University Law Review* 381, 419

¹²⁹ *Id.* 385

¹³⁰ Hathaway J, *The Rights of Refugees under International Law*, (Cambridge University Press, 2005) 427

¹³¹ <https://www.peacepalacelibrary.nl/2017/02/the-us-travel-ban-from-an-international-law-perspective/>

¹³² Atak I and Crepau F, “National Security, terrorism and the securitisation of migration” in Chetail and Bauloz *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 94

¹³³ UNGA Doc A/RES/51/210 17 Dec 1996

The very profile and means of terrorists to inflict imminent harm on a large scale suggests the unlikelihood of their choosing to endure lengthy delays of migration coupled with the possibility of rejection and repatriation, unless they were seeking to incite violence within the camps. It is a difficult argument to sustain and exposes the weakness of policy responses that take this stance. It can only spell out, again, a policy response to evade the international obligations under Refugee Law and weakens the law's sustainability and credibility.

5. European Union response and International co-operation

The Mobility Partnerships, readmission agreements, and development and trade partnerships with countries of origin are difficult to challenge because these policies seek to invest in countries of origin. The question therefore is whether such investment has a long term effect. It is submitted that any suggestion of sustainability is weakened by the fact that these measures involve a "carrot and stick" approach leading to the inevitable demand for a fresh carrot.

Turkey, as third country example, has been taken advantage of by virtue of its long standing hope of accession to the EU. Turkey has recently threatened to renege on its obligations under the EU-Turkey Agreement of 2015 referred to above.

On the other hand, migration benefits states of destination equally in terms of transfer of knowledge and filling labour shortages.¹³⁴ Again, concerns have been raised about the focus on economic development and political aspects of migration as opposed to human rights concerns.¹³⁵ The EU-Afghan agreement referred to above is also demonstrative of the flaws in the readmission agreements and shifting the burden of responsibility to less developed countries.¹³⁶

¹³⁴ UNGA "Report of Special Rapporteur of Human Rights of Migrants" A/68/283, 32

¹³⁵ Id. 35

¹³⁶ Castles et al, *States of Conflict: causes and patterns of forced migration to the EU and policy responses* (IPPR 2003) 39, 41

European case law has taken a robust approach in seeking adherence to the principles of the Refugee Convention. In the case of *Hirsi Jamaa v Italy* the Court held that Italy had breached its obligation and duty of non refoulement by turning back migrants on the high seas given that they had come under the exclusive jurisdiction of the Italian authorities who should have known that the migrants would have been denied treatment under the Refugee Convention if sent back to Libya.¹³⁷

Hathaway has sought to expand this notion of effective control over territory and exercise of public powers to the activities of Frontex (who have carry out patrols and intercept and interview refugees across member states)¹³⁸ for the purposes of establishing shared responsibility and liability for aiding and assisting states to breach their treaty obligations.¹³⁹

There are also differing policy incentives for receiving migrants that are peculiar to each member state and which threaten a coherent approach. For example it is argued that the rationale behind Germany embracing refugees from Syria was the fact that the EU's working population will decline by 17.5 million in ten years and the Syrian crisis thus catered for an economic and demographic challenge.¹⁴⁰

Internationally, the Obama administration expressed its commitment to the Global Compact on Responsibility Sharing for Refugees.¹⁴¹ It is interesting to note the dramatic shift in policy that resulted only four months after the statement at the inception of the Trump administration which played to the fear and anger of the electorate concerning the economy and migration. Even during the Obama administration, however, by August 2016 the USA had accepted only 10,000 Syrian refugees.¹⁴²

6. Mediterranean

Between 2011 and 2016 630,000 irregular migrants and refugees reached Italy via the Mediterranean Ocean. In 2016 alone 181,436 crossed with 4,579 having drowned. This

¹³⁷ Gammeltoft-Hansen and Hathaway (n 9) 263

¹³⁸ Id. 269

¹³⁹ Id. 263

¹⁴⁰ (n 33), 14

¹⁴¹ Joint Statement on Leaders Summit on Refugees (2016) IJ of Refugee law

¹⁴² (n 75)

triggered Operation Triton which was replaced by Mare Nostrum in 2014 -2015 as a migrant rescue operation in the Mediterranean.¹⁴³ The EU-Turkey Statement of 18 March 2016 has had the effect of significantly reducing the flow of migrants across the Mediterranean. These measures were clearly reactionary but also preventive, perhaps even responsive.

7. Non Entrée – EU and International

There has been a tendency internationally to externalise border controls. Australia defined islands within its territorial waters as falling outside its Migration Act and the USA intercepted vessels carrying Haitian refugees.¹⁴⁴ Australia's "Pacific Solution" under which refugees were sent to Nauru was found not to be illegal because they were, despite long term confinement, not at risk of being returned to face persecution.¹⁴⁵

In the EU the notion of "safe third country" has been limited by virtue of *MSS v Belgium and Greece*.

