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in the Refugee Protection Regime

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The EU as a Global Player in the Refugee Protection Regime¹

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1. Introduction

Whenever experts and the interested public discuss the migration issue, read about it, or write about it, it is worth pausing to remember that at that very moment, what we are talking about in the abstract is being experienced, in a very real way by other people. The journey our fellow humans are undertaking is a personal one, bringing joy, fear, pleasure or unhappiness, dependent on how and why their adventure began, how it has been organized and where it will end. Their journey is important to them. Some of those journeys will receive international attention, especially those in which the risks prove all too real, and the dangers of travel by sea on unseaworthy vessels, as stowaways in trains, planes and trucks will become tragically apparent. The cumulative effect of all those journeys is to draw lots of media attention in Europe in particular.

But we also should not exaggerate the number of people undertaking such journeys: less than 3 percent of the world's population is thought to be an international migrant.³ The vast majority of these migrants, including the overwhelming majority of migrations to Europe, are made with legal entry documents in hand, by qualified workers and their families or by students. Since the focus of this paper is on refugee issues, it is important to note that while matters relating to refugee protection are important for the people concerned, and for wider issues of human, state and international security, less than 9 percent of the world's international migrants are people in need of protection. That is 0.2

¹ This working paper is based on the keynote presentation of Joanne van Selm during the two-day conference "Indvandrerday" in Aalborg, 26th and 27th November 2003.

² Joanne van Selm is also Co-Editor of the *Journal of Refugee Studies* and President of the International Association for the Study of Forced Migration.

³ See IOM, *World Migration 2003: Managing Migration – challenges and responses for people on the move* (Geneva: IOM 2003) p.305.

percent of the population of the world. It is too many people, forced to flee and seek refuge beyond the borders of the country they were born in – but numbers can easily be exaggerated.

Some of those people, travelling towards Europe as I write or while you read this paper, are refugees. For a person arriving in a European Union Member State today to request asylum, there is a daunting challenge ahead. Whatever their journey has entailed, their first step in an EU country will not be the end of it. Unknown to most of them, there is a vast array of regulations, laws and policies waiting to test their story and decide their fate. And that is not to mention the image problem they have with the media and populations across this continent. The travelling may have ended for those who are lucky enough to find that their story and the way they tell it meets the rigours of the asylum procedure in a European Union Member State. But the mental journey is far from over.

The subject that I was asked to address at the November 2003 Migration Days conference in Aalborg, on which this paper is based, is European approaches to asylum and refugee issues. My task was to think about the extent to which the European Union is a global player in the refugee protection regime.

With a refugee Convention which, at the time of writing, has stood the test of 52 years, and been reaffirmed in December 2001, and an accumulation of UNHCR handbooks, guides and executive committee conclusions, as well as the experience of ever multiplying refugee crises around the world, there is clearly a refugee protection regime of sorts.

What there is not is an even and equal approach to refugee protection worldwide: the vast majority of refugees are in their regions of origin – there are more than 9 million people of concern to UNHCR in Asia; almost 5 million in Africa and 4 and a half million in Europe. North America has the highest number of asylum seekers by region. 21.4 percent of the people of concern to UNHCR are in Europe – the vast majority being recognized refugees somewhere, internally displaced persons (IDPs) in Eastern Europe and the states of the former Soviet Union, and stateless persons, also primarily in the former Soviet Union and the Balkans. But, just 7.5 percent of those people of concern to UNHCR in Europe were, in 2002, seeking asylum – the other 92.5 percent were recognized as refugees, were IDPs or were stateless persons. In total, less than 1.8 percent of the people of concern to UNHCR worldwide are asylum seekers in Europe: true, a third of the people classed as asylum seekers in 2002 were in Europe – but we must not forget that most refugees in Asia and Africa are never asylum seekers as such, because there

is no asylum system as we know it: the majority of Asian states have not signed the 1951 Convention.⁴

1.1 What is really the problem?

Numerically, in Europe as a whole, the problem is not with asylum seeker numbers – but visually, and in terms of political sensitivity, that is certainly where the problems seem to lie for the European Union. As we progress towards enlargement of the EU, one question is whether this focus on asylum in the EU is appropriate, or whether our attention should rather be on the refugee protection issues close enough to home to cause great discomfort, even if they are not yet on our front doorstep.

A key part of the problem may lie in the absence of European leadership in trying to deal with the asylum and refugee protection issues. Henry Kissinger famously asked what number he should call for Europe. He was looking for a Foreign Policy representative. There was none at the time: there is one now.

But there is no number for anyone to call in Europe on immigration or refugee protection. There is no number for a global decision maker, like the UN High Commissioner, to call, and no number for an individual protection seeker to call. Europe is presenting a far from united front on the issue of refugee protection. There is no clear leader on refugee protection issues in Europe – and there is no European service dealing with asylum and immigration claims. For all that the populations of EU Member States hear about European integration on refugee issues and European asylum policy – there is little, if anything, which could really go by this name. What is more, there is no figure or group of European leaders who are really trying to work on this asylum and refugee issue for Europe – just 15 (soon to be 25) who are trying to work on it within Europe in their national interest.

1.2 Where might we find answers?

We hear that the asylum issue is a European problem: but as yet, we can see only limited European answers. It is hard to know whether the national responses to changing asylum challenges contribute to a European answer, or contribute to making the European problem bigger. Europe has a role to play in the global refugee protection regime for sure: the question is, is it playing a positive role, or a negative one? Is the focus on asylum at home useful to the advancement of Europe's role in the global refugee protection regime?

