International Journal of Refugee Law, 2015, Vol. 27, No. 4, 531–535
doi:10.1093/ijrl/eev049

EDITORIAL

Why Europe Does Not Have a Refugee *Crisis*

Geoff Gilbert*

Burden-shifting

Putting to one side the question of just how many people arriving in Europe constitutes a crisis given the resources that are available in the region, especially after having regard to the numbers that cross into and remain in states in Africa and south-east Asia, this comment is focusing on 'Europe', 'refugees', and the search for solutions. To start with, the alleged crisis is one that is more about the European Union member states than about Europe as a whole. The twenty-eight member states of the EU are arguing about an out-dated allocation procedure for deciding where refugees making it to a member state should have their status determined. In June 1990, when the Soviet Union and parts of the Eastern Bloc were still in existence, and when West Germany and Austria constituted part of the eastern border of the EU, it was not a major cause of concern to establish that the state where the asylum seeker entered the EU should be the one to make the determination on refugee status. The original Dublin Convention[1] aimed in part to prevent 'refugee ping-pong', where a failed claim in one member state would result in the refugee applying in another member state and, if that claim also failed, being sent back to the previous member state. Today, with greater but still manageable numbers for the EU as a whole entering from across the Mediterranean from all parts of Africa, and with the war in Syria displacing so many into Turkey, Lebanon, and Jordan, some of whom then head for Greece or Bulgaria as the point of entry into the EU, that process cannot be sustained. As Germany has recognised, the current Dublin system[2] for allocating refugee determination processes between member states needs

* Professor of Law, School of Law & Human Rights Centre, University of Essex. Parts of the argument here follow on from a consultancy with UNHCR in 2014 on rule of law and its engagement for solutions that was undertaken with Mag. Anna Magdalena Rüsch (LLM (Vienna), LLM IHRHL (Essex) 2011–12). Needless to add, the views expressed here and any errors are mine alone.

1 Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, 97/C 254/01 (15 June 1990).

2 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) OJ L/180/31.

to be reconsidered because of the impact on the member states to the south and east. However, that is an EU problem, and one that is distinct from international refugee law.

The 1951 Convention Relating to the Status of Refugees[3] does not require persons fleeing to seek refugee status in the first safe country, whatever that might mean, to which they come. Everyone who makes it to the territory of a state party to the 1951 Convention should be able to seek protection there. Since the 1990s, the Dublin procedures have allowed EU member states to return an applicant for refugee status to the point of entry state for their determination, which then effectively becomes an EU-wide decision.[4] It is still the case today, when the issue is more to do with northern EU states trying to ensure that the refugees remain in the southern and eastern member states, despite the fact that, since the financial crisis of 2008, these are generally the poorer parts of the EU with fewest resources to devote to handling the numbers who arrive. It is to Germany's very great credit that it has waived the Dublin procedures as regards Syrian refugees as it prepares for the arrival of 800,000 people, whose applications for refugee status it will process, representing approximately 40 per cent of all EU applications.[5]

That, though, is only part of the story. Alongside the EU's Dublin procedures, there is the Council of Europe's European Convention on Human Rights (ECHR).[6] In this particular context, although the Dublin procedures allow for return to the point of entry state, that cannot occur if it would subject the applicant to inhuman or degrading treatment[7] –the conditions in some detention facilities are so poor that they would amount to a violation of article 3 ECHR. In addition, having regard to the broader picture of population flows resulting from wars, situations of civil disturbance, and gross human rights violations taking place in various countries of origin, and knowing that there are so many vulnerable people trying to reach Europe across the Mediterranean, it is arguable that the positive obligations arising from the ECHR – the right to life and the right to be free from torture, inhuman or degrading treatment - require member states to take active steps to search for those who might be in distress on the seas. The picture on the front of *The Independent* newspaper[8] of the young boy drowned at sea should not have come as a surprise to anyone. The statistics of the hundreds dying this summer, as they strive for protection not available in their country of nationality or in the countries *en route*, mean that he will not be alone and will certainly not be the last unless the EU's maritime operation assumes its responsibilities to search for and rescue those making this hazardous crossing.[9] To that end, determination outside Europe has very real merit, but only if processing by EU member states in Lebanon, Turkey, or Jordan gives

