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Submission: *Journal of Human Rights Practice, Special Feature*

Title: **Asylum, Refugee Protection and the European Response to Syrian Migration**

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Abstract: The recent increase in migration to the European Union raised many concerns for the EU, for member states and for the individual. Much of the discussion hitherto has been focused on the EU from a state perspective and has been concerned with the policies proposed and adopted to address and limit inward movement of peoples. One issue that has not received requisite attention is that of the meaning of ‘protection’ from the individual claimant’s point of view. This article reflects on the Syrian migration of 2015 and 2016 and the implications of a triumph of *realpolitik* – that is state sovereignty – over a generous, meaningful and humane approach to asylum.

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In 2014 and 2015, the world watched with astonishment and alarm, as hundreds of thousands of people crossed seas, walked great distances, climbed barbed wire fences, forged rivers, endured indignity and ill-treatment, battled the elements, experienced lack of food, water and shelter, and risked their lives to gain entry to the European Union (EU) to request asylum. How was it, in Europe, that chaos rather than order emerged? How was it that, despite indisputable evidence of great suffering, the enormous machinery of the EU ground to a shuddering halt, seemingly unable or unwilling to assist those in need or offer practical solutions? After all, this was the same Europe for which the 1951 Refugee Convention, with its million post-second world war refugees, was drafted and implemented.<sup>1</sup> This was the Europe, as the EU, that proudly proclaimed amongst its foundational values respect for ‘human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities’.<sup>2</sup> Such values, it asserted, were ‘common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail’.<sup>3</sup> Finally, and perhaps most ironically, this Europe had constructed, in the guise of the Common European Asylum System (CEAS), the most complex regional asylum framework of minimum standards of protection, reception conditions and procedures.

So, what went wrong? What does this unedifying episode tell us about the current state of refugee protection in the EU? Has refugee protection, as presently understood, run its course?

### **The meaning of asylum and protection for the refugee**

Before such questions can be answered, it is worth pausing to reflect on what motivated the migration and what those on the move were, in fact, seeking. According to the IOM, almost 82% of people arriving in Europe in 2015 were from four nationalities: Syria, Afghanistan, Iraq and Eritrea (IOM, 2015). While the cumulative arrivals from Syria, Afghanistan and Iraq declined throughout 2016 to 41%, the numbers from Africa, especially Nigeria and Eritrea increased (IOM, 2016). Drivers of migration were multifaceted and complex but these were all – and continue to be – countries facing conflict, internal violence and human rights infringements. Any view that these populations were not forced to move – whether it be to escape conflict or violence, or to survive – is not supported by the evidence.

Interviews conducted with migrants and refugees in 2015 and 2016 provide interesting insights to nuanced perceptions of protection and its objectives, which very much reflect the original aims of the Refugee Convention.<sup>4</sup> For example, for one interview subject asylum

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<sup>1</sup> The 1951 UN Convention relating to the Status of Refugees contained a time limitation in Article 1A(2), which referred to ‘events occurring before 1 January 1951’, and the option, in Article 1B, for states to agree to the application of the Convention either to events in Europe alone or ‘in Europe or elsewhere’ – known as the geographical limitation. The subsequent 1967 Protocol lifted the time and geographic limitations (except for those states who wished to maintain the geographical limitation of the Convention).

<sup>2</sup> Consolidated Version of the Treaty on the European Union, OJ C 326/15, 26 October 2012, Article 2.

<sup>3</sup> Ibid.

<sup>4</sup> Interviews were undertaken by the author and co-investigators with about 250 people who entered the EU in 2015 and 2016, as part of a research project, *Crossing the Mediterranean Sea by Boat: Mapping and Documenting Migratory Journeys and Experiences*. This work was supported by the Economic and Social

meant 'getting [a] residence permit. If I get a residence permit, I can ... be integrated, go to school, join the society. ... we don't get afraid; we don't get afraid of anything. ....[It means] protection of the human being, human rights.' Another stated: 'for me safety and citizenship is the same thing. I want a place that can provide me protection in order to be able to bring my family to live altogether there.' A third perceived asylum as a way 'to build a future ...and have a life; build a future for my children, so that they can have a better life'.

In other words, there is a disarming purity to these conceptualisations of protection and asylum: for the individual, they denote not only safety but crucially an opportunity to live a life of meaning, to reunite with family, to offer hope and a future to children, to try to flourish as a human being. The interviewees clearly recognised that, for this to be achieved, membership of – and integration into – a new community was called for.