⁴ Statistics from UNHCR – see www.unhcr.ch

In seeking some deeper answers to these questions, it is useful to address the following points:

- How far are we in Europe today? What issues are on the agenda right now?
- What does Refugee Protection broadly mean?
- Is there an institutional way to make things work better – for Europe, for refugees and for the global regime?

These points reflect the organization of the discussion below. In asking how far Europe has come, we will address the agenda issues, as well as those themes that are not on any formal agenda, but which have been central to political and policy discussions for the last five years. The agenda issues and other themes will be discussed in terms of *Milestones* and *Millstones*. In asking what refugee protection means, we will discuss the terminology of *effective protection*, and ask what means of arrival for refugees in the EU other than spontaneous seeking of asylum could be usefully assessed. Finally, on the institutional construction of the asylum issue in Europe we will set out three models – the existing construct, and the ways in which the refugee protection and/or asylum issue might be addressed institutionally in the years to come.

A major issue, which I will seek to demonstrate throughout, is the tension between an ordered and very basic agenda for political and administrative decisions at EU level, developed in the early 1990s already, and the wider philosophical debate in 2003. The broader debate about refugee and asylum issues across the EU questions the very underpinnings to the continuous discussions about qualification for refugee status, procedures for granting refugee status and reception conditions for asylum seekers.⁵ Yet there is no leadership in the EU to adjust the agenda and really lead the Member States to the common approach which all EU governments claim is essential. Put simply, the EU's progress on asylum issues is hampered by there being two parallel tracks, vying for attention: a broad philosophical discussion, and a tight, but limited work programme. The two are in contention, and when they meet, they do not necessarily lead to fruitful conclusions, for either the EU or refugees.

⁵ These issues are all part of the *soft law* developed between 1992 and 1999. The qualification for status and procedures issues are also agenda items that remain on the table as the Amsterdam agenda winds down (it should be completed by 1 May 2004).

2. Where are we in Europe today?

Within the European Union attempts to develop some sort of collective approach to asylum and refugee protection issues have been present since the mid 1980s. The 1992 Maastricht Treaty first made clear that the issues were on the agenda, but only with the Treaty of Amsterdam, which came into effect in 1999, were asylum and immigration issues made into key matters of Community interest.⁶ The Commission got a role, and Member States committed to work together on law and policy. Only they did not all commit. Denmark opted out, and the UK and Ireland reserved the right to opt in. In general, the UK and Ireland have opted in to asylum measures.

Notably, all of the defined agenda items, set out by the Amsterdam Treaty for discussion leading to hard law decisions in the form of directives and regulations had been the subject of prolonged discussions leading to very basic, soft agreements during the pre-Amsterdam period. These include the definition of a refugee; procedures for determining status; and reception conditions for those seeking asylum in the EU. Even the more solid Dublin Convention was to be re-opened, not only because it was not functioning as States hoped it would, but also because it was an inter-governmental Convention and not a Common policy at EU level.

2.1 What issues are on the agenda right now?

The agenda formally on the table – set out in the Treaty of Amsterdam, re-enforced in various European Council Conclusions from 1998 to 2003 includes the search for agreement on six points:

- Temporary Protection
- The Qualification for refugee status and subsidiary protection
- The Procedures for determination and withdrawal of status
- The Reception Conditions for Refugees
- Determining the State responsible for examining a refugee claim
- Burden-sharing (called a “balance of efforts” in the Amsterdam Treaty).

To date, agreement has been reached on all but two of these issues (The Qualification Directive and the Procedures Directive). One could, of course, argue that these are the two most important directives: how can the EU develop a Common Asylum System without agreement on who is a refugee, who deserves to

⁶ See van Selm-Thorburn, Joanne, “Asylum in the Amsterdam Treaty: a harmonious future?” *Journal of Ethnic and Migration Studies* 24(4), 1998, pp. 627-638.

be granted subsidiary protection, and how to establish procedures to grant or withdraw either status.

Further proposals exist, within the context of the on-going discussions, on common recognition of *safe third countries*, to which asylum seekers could be re-admitted if they could have sought protection there rather than continuing to an EU Member State. Proposals in other areas of the EU's immigration work, for example, on return; on visas; and readmission agreements, of course also impact the EU Member States' thinking on and approaches to asylum and refugee issues.

The agreements which have been reached – and the new approaches which have emerged in the EU over the last fifteen years, including the safe third country concept and the safe country of origin principle have all been measures which seek to limit access to admission procedures and protection in the EU – impacting both those who are indeed abusing the system and those people who genuinely need protection. Many of these measures – the restrictive measures – have been copied around the world, sometimes in even more severely repressive forms than they see within Europe. Countries from South Africa to Indonesia, Kazakhstan to Egypt have been able to introduce measures which violate human and refugee rights using the justification that if Europe can do it, so can they.

2.2 Themes not on the agenda

Since Amsterdam there have been a number of milestones in the asylum debate in Europe. One of those was the Tampere Summit in October 1999, which itself set out the milestones to be achieved in the area of Justice and Home Affairs. It is from this summit's conclusions that I draw this terminology of *Milestones* – and make my suggestion that in fact some issues have been millstones. Several of the milestones (or millstones) have come in the form of European Council discussions and Conclusions. While some of the biannual European Council meetings have focused on speeding up the progress on the agenda set out in the Amsterdam Treaty, all have included discussions going well beyond that limited agenda. It is as if the politicians' minds cannot stick to the basic agenda they set, because the issues are so much bigger, and the domestic problems with asylum, for some, seem ever greater. The three themes – not in the Treaty as such, but prevalent in all debate are:

- The regions of origin of refugees, and what Europe can do to protect (or keep) refugees there;
- The ways in which the 1951 Convention has become – or been made – irrelevant;

- How to manage the arrival of refugees who must come to EU Member States, to avoid the irregular mixed arrivals of asylum seekers and migrants who do not need protection.

