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Seeking Asylum in Europe

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This post is the third of four articles to be published as part of this week's intensive series on refugee and migration rights. Stay tuned for tomorrow's article on safe passage for asylum seekers in the Aegean Crossing.

Syrian refugees strike in front of Budapest Keleti railway station. Refugee crisis. Budapest, Hungary, Central Europe, 3 September 2015. Licensed under Creative Commons

The UN Agency for Refugees (UNHCR) recently stated that during 2015 over 1 million refugees and migrants reached Europe on vessels run by smugglers in pursuit of international protection from war, violence and poverty. The number of persons unlawfully crossing the Mediterranean has increased enormously since 2014, when it was slightly more than 216,000, while the number who have gone missing or died during the journey in 2015 reached 3,735.

The difficult scenario depicted by these figures has brought to the forefront existing critiques as to whether or not European policies on asylum and migration are capable of guaranteeing the security of the EU's external borders without obstructing the protection of those persons in real need of help.

In May 2015, the European Commission adopted a new Agenda on Migration in an attempt to address some of these critiques. Within the Agenda's goals to resolve the current refugee crisis, two particular aspects have to be addressed in the immediate future. The first one is the necessity to save lives and secure external borders, enhancing the management role of the EU through the action of the European border agency, Frontex. The other aspect of this is the necessity of strengthening the European Common Asylum System (CEAS) through the relocation of those in need of international protection amongst all Member States.

In order to assess current transformations of European policies on asylum and migration, it is crucial for us to understand what the CEAS is, the main instruments that constitute it, and why a lawful access to the EU territory is often very difficult – if not impossible – for refugees and asylum seekers.

As a general premise, it is important to remember that when adopting common rules on asylum and migration, the EU must comply at all times with the international protection obligations assumed by all of its member states under International Refugee and Human Rights Law, and also under Article 18 of the EU Charter of Fundamental Rights (EUCFR). According to scholars, the right to asylum *ex* Article 18 should be understood as a right to seek asylum; that is, a right to obtain access to the asylum procedures in a given country.

Within this legal framework, the CEAS was created with the aim of harmonising the national asylum systems present among the various Member States. This means that persons in need of international protection should be able to receive equivalent treatment in terms of reception conditions, and access to proper procedures and status determination, regardless of the Member State in which their asylum claim is submitted.

The CEAS is composed of four recast directives that regulate the essential features of the asylum process within host countries: i) the Directive 2011/95 (Qualification Directive) on standards for the qualification of third-country nationals as beneficiaries of international protection and for the content of the protection granted; ii) the Directive 2013/32 on common procedures for granting and withdrawing international protection; iii) the Directive 2013/33 laying down standards for the reception of applicants for international protection; iv) the Directive 2001/55 on temporary protection in the event of a mass influx of displaced persons.

One of the most striking features of the CEAS is that, unlike other regional asylum systems, the Qualification Directive does not extend refugee status to those persons who are in real need of protection but fall out of the scope of the refugee definition, as expressed in article 1(A)(2) of the 1951 Geneva Convention. Indeed, the aim is to preserve the original scope of the refugee definition. However, this does not mean that the directive falls short in recognising the plight of other individuals seeking refuge, who are instead qualified as beneficiaries of another form of international protection: subsidiary protection.

In addition to these directives, the Dublin Regulation completes the CEAS, establishing the criteria for determining the Member State responsible for the examination of the asylum claim. Its purpose is burden sharing, which means that the Dublin Regulation aims to guarantee the presence of at least one Member State responsible for each asylum claim. Usually the designated State is that of applicant's arrival.

If an individual claims asylum in a Member State different from that which was primarily designated as responsible according to the Dublin criteria, this second Member State may be able to reject the claim and transfer it to the competent one. However, article 3(2) contains the so-called 'sovereignty clause', which makes this transfer impossible in situations when there are substantial grounds for believing that the Member State primarily responsible for the asylum claim presents systemic flaws in the asylum procedure and in the reception conditions. In such cases, the transfer would involve a risk of inhuman or degrading treatment for the applicant.

The jurisprudence of the ECtHR and CJEU also imposed the obligation to apply the sovereignty clause in favour of some asylum seekers coming from Italy and Greece in situations where these two countries, although designated as primarily responsible according to the Dublin regulation, were incapable of guaranteeing an adequate treatment of the claimants[1]. Furthermore, it should also be noted that the geographical position of these two countries makes them the major point of arrival for those seeking international protection. In light of that, the relocation scheme of asylum seekers from Italy and Greece to other countries, presented in the new Agenda, has been praised because it develops a new solidarity approach for the management of asylum claimants, which partly finds its roots in the sovereignty clause.

Another problematic aspect of the asylum discourse in Europe is that CEAS's rules are only applicable once the asylum seeker is present on the territory of a Member State[2]. Nonetheless, lawful access to European territory has become very difficult for the vast majority of people in need of international protection. Indeed, the increase of mixed movements of asylum seekers and other irregular migrants towards the EU has determined the adoption of strict immigration rules. The objective of controlling and securing the external borders against terrorism and other threats seems to have prevailed over the need for protection in favour of those who seek it.

Further, we can see that the instruments designed to combat irregular migration, such as visa requirements[3] and carrier sanctions[4], are (in theory) compliant with the obligations of international protection assumed by Member States and under Article 18 of the EUCFR. Indeed, they contain provisions that should exclude their application vis-à-vis those who seek international protection[5]. However, in practice, this reveals some serious shortcomings. When implementing these instruments, European States appear to be incapable of distinguishing effectively between 'real' asylum seekers and other irregular migrants present within mixed migratory movements. According to the UNCHR, this phenomenon risks undermining the ability of asylum seekers to benefit from international protection.

The analysis of the issues related to the CEAS and access to EU territory becomes relevant when assessing the reforms in the asylum and migration domains proposed by the European Commission in the new Agenda. Surely, it is now too soon to make a full evaluation of whether or not these reforms will do more harm than good for the plight of refugees and the institution of asylum. For the moment, the hope is that the European institutions will be able to undertake these reforms in a way that ensures compliance with the international protection obligations and with Article 18 of the ECFR, not only in theory but also in practice.

[1] CJEU, N.S. v. Secretary of State for the Home Department, C-411/10, 21 December 2011 ; ECtHR, M.s. v. Belgium, No. 50012/08, 31 January 2012; ECtHR, Tarakhel v. Switzerland, No. 299217/12, 4 November 2014.

[2] Directive 2013/32/UE, art.3.

[3] Regulation (CE) 539/2001.

[4] Directive 2001/51/CE.

[5] More precisely, it should be noted that the Regulation (CE) 539/2001 itself says nothing about the exemption of visa requirements for those seeking international protection. However such exemptions can be found in articles 5(4)(c) and 13(1) of Schengen Borders Code.

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