

## #1: Abstract and Introduction

The Syrian war has brought the massive influx of asylum claimants and refugees across the European Union (EU) into sharp relief. Despite the humanitarian crisis, the international and regional EU responses to the migrant crisis have been inadequate and much too late.

- United Nations High Commissioner for Refugees (UNHCR) have proposed an approach which seems to undermine the original object and purpose of the Refugee Convention, by recognising refugees in groups instead of allowing individualised refugee status determination.
- EU approach to trade Syrian refugees one for one from those traveling through Greece to Turkey undermines international protection such as *non-refoulement* for asylum claimants.

It is argued that in order to properly safeguard the rights of a asylum claimants, proper substantive and procedural safeguards need to be in place, as well as an enlarged role of the regional courts in the EU in adjudicating asylum decisions.

## #2: The Law on Refugees and Refugee Status Determination

### International Law

International law provides the bare minimum rules for Refugee Convention contracting parties to follow. It is then up to the contracting parties to transpose the international law requirements to their domestic legislation and establish national procedures to carry out their international law obligations.

- **Refugee:** Someone who is fleeing from a 'well-founded fear of persecution on account of race, religion, nationality, membership of a particular social group or political opinion'; who is outside of his or her country of origin, and who is unwilling or unable to avail him or herself to State protection.
- **Burden of Proof:** The asylum claimant has the burden of proof to establish, on the threshold of a 'reasonable likelihood', the above-mentioned elements. In establishing a 'well-founded fear of persecution', both subjective (fear) and objective (well-founded) elements must be proven by the asylum claimant.
- **Factors to Consider:** a) Factual considerations; b) personal circumstances of the claimant; and c) situation in the country of origin.

### EU Law

The EU has established the Common European Asylum System (CEAS), which aims to establish a harmonised, fair, and effective asylum procedure to process asylum claims across EU member states, while complying with international law obligations to protect asylum claimants fleeing persecution.

The Dublin Convention, Dublin II Regulation and Dublin III Regulation, determine the mechanism and criteria for establishing state responsibility with regards to the processing of asylum applications among EU member states.

- **Qualification Directive:** gives EU member states guidance on the standards for qualifying third-country nationals or stateless persons for international protection and subsidiary protection and the content of the protection granted.
- **Asylum Procedures Directive:** provides guidance on the procedures utilised by member states to grant and withdraw international protection.
- **Reception Conditions Directive:** lays down the standards for the reception condition of applications for international protection for member states.

## #3 UNHCR's Response and Problems

The UNHCR exercises a supervisory role over contracting parties' compliance with the Refugee Convention. While the commentaries and interpretations by the UNHCR are considered 'soft law' and therefore are non-binding, they are nonetheless considered authoritative and have been interpreted by States as such.



### UNHCR's Response

- Protection Guideline No 11, *prima facie* recognition of refugees or, a *prima facie* approach, means 'the recognition by a State or UNHCR of refugee status on the basis of readily apparent, objective circumstances in the country of origin or, in the case of stateless asylum-seekers, their country of former habitual residence'.
- A *prima facie* approach may be applied to individual refugee status determination circumstances, but is most often used in group situations, where 'individual status determination is impractical, impossible or unnecessary in large-scale situations'.

### Problems with UNHCR's Response

- Contrary to object and purpose of Refugee Convention: The object and purpose of the Refugee Convention is 'to ensure the protection of specific rights of refugees, to encourage international cooperation in that regard, including through UNHCR, and to prevent the refugee problem from becoming a cause of tensions between states'.
- Difficult to assess claimant's 'personality, background and personal experiences' in group-based recognition system.

## #4 EU's Response and Problems

The EU and Turkey have agreed to a joint action plan on March 7, 2016, where Turkey agreed to 'accept the rapid return of all migrants not in need of international protection crossing from Turkey into Greece and to take back all irregular migrant intercepted in Turkish waters'.

### EU's Response

EU-Turkey Deal, where: 1) all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey, 2) for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU taking into account the United Nations Vulnerability Criteria.

### Problems with EU's Response

- The EU-Turkey Deal violates the principle of *non-refoulement*: It proposes to send asylum claimants or refugees back to Turkey, where there will not be adequate asylum procedures to process them.
- The fact that Turkey has an inadequate asylum processing system and lack of procedural safeguards to ensure adequate protection for asylum claimants and refugees due to a poor human rights record has been recognised by leading academics.
- The EU-Turkey Deal violates international law: it promotes collective expulsion of asylum claimants or refugees, when massive numbers of a asylum claimants or refugees are being returned to Turkey.

## #5: Conclusion and Recommendations

- Both the UNHCR and EU responses to the migrant crisis have been anything but adequate and timely.
- The UNHCR's proposal to establish group-based recognition of refugees appears to be problematic, given that individualised interview and therefore the right to be heard would be curtailed.
- The EU's proposal to return asylum claimants or refugees back to Turkey where the asylum system is deficient violates *non-refoulement* obligations and the prohibition against collective expulsion.

### Recommendations

- Regional courts such as the Court of Justice of the European Union and the European Court of Human Rights (ECtHR) play a larger role in the adjudication of asylum decisions and to ensure that proper substantive and procedural safeguards are in place to allow for maximum protection of asylum claimants and refugees.
- Defining what constitutes a 'margin of appreciation', a creation of the ECtHR, which is defined as showing deference to Council of Europe member states when they interpret and apply their international law duties such as *non-refoulement* obligations.
- A better defined 'margin of appreciation' may strengthen member states' compliance with *non-refoulement* while at the same time champion the rights of individuals by curtailing State sovereignty.



## #6: Future Questions

1. What potential responses from the UNHCR / EU would likely take place in the future?
2. Where is the principle of *non-refoulement* heading?