In the following section I will trace the Milestones – the Conclusions and high political debates – and explain how the issue of asylum might in fact be seen as something of a millstone.

2.3 Milestones and Millstones

In 1998 the Austrian Presidency made proposals that essentially questioned the continued relevance of the 1951 Convention.⁷ Those proposals were not pursued, largely because the language used to question the Convention went too far for many states. It should be noted that in December 2001, all the Member States re-affirmed their commitment to the Convention as part of the UNHCR Global Consultations process.⁸

At the end of the Austrian Presidency, the Vienna Council came to conclusions, setting out a technical path for future European discussion of asylum issues. This path was largely contained in an ACTION PLAN drafted by the Commission, and endorsed by the Council, which set out a path of priorities for pursuing the various aims of the Treaty of Amsterdam.⁹ Here we see how discussion at large was on broader issues, while the Council meeting brought the leaders back to their fixed agenda.

Where the Vienna Conclusions gave the strong state perspective on the future of asylum in the EU, the 1999 Tampere summit meeting was intended to give the softer face, and more public vision for asylum. Members of the European Council on Refugees and Exiles have often noted that elements in the language of the Tampere Conclusions seemed to come directly from their, NGO, pre-Tampere documents. The Conclusions set out “Milestones for progress on the Area of Freedom, Security and Justice”: promoting the project of developing an area of free movement, in which citizens felt assured of an environment of security and justice.¹⁰ Those milestones echoed the previous Treaty of Amsterdam and Vienna

⁷ Austrian Presidency, *Strategy Paper*. doc. 9809/1/98 CK4 27 ASIM 170 REV 1. 1998

⁸ Declaration of States Parties to the 1951 Convention and or its 1967 Protocol Relating to the Status of Refugees HCR/MMSP/2001/09, 16 January 2002.

⁹ European Union. *Action Plan of the Council and the Commission on How Best to Implement the Provisions of the Treaty of Amsterdam Establishing an Area of Freedom, Security and Justice*. 13844/98, 1998.

¹⁰ European Council, *Presidency Conclusions, Tampere European Council*. Brussels: Council of Ministers, 1999.

Action Plan in substance, but the tone was very down-to-earth, and human rights oriented.

Tampere itself seemed to be a milestone – a turning point in the way in which the Member States talked about immigration and asylum. For the first time, the governments set out their desire to develop a Common European Asylum System. The language of harmonization was replaced with that of a common policy. It was a moment at which a Union with some thirteen social democratic led governments allowed a humanitarian face to be shown to the world, and a moment at which those leaders indicated that this was the new big project for the EU – and indicated an awareness of the need for leadership within the Union on asylum and immigration, and for the Union to play a key role in relations with other states.

The Tampere summit received the first five reports of the High Level Working Group on asylum and migration, established in late 1998. That High Level Working Group itself was a departure from the Amsterdam agenda, both in terms of the issues to be discussed (which focused on countries and regions of origin) and in its institutional setting, which was cross pillar.¹¹ As Foreign Policy was so centrally involved, this meant that asylum issues, which were just being transferred to the first pillar, were suddenly back in an inter-governmental second or third pillar mode.

The millstone that I am suggesting this issue of asylum could become was apparent in those reports. The High Level Working Group, made up of high-ranking civil servants from Justice and Foreign Affairs ministries across the EU, had drafted reports on Afghanistan, Iraq, Morocco, Somalia and Sri Lanka, which were supposed to focus on relations with those countries – but at that point had had no contact at all with the representatives of those countries. Rather than treating those states as partners, the High Level Working Group had treated them as subjects for discussion. The process may have allowed a new, deeper level of discussion between the Member State officials, who were discussing objectively conditions elsewhere instead of focusing, as they usually had to, on the subjectively sensitive topic of their own national laws and any concessions they could possibly make in the name of harmonization. However, this was one example of where the EU was demonstrating a certain arrogance vis à vis other states involved in the process of migration, including refugee protection. Morocco and Sri Lanka in particular voiced concerns (Iraq, Afghanistan and Somalia did

¹¹ van Selm, Joanne, “Immigration and Asylum or Foreign Policy: The EU’s Approach to Migrants and their Countries of Origin” in Sandra Lavenex and Emek Uçarer (eds.), *Migration and the Externalities of EU Integration*, Lexington Books, Lanham 2002.

not have governments which either would be concerned, or in a position to voice any concerns, of course).¹²

Two years after Tampere, in December 2001, the Laeken Conclusions noted the slow progress of building a common European asylum system. The focus in Laeken, just a couple of months after September 11, 2001¹³, was inevitably on security issues. Already, however, some governments were starting to blame the Commission for the slow progress.

That blaming of the Commission continued in Seville, in 2002. At that point, a decision was made to try to speed up the implementation of the Tampere Programme. In order to put that decision into effect, the Danish Presidency drew up a Road Map of the work on border control, immigration, asylum and cooperation with third countries. The Road Map shows there is a lot of work ahead, if the Member States are to meet their own deadlines for agreements within 5 years from the entry into force of the Treaty of Amsterdam. The deadline is May 2004, and agreement still has to be reached on the most basic building blocks for the Common European Asylum System.

The Greek Presidency in the first part of 2003 put migration very high on its agenda. The Greek Foreign Ministry, and the Foreign Minister George Papandreou personally, decided to be very pro-active on migration issues, and to prioritise a change in the language used to discuss migration. In effect, they sought a return to the social democratic, humanitarian and more open language of Tampere, and a departure from the impact of anti-immigrant political forces across Europe, which had virtually hijacked the issue, making any discussion of immigration and asylum a negative one. They established the Athens Migration Policy Initiative, coordinated by the Migration Policy Institute, which held a series of high-level meetings and conferences during the Presidency – and beyond.