### **The meaning of asylum and refugee protection for the EU**

The simplicity of these understandings of asylum and protection have arguably been lost in the EU and its member states (alongside many countries around the globe) and one might suggest deliberately so. While there is an underlying assumption to the enquiry posed by this collection – namely, that there is consensus about the core content of such protection – understanding what is meant by protection is not so clear-cut (Stevens, 2013, Storey, 2016). Asylum is itself multi-dimensional and has many meanings (Grahl-Madsen, 1980; Gunter Plaut, 1995; Goodwin-Gill & McAdam, 2007: Ch 7). There is a tendency to consider asylum and protection from a top-down perspective, with reference to international legal norms, international relations, state interests and institutional players. Asylum and protection have been crafted over decades, addressing, in the main, the concerns of the powerful; it is rare to hear the voice of the refugee, what she desires or needs, or to recognise the strategies adopted by the refugee in achieving an alternative form of protection – what might be termed, to paraphrase Betts, 'survival protection'.

Considering the historical antecedents of many member states, and their own experiences of war and displacement, the EU (and formerly the European Community) has had, arguably, a rather curious relationship with asylum and refugee protection. On the one hand, EU asylum policy is clearly positioned within the 'meta-values' of the EU, as outlined above, especially those of human dignity, respect for human rights and solidarity. The importance of international protection for persons in need litters EU documentation; the institutions of the EU have all, at various times, iterated their full commitment to protection and the Refugee Convention. The European Council meeting in Tampere in 1999, in a significant step in the development of a CEAS, declared that its aim was an 'open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other human rights instruments, and able to respond to humanitarian needs on the basis of solidarity' (Tampere, 1999). The CEAS ostensibly meets these objectives with its acknowledgement that the Refugee Convention and 1967 Protocol 'provide the cornerstone of the international legal

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[www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/irs/crossingthemed/](http://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/irs/crossingthemed/). See, also, MEDMIG Report, *Destination Europe – Understanding the dynamics and drivers of Mediterranean migration in 2015*

regime for the protection of refugees'<sup>5</sup> and the declaration that 'solidarity is a pivotal element in the CEAS'<sup>6</sup>, while remaining largely undefined and somewhat conceptually disputed.<sup>7</sup> A 'right to asylum' is now provided by the EU Charter of Fundamental Rights,<sup>8</sup> leading to academic argument for a right to *be granted* asylum (Gil-Bazo, 2008) while the Court of Justice of the EU provides interpretative guidance on asylum law, with the possibility of enhancing protection standards; however, its jurisprudence to date has had a mixed reception (Banks, 2015).

On the other hand, as widely documented, the recognition of fundamental rights and the primacy of the Refugee Convention, the establishment of minimum acceptable standards for asylum applicants and agreement on the core content of international protection to be granted to beneficiaries, has not been the panacea suggested by those advocating a harmonised asylum policy – this despite nigh on three decades of EU, EC and intergovernmental concern with the asylum issue. Asylum seekers must overcome a variety of state-imposed hurdles: *inter alia*, extra-territorialisation migration measures, border controls, third country removals, interception at sea, 'push-backs', visas. In the 1980s and 90s, it was popular to talk of 'fortress Europe' and the creation of a '*cordon sanitaire*'; now, the focus is on the prosaic 'access to asylum', but the argument remains the same: any improvements to member states' treatment of asylum seekers in their territories do little to enhance access to asylum and protection (see, for example, Gammeltoft-Hansen, 2011). And without enhanced access, refugee protection remains a distant dream for the individual.

### **Asylum and refugee protection in 2015 and 2016**

As the *cordon sanitaire* breached, and desperate people made their way across European territory, the true face of EU asylum refugee protection emerged: the CEAS was not common; solidarity was not universal; mistrust rather than mutual trust triumphed; EU values could be ignored at will; a Directive specifically designed to offer temporary protection in situations of 'mass influx' was ignored. Instead, panicking Member States and EU institutions scrambled to find a politically palatable solution; the outcome: the European Agenda on Migration and the EU-Turkey Statement; the clear aim: putting an end to inward migration. The CEAS is to be revisited to ensure full implementation. Directives are to become Regulations, removing optionality for Member States and imposing uniformity.<sup>9</sup> The focus is on reducing incentives; preventing primary movements of people to – and secondary movements in – the EU; facilitating third country removals; promoting the return of irregular migrants. The impact on

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<sup>5</sup> Directive 2011/95/EU: para (4).

<sup>6</sup> Regulation 604/2013: para: (22).