The notion of "safe country of origin" is in conflict with the individual focus of the Refugee Convention¹⁴⁶ and it has been argued that the list of countries may be the result of political bargaining to advance national interests rather than considering human rights.¹⁴⁷ The Procedures Directive has been criticised because it allows a member state to designate part of a country as safe.¹⁴⁸

It is worth noting, as Kersch and Mishtal have argued, that non entrée policies are not deterring the flow of asylum seekers¹⁴⁹, with the exception of the reduced flow across the Mediterranean.

8. Intention and reality

¹⁴³ Kersch and Mishtal (n 70)

¹⁴⁴ Hoffmann and Lohr (n 13) 16

¹⁴⁵ Hathaway (n14) 196

¹⁴⁶ Hoffmann and Lohr 21

¹⁴⁷ Id.

¹⁴⁸ Id.

¹⁴⁹ Kersch and Mishtal (n 70) 120

There is a disjoint between policy intentions and realities on the ground. Health care, legal services and counselling are in some cases at the own cost of the refugee and the daily allowance and mental health services provided for in the Reception Conditions Directive¹⁵⁰ have not been administered.¹⁵¹

Quite forceful is the observation that migrants living in a prolonged state of irregularity corrodes confidence in the system, fuels stigmatism and hampers integration.¹⁵²

9. Moving forward

The Special Rapporteur on Human Rights of Migrants has suggested that migration policies formed at the national level ought to involve the contribution from ministries such as health, education, employment and children services to allow for more preventive rather than reactionary or emergency measures and to promote greater social cohesion.¹⁵³

Future

The current policies do not deal adequately with psychosocial stress and trauma, health complications, physical harm and risk of exploitation.¹⁵⁴ The New York Declaration for Refugees and Migrants notes at page 709 that states should take measures to prevent irregular border crossings but fails to offer specific proposals as to how to achieve this without compromising the protection of asylum seekers.

“Decentring sovereignty” has been proposed as a way forward¹⁵⁵ and the EU project was a strong example of this work in progress, however, “Brexit” has shown that “wealthier nations are resisting globalisation”.¹⁵⁶

The principle of Responsibility to Protect has not been invoked in the case of Syria even though over 100,000 civilians have died and 10 million displaced.¹⁵⁷ The core of the principle is to provide

¹⁵⁰ 2003/9/EC

¹⁵¹ Kersch and Mishtal (n 70) 103, 108, 109

¹⁵² (n 33) 7

¹⁵³ UNGA (n 135)

¹⁵⁴ UNGA (n 68)

¹⁵⁵ Dauverge (n 52) 190

¹⁵⁶ Id. 186

¹⁵⁷ “Protection of Internally displaced persons” in *Research Handbook on International Law and Migration* (Edward Elgar, 2014) 609

protection from serious human rights violations¹⁵⁸ and therefore supports the idea of congruence between International Human Rights Law and Refugee Law.

A convincing proposal is to spread more equitably the responsibility for refugees by allocating amongst different member states responsibility for: protection for the duration of the risk; providing immediate solutions for more difficult cases; and ensuring access to resettlement opportunities.¹⁵⁹

The proposed World Migration Organisation and Migrant Bill of Rights is intended to make global migration policy free of the individual political interests.¹⁶⁰ The Global Migration Group has partnered with other UN institutions¹⁶¹ and Turk and Garlick advocate in favour of a Global Compact on Refugees to promote responsibility sharing.¹⁶²

In referring to the US intervention in Cuba, Vietnam, Lebanon, Iraq and Afghanistan and the lack of forethought to the consequences of effecting regime change in Libya, Egypt or Syria, Engel and Vattel rightly note that the USA “never really questions its individualist free market ideology or the way that ideology tries to implement foreign policy”.¹⁶³ It is suggested that Refugee Law should be viewed in context of the latter underlying reason for conflict in the Syrian region and the consequent civil unrest, power struggles and infiltration by terrorist groups. Only then is it possible, with a view to seeking to regulate the reconstruction of post conflict societies, to manifest the purpose behind the surrogate Law of Refugees as a means to that end.

Inadequacy

Hathaway rightly resists revisiting the content of Refugee Law save for the mechanism to oversee legal obligations and sharing of responsibility.¹⁶⁴ A holistic approach is required to ensure that a “short sighted perspective [does not] prevail over a long term strategy”.¹⁶⁵

¹⁵⁸ Nanda V, “The future under International Law of Responsibility to protect after Libya and Syria”(2013) Michigan State International Law Review 3

¹⁵⁹ Hathaway (n14), 203

¹⁶⁰ Opeskin B, Perruchoud R and Redpath-Cross J, “Conceptualising international migration law”, in Opeskin et al., *Foundations of International Migration Law*, (Cambridge University Press, 2012), 10

¹⁶¹ UNGA (n 135)

¹⁶² Turk and Garlick (n 15) 658

¹⁶³ Engle and Vattel (n 117) 136, 160, 161

¹⁶⁴ Hathaway (n14), 203

¹⁶⁵ Trombetta (n 69)

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