During the period of the Greek Presidency, the UK government issued proposals for a new vision for asylum in Europe. Their proposal contained three elements:

Transit Processing Zones – to which anyone applying for protection in the EU (or participating states) would be sent for processing;

¹² Since then there has been some more dialogue, especially with the governments of Sri Lanka and Morocco, but no significant progress.

¹³ In the US, this date is most often referred to as 9-11, not just because that is how the date might be written, but also because 911 is the emergency telephone number in North America, as 110 is in Continental Europe or 999 in the UK.

Regional Protection Zones – in which people would be *protected* close to their regions of origin, and to which people could be sent as a safe flight alternative; and

Intervention in refugee producing crises and conflicts, in an effort to limit the number of people who would become refugees.

It is not my intention to dwell on these proposals, or the counter proposals made by UNHCR, which were 3-pronged in approach, and included processing within the EU, and reportedly UNHCR's offer to assist in re-organising the British asylum system (an offer which was apparently politely ignored).¹⁴

Suffice it to say that the UK's proposals, and the pursuit in particular of discussion on protection in regions of origin in a mini-EU forum between the UK, the Netherlands, Denmark and the European Commission – more recently joined by Austria and Ireland, keeps alive two possibilities (one positive, one negative) in the context of the EU as a global player in refugee protection. If the discussions can be interpreted positively for refugee protection globally, then these states might be pursuing policy ideas that could increase capacity for protection in and by states near refugee crises. As we have already seen, the vast majority of people of concern to UNHCR (between 75 and 90 percent of them) remain in their country or region of origin. So, capacity building in those regions of origin – particularly in Africa, Asia and European states beyond the EU - would be positive for the global refugee protection regime. However, if the discussions between the UK, Netherlands, Denmark, Austria, Ireland and the European Commission are interpreted negatively, they are about burden-shifting – and suggesting that some of the relatively small number of people in need of protection who arrive in Europe, or who are Europeans (about 10-15% of the world's population of people of concern to UNHCR) should in fact be elsewhere.

The European Council responded to the UK Vision Proposals by requesting, in the Thessaloniki Conclusions, that the Commission seek pilot projects on reception in the region of origin. The financial resources to do this were already available via the High Level Working Group budget line. And so, the dots are joined – and the European Union developments of the years from Vienna to today can be seen to be focused on refugee protection in the regions of origin, and on managing the arrival

¹⁴ UNHCR's approach was presented again, in a *re-packaged* way at a meeting between High Commissioner Ruud Lubbers and the EU's ministers responsible for immigration in Dublin, under the Irish Presidency of the EU, on 29 January 2004.

of any refugees who ultimately have a reason for needing protection within the territory of the European Union.

The broad issues as I have outlined them for the EU since 1998 are only mildly reflected in the subjects that have been on the work programme. While the building blocks in terms of administrative agreement for a basis to a common EU policy are, from a practical point of view, essential, it seems that the discussion outside the Council meeting room has moved ahead of the basic building blocks. The problems with reaching agreement on the qualification and procedures directives are in part due to the shifting field of general debate about the three broad issues. Without a common philosophy for the basis of refugee protection globally, as well as for asylum in Europe, how can Member States reach the practical agreements necessary to have a common administrative and legal approach to asylum and refugee issues? Opinions change, and vary, about the usefulness of the 1951 Convention; the optimal place for refugees to be protected, and the optimal mode of arrival of refugee in the EU from the point of view of Member State governments (and their understanding of the concerns of the electorate).

The bottom line perhaps is that the fifteen Member States have quite divergent views of what the issue of refugee protection globally is really about. This was demonstrated very clearly by the reactions to the UK's Vision proposals. The Netherlands and Denmark were quick to engage on some elements, which as I just explained could be viewed positively as capacity building or negatively as burden shifting. Meanwhile, Sweden, Finland, Greece, Germany and France were quick to interpret the proposals as burden shifting, and to reject the whole as an inappropriate form of discussion for a humanitarian group of states. What that divergence in reaction demonstrates, to my mind, is a fundamental disagreement on the basic issue of what refugee protection really is.

3. What does Refugee Protection broadly mean?

3.1 Effective Protection

The buzzword in European Union discussions on asylum right now is *effective protection*. This terminology has in part been generated by the Ministerial Declaration at the end of the UNHCR process of Global Consultations in 2001, which called for protection to be made *more effective*. For UNHCR, as Erika Feller, Director of the Department for International Protection, has made clear, to be effective, protection of refugees must be based in refugee and human rights

law, with humanitarian objectives to the fore, in a manner consistent with the spirit and the letter of the refugee protection regime.¹⁵

“Why stress the word ‘effective’? Because it can only be through implementation and in observance that international standards are transformed from rhetoric into reality; that what is preached is indeed practiced.”

The real question is, however, who has to judge protection to be effective? Or, put slightly differently, whose judgment of the effectiveness of protection carries most weight for EU policy makers? For UNHCR, making protection more effective means improving the quality of protection everywhere – in Pakistan, Iran, Thailand, Tanzania, but also across the EU. For some EU Member States, however, there seems to be an inclination to adopt this term “effective protection” to mean something like protection which is good enough somewhere other than in the EU – so that we don’t have to accept refugees for protection in the EU. The policymakers may not intend their use of the term to be understood in quite such strongly negative language, but NGOs and refugees certainly can and do interpret it that way. Hence it is important to ask who has to judge protection to be effective – or to be good enough.