<sup>7</sup> Article 80 Consolidated Version of Treaty of the Functioning of the EU states that '[t]he policies of the Union set out in this Chapter [border checks, asylum and immigration] and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States'.

<sup>8</sup> Article 18.

<sup>9</sup> It is proposed that the Procedures and Qualification Directive become Regulations, while the Reception Conditions Directive remains a Directive.

access to protection, particularly as understood by the individual asylum seeker, is hardly addressed, beyond the inadequate resettlement quota.<sup>10</sup>

Meanwhile, with the closure of borders, more than 60,000 people were trapped in Greece, scattered across urban settings, formal and informal camps and so-called ‘hotspots’ on the islands of Lesbos, Chios, Samos and Kos. Transformed very quickly from a country of transit to one of containment, Greece struggled to cope. Conditions in informal camps and in hotspot detention centres are often very poor; there is little access to information; there are serious delays to registration, asylum processing, family reunification or relocation elsewhere in the EU.<sup>11</sup> Even where political leadership and humanity was shown – as in the case of Germany –<sup>12</sup>, the reality of protection on the ground is revealing. For example, a change in policy in 2016 in Germany, withdrew the automatic grant of refugee status to Syrians and replaced it with subsidiary protection, with consequences for family reunification.<sup>13</sup> Perhaps more than any other aspect of the current problems faced by protection seekers, delays and refusals of family reunification cause the greatest distress.

With such obvious state and institutional failures, alternative forms and places of protection materialised, challenging the status quo and with a focus on the local: individual actors emerged across Europe to offer aid and assistance, termed by Papataxiarchis, in the Greek context, as ‘solidarians’, ‘volunteers’, ‘professional humanitarians’, and the ‘ordinary people’ (Papataxiarchis, 2016). Cities of welcome; cities of sanctuary; human rights cities opened their doors and offered access to labour markets irrespective of national policies.<sup>14</sup>

## Conclusions

What this brief foray into recent migration events in the EU tells us about refugee protection is that it is not necessarily ‘dead’ but it is deeply circumscribed. EU states are clearly content to maintain an asylum system that grants certain rights to the very few. Every effort will now be spent in trying to avoid any further ‘mass influxes’ while seemingly ‘improving’ the CEAS. The relatively small numbers who reach an EU state willing to process their asylum claims will, if they succeed in overcoming the many procedural and substantive obstacles, benefit from numerous rights accorded by EU law. Such an approach allows for the promulgation of the view that the EU continues to be comprised of liberal states that believe in fundamental

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<sup>10</sup> At 2 March 2017, the EU resettlement scheme stood at 22,504: EC Press Release, ‘Commission calls for renewed efforts in implementing solidarity measures under the European Agenda on Asylum’, 2 March 2017: [europa.eu/rapid/press-release\\_IP-17-348\\_en.htm](http://europa.eu/rapid/press-release_IP-17-348_en.htm).

<sup>11</sup> See Briefing Note, *Crossing the Mediterranean Sea by Boat: Mapping and Documenting Migratory Journeys and Experiences*: [www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/irs/crossingthemed/output/crossing\\_the\\_med\\_evidence\\_brief\\_ii.pdf](http://www2.warwick.ac.uk/fac/soc/pais/research/researchcentres/irs/crossingthemed/output/crossing_the_med_evidence_brief_ii.pdf).

<sup>12</sup> Many have argued that the decision of Angela Merkel to accept hundreds of thousands of people, mainly Syrians, was politically motivated (due to the demographic decline) and not simply a major humanitarian gesture; notwithstanding, it is suggested here that moral obligation played a significant part in the political calculation.

<sup>13</sup> Family reunification was suspended for two years from March 2016 for those with subsidiary protection.

<sup>14</sup> For example, Amsterdam, Lund, Barcelona, Düsseldorf.

rights, are party to international law and have effectively incorporated the international refugee law into their regional regime.

The emergent shoots of what might be termed local protection in the EU is beginning to reflect other parts of the world where 'silent integration' without *de jure* status has occurred. (Bakewell, 2011). These alternatives, where supported by host communities and city municipalities, whilst having their legal limitations, realise partial integration and membership and are certainly an interesting development in the protection narrative. Arguably, for the October 2016 New York Declaration for Refugees and Migrants to be more than meaningless political rhetoric, calls for the 'empowerment' of refugees and for a 'people-centred' approach need to be properly addressed. A start can be made by revisiting protection from the individual's viewpoint.

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