3 189 UNTS 137. In this particular context, see also, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

4 Cf *Regina v Secretary of State for the Home Department, Ex Parte Adan and Aitseguer* [2001] 2 AC 477.

5 At the time of writing, it is unclear whether the relocation of a mere 120000 applicants within Europe will go ahead. See also, 'Informal meeting of EU heads of state or government on migration, 23 September 2015 - statement', European Council 673/15, 24 Sept 2015.

6 ETS 5 (1950)

7 See, eg, *MSS v Belgium and Greece* App No 30696/09 (ECtHR, Grand Chamber, 21 Jan 2011) available at: <http://hudoc.echr.coe.int/>.

8 *The Independent* (3 Sept 2015).

9 See GS Goodwin-Gill, 'Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action', available at: <http://www.jmcemigrants.eu/guy-s-goodwin-gill-refugees-and-migrants-at-sea-duties-of-care-and-protection-in-the-mediterranean-and-the-need-for-international-action/>.

the applicants access to good legal advice, fair procedures from which there is appeal, and the sorts of protection, beyond the 1951 Convention, that would be available if the applicant had made it to Europe. The usual problem with offshoring is that applicants are subjected to a much restricted process in terms of due process and protection.

Persons have the right to seek asylum from persecution and it is the height of futility to hope that other European states will solve the problem while asserting that taking more refugees is not a solution. Nevertheless, in international law states have the right to control entry to their territory, although article 14 of the Universal Declaration of Human Rights provides that everyone has the right to seek and enjoy asylum. On its face, closing borders with razor wire interferes with that right. However, how does one give effect to article 14 when the people trying to enter the state have only the intention to pass through and seek protection elsewhere? Part of the problem is trying to apply the 1951 Convention in states where the EU regulates where refugee status determination ought to take place – none of the member states is acting solely in relation to its own interests. Given that article 14 is a humanitarian provision, any limitations on its application must be read in a restrictive fashion. Closing borders with razor wire and using tear gas cannot be seen as anything but a violation of the obligation to allow persons to seek asylum. The appropriate response is to establish reception centres, possibly with the assistance of the international community, where all persons can seek protection with access to legal advice. It is at that point that organised distribution of those qualifying for protection within the EU is a necessity, as reception states cannot be expected to shoulder this responsibility on their own. States parties to the 1951 Convention have assumed a responsibility to protect from *refoulement* all those with a well-founded fear of persecution and, having entered into the EU-wide Dublin procedure, that protection will effectively demand full participation by all member states in new EU processes to respond to new crises – and resources must follow the refugees.

Ultimately, though, long-term resolution of the displacements caused by war and other major civil disturbance will require recognition that people will continue to come until either the crisis in their country of nationality is resolved in a manner that involves all the relevant actors, or local integration or resettlement is provided through a comprehensive plan of action across not just the entire EU, but globally. It is a mark of the self-obsession of the EU member states that the initial focus was entirely on the refugees who make it to their borders, rather than on the many more refugees in neighbouring states to the conflicts. The causes of conflict are multiple, but unfair distribution of resources often plays a part, and it is also a push factor towards the global north. The mass movements of people will not be resolved by the EU, there is a need for a global conference organised by the UN, drawing on the expertise of not just UNHCR but also other UN actors more focused on development within states and between states. Thus, the £100m promised by the UK to states bordering Syria, the EU's €1bn, and Japan's promise at the UN General Assembly to provide US$1.6bn for displaced Syrians and Iraqis are all generous and to be welcomed, but they are a sticking plaster on a gaping wound. They are crisis driven and are not the planned contributions that the UN's humanitarian activities require.[10]