In suggesting protection somewhere else is good enough, it would be very easy for a Europe based decision maker to deny abuses of human and refugee rights under the mantra that things are *different* in the Third World – that cultural relativity is important. It is quite easy to think that economic, social and cultural standards somewhere else are different – and pretend that cultural and economic differences do not equal human rights violations, even if the *difference* has the effect of denying employment or reasonable housing to a refugee.

In the opinion of someone seeking asylum in an EU Member State, their protection might not have been effective in a country in their region of origin because, for example, they had to walk for half a day to get water; their children had no access to primary education or they could not obtain a travel document. In the eyes of a decision-maker in an EU Member State, none of these issues might seem to suggest a lack of effective protection if the country in question is on their list of safe places where refugees generally do not have immediate security concerns and need not fear persecution.

¹⁵ Erika Feller *Effective protection in today's world* Speech to the Executive Committee of the High Commissioner's Programme (54th Session)

If we allow policy makers to start using the term *effective protection* to mean ‘protection which, in the eyes of an EU policy maker, means that the living conditions for a refugee in another country are reasonable enough according to standards modified to allow for cultural and economic differences, and the person was probably safe there, so they need not have requested asylum here’ then we are slipping back into a rhetoric which, to return to Erika Feller’s statement, lowers international standards, and denies realities.

If, however, EU policy makers could see the term *effective protection* in the way that Erika Feller has described it, and genuinely offer capacity building initiatives to states elsewhere, assisting them, through leadership, to make their protection standards truly effective, things would be different. In this case, the EU would be taking its place as a leader in the global refugee protection regime. In the scenario I previously described (which is the one that looks perilously closer to the truth) the EU would be leading the global refugee protection regime into another downward spiral, making protection less effective for everyone concerned.

Whatever *effective protection* is, it is clearly linked not only to the question of status as a refugee, but also to wider human rights and, importantly, to humanitarian assistance. Sometimes, discussion on protection in the region of origin seems to conflate the issues of status, political and civil rights with social, cultural and economic rights and entitlements and assistance. Sometimes, it seems that governments in the EU suggest that if they supply sufficient food, water, shelter and medical supplies to refugees in their regions of origin then that will be enough – their protection will be complete. Yet it will not be. The issue of recognition of refugee status, the legal documentation reflecting that status, and the treatment of the refugee as someone with rights very closely approaching those of nationals is the real heart of protection. To that extent, capacity building of asylum systems in regions of origin is just as or more important than the provision of humanitarian assistance. And it is in this area that the EU Member States again need to ponder the question of what effective protection really means, and how they can lead in this area.

It is impossible to expect governments of less-developed states to provide food, water, shelter, medication, education and other services if the EU Member States do not make such provisions. Many EU Member States have been cutting asylum seeker entitlements, if not the entitlements of those people recognized as refugees. Many EU Member States are very specifically restricting refugees’ rights to freedom of movement and residence by implementing dispersal policies within Member States. It is impossible to expect governments of less developed states to

live up to the spirit and letter of the refugee protection regime if EU Member States do not do so. It is certainly impossible to expect governments of less developed states to create robust asylum procedures, living up to the spirit and letter of the refugee Convention if the EU Member States themselves place severe restrictions on their interpretation of the definition of a refugee, and if they do not provide full legal documentation to those who are recognized and granted protection.

The type of issue that we now are calling *effective protection* first came to dominate the European Union Member States' approach to asylum and refugee protection in the form of the "safe third country" concept. The idea was, and remains that the international obligations to which states have signed up do not stipulate the state in which a person should seek protection. In not making such a stipulation, EU Member States, and others, found ways of suggesting that protection – meaning safety in this context – should be sought as close to home as possible. In fact, the logic goes, if you are truly in danger, you will not seek to travel half way round the world to ask for asylum, rather you will end your journey, your days migrating, in the first safe place you reach. Employing this logic, European Union Member States, from the early 1990s onwards, started to introduce rules that meant that if they could send an asylum seeker back to a state transited en route they would do. This was a way of encouraging newly open states of eastern and central Europe to play their role in the refugee protection regime. It was also a way of limiting access to asylum in the EU, where the numbers of arrivals were rising compared to the relatively controlled Cold War era. In theory, this too could be seen as a way in which the EU Member States were impressing a sense of duty on their eastern neighbours – if only the consequence of that leadership was not bound up in the battle to limit asylum seeker numbers within the Union, and if only enlargement of the European Union did not mean an enlargement of the safe third country *buffer*. The states with which the European Commission is mandated to negotiate readmission agreements, including Albania, for example, demonstrate that the concept is extending.

3.2 Organized arrival?

EU Member States are also talking about making their decisions about who should be a refugee in the EU, and who has effective protection elsewhere, before any individual reaches the EU territory. While this has been a pervasive, behind the scenes issue for some five years, it has come clearly onto the agenda through the conclusions of the Thessaloniki European Council in June 2003. The Council invited the European Commission "to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international

protection, and to examine ways and means to enhance the protection capacity of regions of origin with a view to presenting to the Council, before June 2004 a comprehensive report suggesting measures to be taken, including legal implications.”

There are two ways in which this idea of orderly arrivals is being conceptualized. One is the quite novel idea of *Protected Entry Procedures*; the other is a very traditional method of refugee protection, i.e. *Resettlement*. Two feasibility studies have been conducted on these two subjects. The Danish Centre for Human Rights conducted the Study on Protected Entry Procedures, with the research led by Gregor Noll.¹⁶ The Migration Policy Institute conducted the other study, on resettlement, and I led that research.¹⁷ Both feasibility studies were presented to a seminar organized by the Italian Presidency in Rome in October 2003.

Protected Entry Procedures could mean a range of measures, including the granting of humanitarian entry visas to EU states either from an embassy in a country of origin of someone claiming to need protection or from an embassy in a third state. The visa could be granted only after the asylum case has been processed and the need for protection determined, or after admissibility has been determined, but before the asylum procedure itself has taken place. A few Member States have employed such procedures in the past, and some of them have abandoned them in recent years. Member States are looking at this type of measure in the hope that they can counter smuggling by offering a legal entry route to asylum seekers – yet they realize there is no conclusive proof that this will actually be possible.

Where resettlement is concerned, just six Member States are resettlement countries. Yet, resettlement is far better established in the international refugee protection regime than protected entry procedures in the form of visas for entry for humanitarian purposes are. The US, Canada and Australia have the largest continuous resettlement programmes worldwide. Sweden, Finland, Denmark, the Netherlands, Ireland and most recently the UK have resettlement programmes too, ranging from 10 cases (about 60 persons) per year on the Irish quota to just over 1,000 persons on the Swedish quota. Traditionally, the Nordic quotas have been

¹⁶ *Study on the feasibility of processing asylum claims outside the EU* - against the background of the common European asylum system and the goal of a common asylum procedure - Final report (2002)

¹⁷ Study on *The Feasibility of Setting Up Resettlement Schemes in EU Member States or at EU Level*, - against the background of the Common European Asylum system and the goal of a Common Asylum Procedure (2003)

small and used for those refugees in need of resettlement whose cases might be most difficult. The UK's new 500 person programme, started in April this year, is not focused in this same way – and, it is anticipated, will grow in size over time. Resettlement, involving the selection of refugees prior to their departure from a country of first protection, has a history as a durable solution – an alternative to return or local integration for refugees who are particularly vulnerable or in a protracted refugee situation to which no other solution readily lends itself. The US has a resettlement ceiling of 70,000 people per year, though in the last two years (FY 2002 and FY 2003) just 26,000 and 28,000 respectively have arrived. Canada has a three-stream programme, with 7,500 arriving with Federal Government sponsorship during their first year in the country, up to 4,000 arriving with private sponsorship during their first year and several hundred people with particularly special needs arriving on a joint programme in which there is Federal funding available for their assistance, but also the support of a private sponsor.

There are 18 resettlement countries world wide – all with different programmes.¹⁸ What is important to note in this context is that the EU has never engaged this globally significant approach to refugee protection. Indeed, the discussions on harmonization to date have ignored the existence of 4 traditional resettlement programmes, and certainly not impeded the start of the 2 new programmes in Ireland and the UK. People who will be resettled need to be defined as a refugee – in practice they are rarely the same people who would get through the rigours and limitations of European Union Member State asylum procedures today. Yet the proposals for the Qualification directive at the EU level make no reference to their situation.

It is also important to note that while six countries have resettlement programmes, several others have *ad hoc* arrangements with UNHCR which means they have some low-level experience in this area. The Presidency seminar in Rome in October 2003 clearly showed strong Member State interest in resettlement, and relatively little support for Protected Entry Procedures, which appear much more complex.¹⁹

Resettlement is, however, not a simple programme. Many decisions need to be made: it is not enough to point to the fact that there are 20 million or more people of concern to UNHCR in the world and then say that Europe would resettle

¹⁸ All 18 programmes are described in the Feasibility Study cited above.

¹⁹ See the Conclusions of, and papers presented at that seminar in: *Towards more orderly and managed entry in the EU of persons in need of international protection* (Rome: Anterem Edizioni Roma), forthcoming 2004.

200,000 of them (1 per cent of the total) each year, for example. The criteria for selection need to be determined; selection procedures established; decisions made on what to do about health issues that may arise; security and fraud concerns to be dealt with to the fullest extent possible. And then EU Member State governments would need to undertake quite a philosophical shift in their thinking about refugees, immigration and integration. Resettlement is not an immigration programme – it is humanitarian. But resettled refugees are granted long-term residence rights prior to their arrival in the destination state – totally unlike asylum seekers: and temporary status, with a defined time limit, does not work to put into effect this *durable* solution.

The EU will also need to think about numbers – and in several ways. Firstly, the EU would need to set a target figure – and I deliberately suggest a target figure and not a quota. To my mind, quotas in the EU are for milk, cows, corn and fish – not for refugees. Further, a target figure (which Canada uses) means you can set a range, and say ‘well, we aim to bring in at least 10,000 people, but it might be 12,000’ – which assists enormously in planning, and in achieving a tangible success – whereas quotas often are not filled, and therefore look like a failure, or if they are full, mean that the 1,001st person cannot be given an entry visa because the quota of 1,000 has already been filled. Setting a specific target would not be easy – and therefore, in the study for the Commission, I suggest a bidding system with pledges of targets by Member States within the overall, commonly decided target – so as to avoid a re-opening of the burden-sharing discussions. The target range could start small and develop over time. To really make an impact on refugee protection worldwide, it would need to be very significant – certainly in the hundreds of thousands – and that seems politically unlikely.

However, numbers lead to another sticking point: Many politicians across Europe seem to imply, or openly suggest, that if they resettled refugees then either asylum seeking would stop – because genuine refugees would have this resettlement route as their safe alternative to smuggling. I call this the *seesaw hypothesis* – the thinking being that we now have high asylum seeker numbers (more than 3 hundred and 30 thousand in 2002), but only 3,000 resettlement places per year across the EU, whereas if we had a high number of resettlement places we would see fewer asylum arrivals. It is perhaps possible – but there is no empirical evidence to prove this. Indeed, the closest we come to evidence on this is in the US, where asylum seeker numbers were very high when resettlement numbers were high – and only dropped when there were significant reforms in the asylum system. (Australia is not a good example for comparison here, as they take 12,000 refugees in total each year – and if 4,000 entered through asylum they would

resettle 8,000; if 8,000 entered through asylum they would resettle 4,000 and if more than 12,000 entered through asylum they would resettle no-one). Frankly, talking about resettlement and asylum as linked on the numerical plane is unproductive: if we focus attention on the numbers and the balance between the two programmes then we run the risk of saying that a perfectly good resettlement programme has failed, not because there is any problem in that programme, but because just as many asylum seekers arrived as used to arrive prior to resettlement opening.