[10] See 'UN agencies "broke and failing" in face of ever-growing refugee crisis' *The Guardian* (6 Sept 2015) available at: <http://www.theguardian.com/world/2015/sep/06/refugee-crisis-un-agencies-broke-failing>. See also, GS Goodwin-Gill, 'Refugees – Challenges for Protection and Assistance in the 21st Century', an address to the Parliamentary Assembly of the Council of Europe Ad Hoc Committee on Large Scale Arrivals of Refugees to Turkey, 14 June 2015, available at: <http://www.kaldorcentre.unsw.edu.au/news/professor-guy-goodwin-gill-speaks-challenges-refugee-protection-and-assistance-21st-century#sthash.9ToOKxsN.dpuf>.

Finally, the UN has adopted the rule of law as core to its operations,[11] a principle designed to build state capacity to meet their international obligations, to promote the rights of all individuals within states, including the displaced and the stateless, and to enhance co-operation between all states so that burdens are fairly shared, and between the various UN bodies so that they may act as one – to facilitate the operationalization of interoperability. This approach ensures a holistic view is taken to all crises. It seeks to provide protection and engages with solutions in the short- and long-term from the outset and realises that individuals will only be protected and empowered where the UN and states work together to operationalize the various rights that the international community has drawn up over the past seventy years. It offers the best outcome for responding to the present global crisis. Now more than ever a global response is needed, not just one reflecting the overreaction of twenty-eight states that are still among the wealthiest on the planet. Those fleeing armed conflict and other human rights violations will not simply stop coming just because politicians try to outdo themselves with empty rhetoric while failing to fulfil international obligations they would prefer to impose on other, less well-off states.

***

This is my final editorial. After fourteen years, I am handing over to Professor Jane McAdam of the University of New South Wales. At the time I took over, articles still had to be submitted on paper in triplicate. Now, authors upload an anonymised copy online and thereafter automated emails ensure the review and acceptance process runs as smoothly as possible. That process depends on the dedication and goodwill of many people who deserve my thanks. To start, the Division of International Protection at UNHCR who helped found the journal and who continue to support it in so many ways. The team at Oxford University Press, currently led by Emma Thomas, Senior Publisher – Law Journals, have persevered with me and shown so much patience over the years. Due to their professional skills, the *International Journal of Refugee Law* is now read by more people than ever before, and the journal's impact and reach have expanded to unexpected levels. Clearly, that is also due to the quality of the articles published, so my thanks must go to the authors who continue to send the highest quality scholarship, and also to the reviewers, a set of experts who give freely of their time to ensure that the quality is maintained and to assist authors to improve what they submit. As editor, reading the articles and then the suggestions for improvements from the reviewers has been one of the best educational experiences for me. I am also indebted to other members of the editorial team over the years, Brian Gorlick, Colin Harvey, Ryszard Piotrowicz, Michelle Foster, and Hélène Lambert. Two more people deserve my especial thanks: first, Professor Guy Goodwin-Gill for having offered me the editorship at the beginning of the new millennium – it was terrifying trying to follow him and I had no idea at the time what a privilege he was bestowing. Finally, anyone involved in the process, authors, reviewers, the team at OUP, ought to also thank the journal's administrator throughout that time, Jane Porter. She understood the online submission process, solved technical problems, marked up accepted articles, and checked website addresses and quotations. She has been known to chase me for action, work the worst hours to make

[11] See UNGA res A/67/1.

up for my delays and to make sure OUP's deadlines are not overrun by too much … and she has become reasonably expert in international refugee law in the process! As editor-in-chief, I know that the *International Journal of Refugee Law* owes an enormous debt of gratitude to her. To close, I can only hope that Professor Jane McAdam has the same fantastic experience that I have enjoyed.

Colchester, 4 October 2015