To sum up: resettlement could be a useful new avenue for the EU to explore. In doing so, the Member States need to recognize that resettlement has similarities to asylum in that the beneficiaries of both are refugees – but resettlement is not the same as asylum. This leads me to my final points – on the institutional aspects of the EU’s approach to refugee protection, which influence its role as a global player.

4. Is there an institutional way to make things work better – for Europe, for refugees and for the global regime?

Let us go back for a moment to Tampere in 1999. At that point, the EU leaders were very much focused on the issue of asylum seekers in the Union: the few hundred thousand people who were arriving in the EU, putting the asylum procedures of Member States to the test, and often remaining in the EU with or without a refugee or subsidiary protection status were the concern of the Heads of State meeting in the European Council. The Heads of State were also meeting just months after the Kosovo crisis, and quite positive experience with genuinely temporary protection.²⁰ Those Heads of State set out conclusions, in the form of Milestones, which included the development of a common European asylum system. Measures should be taken, agreements reached, all set out in the Amsterdam Treaty and all the subject of discussion in the EU since the early 1990s, on the Qualification of a person as a refugee or in need of subsidiary protection; on procedures for granting or withdrawing refugee status; on burden-sharing across the Union and on temporary protection. All of these measures were deemed to be part of the basis for a common asylum system with common procedures. If you sketch it out, this system and its elements would look like this:

²⁰ van Selm, Joanne, (ed.), *Kosovo’s Refugees in the European Union* (London: Pinter, 2000).

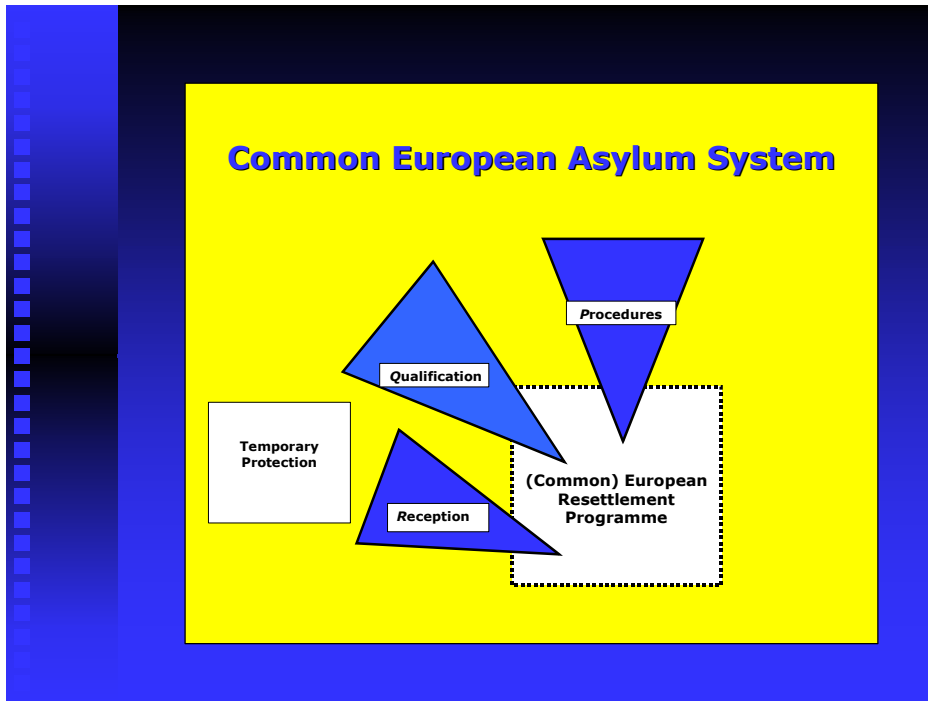
Figure 1: The current Institutional organization of issues within Justice and Home Affairs.



This is essentially the administrative and legal agenda of the EU, with no regard for the broader philosophical discussions of the last five years.

The way in which the European Commission and Member States have started to talk about new elements, such as resettlement and capacity building in regions of origin, it seems as if their intention is for these elements to be part of that same Common European Asylum System – in which case it would look, sketched out as a plan, something like this:

Figure 2 An expanded Asylum System?²¹

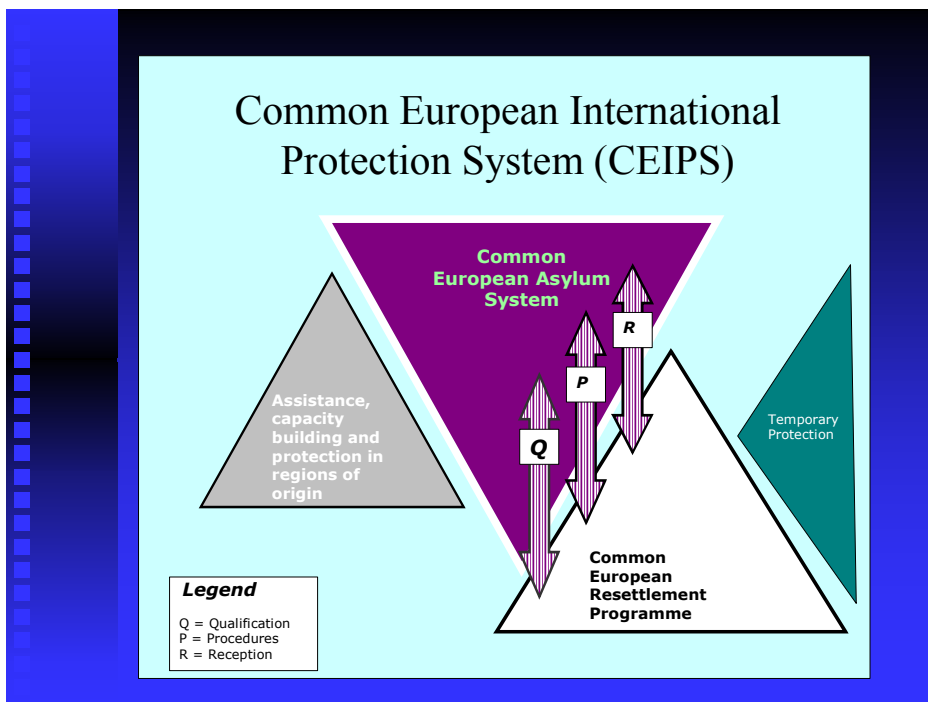


However, let's think carefully for a moment about terminology. What is *asylum*? Asylum is, according to legal and political documents through the ages, a matter of an individual arriving in a new country and seeking protection. According to the Universal Declaration of Human Rights, everyone has the right to seek and enjoy asylum in a country other than his own. There is a movement involved – by the individual, at their initiative – to seek, to look for, asylum. And it is up to the state, presented with that individual, to judge whether or not they will grant asylum. The duty on the state is not to return/*refoule* the person to a situation of danger. This is all very territorial in nature – *refoulement* according to many legal decisions regarding e.g. Haitians on boats prior to arrival in the US, or asylum seekers outside the territorial jurisdiction of Australia, are not being *refouled* if they are not within the territorial jurisdiction – hence the determination many states show to interdict at sea. Asylum is something states may or may not grant to individuals who have the right to seek it.

²¹ Figures 2 and 3 appear in the Study on the Feasibility of setting up Resettlement Programmes, cited above. I am grateful to Fancy Sinantha at MPI for her help in the technical production of these figures.

Resettlement, however, has no rights attached to it. Surely, the decision to select an individual for resettlement has legal issues attached to it – pertaining to residence rights etc. But the actual decision to resettle a particular person is purely administrative. And it is done before the person arrives in the destination state – by definition, resettlement is about prior selection and organized transportation to the destination state. Hence, it seems to me to be semantically incorrect, politically undesirable, and legally hazardous to conflate asylum and resettlement and call the package of measures *asylum*. It gets even more problematic if protection, assistance and capacity building are also called part of an asylum system. Surely these three issues (asylum, resettlement, assistance and capacity building elsewhere) and indeed a fourth – temporary protection – are all elements of a refugee protection system, but all distinct elements of that system. At the most, decisions on who to define as a refugee in the asylum system may have resonance in the resettlement system, for example.

Figure 3: a European International Protection system, including asylum.



Hence, I would suggest that this third sketch of how we could think about refugee protection in the European Union would in fact be most appropriate – keeping elements distinct; allowing a new common asylum system to develop in its own

right, and separate from new systems for resettlement and for capacity building and assistance in regions of origin. It would also show the world that the European Union acknowledges that asylum in the EU is not the one and only refugee protection issue with which it is dealing. Rather, it has different policy approaches to global refugee protection, including both asylum and resettlement as means through which individuals can achieve the protection they need in the EU if that is the most effective solution to their long-term protection need. But again – protection within the EU Member States is not the only policy instrument the EU has for refugee protection – rather, it can also be an effective actor globally, offering assistance and capacity building support internationally: making it a leading global player in the refugee protection regime. The EU can and should lead by example – and it can and should lead by positive rather than negative example.

5. Conclusions

I have sought to demonstrate that there is a significant tension between the practical agenda of issues on which agreement is being sought across the EU on asylum and the broader philosophical discussion in which the same states are engaged about what refugee protection, effective refugee protection, really is.

The broader discussion on refugee protection, including the discussion on protection policies for access for refugees to the European Union Member States through approaches such as resettlement shows the potential for a more pragmatic, flexible and reasonable approach to refugee protection by the EU than the focus on asylum issues within the EU alone would allow. However, in order for that potential to be achieved, the EU Member States need to re-think the terminology they are using and the constructive approach they take to refugee protection issues as issues of collective policy making. Rather than focusing on a common asylum system, I would suggest they need to broaden their thinking to include asylum as just one element in a Common European International Protection System.

The EU needs leadership in order to move the agenda on refugee protection in Europe – in the three ways that are necessary i.e.:

- Change the agenda on internal EU discussion on refugee protection;
- Raise the profile of refugee protection on the agenda for European integration as being genuinely the next big issue after the Euro; and
- Raise Europe's positive profile in discussions on the global refugee protection agenda

At the moment, too many cooks seem to be seriously spoiling the broth. There are states that could lead this agenda – there are heads of state who could lead it, but none seem to see genuine political gain from doing so. It seems no-one is yet ready to play political poker with this issue, with a hope of winning. Perhaps, for all the rhetoric, there is not a sufficient, credible mass of Member States which are ready to genuinely move to a common approach on issues of immigration, asylum and refugee protection.

Finally, we cannot avoid the fact that the EU is a global player in the refugee protection regime. The real question is whether it is a player for good or for bad. Other states will follow where the EU leads on this issue: for the sake of effective refugee protection everywhere, it is time for the EU to make its global humanitarian rhetoric into a reality.

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