

Discuss: Does Europe need a new legal framework to tackle mass migration?

In 1939 the *SS St. Louis* left Germany with Jews fleeing from the Third Reich. On September 2, 2015 Alan Kurdi and his family boarded a small boat in Turkey with the hope of getting to Europe. Seventy-six years separate these events, but the outcomes are the same: the international community failing to acknowledge their responsibilities for those fleeing persecution.

Europe has the financial means, policy framework and the legal mechanisms to cope with its migration 'crisis'. Yet, attempts to do so have thus far been disjointed and inadequate. At present, Europe faces two critical challenges: firstly how to prevent further perilous journeys across the Mediterranean and secondly how to reorganise, redistribute, reapportion the costs and responsibilities among its Member States.

Current legal framework

The cornerstone of Europe's legal framework is the Dublin III Regulations. The current system's failure rests upon the fact that an asylum seeker must lodge their claim in the first EU country they enter and if the claimant applies elsewhere, he or she can be deported to the first country of entry.¹ This creates fundamental inequality within the Schengen agreement, by placing disproportionate responsibilities on frontline states like Greece,² Italy and Hungary, who overwhelmingly receive the

¹ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals.

² It should be noted, however, that the ECHR has ruled since 2011 that Greece is no longer responsible for all the asylum-seekers who arrive there. See, *M.S.S v Belgium & Greece* (application no.30696/09)

most claims.

In addition, European law imposes carrier sanctions on transport companies if they transport people without visas,³ which explains why migrants and refugees pay smugglers for transit into Europe. It is clear, Schengen border controls have a troubled relationship with asylum law. Nevertheless, it would be naïve to assume that simply re-imposing border controls provide the answer.

A new legal framework?

There is no need to reinvent the wheel. The first issue to address is ‘access’ to make asylum applications. One solution would be to implement a humanitarian visa system that allows asylum seekers to travel legally to a country in which they can then claim asylum. This would immediately reduce the smuggling problem and prevent repetitions of *Lampedusa*. The idea has historical precedent, and builds upon the framework of the Nansen Passport system used by the League of Nations, following the Russian Revolution and the collapse of the Ottoman Empire.

Secondly, Europe needs to refocus on principles of solidarity to re-emphasise the need to share the burden of this crisis.⁴ This could involve initiating a Comprehensive Plan of Action that incorporates immediate temporary protection,⁵ EU-based subsidiary

³ Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

⁴ Article 78(3) TFEU.

⁵ Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

protection⁶ and other forms of humanitarian admission and sponsored admissions, as well as an expansion of refugee resettlement directly from Syria. This worked during the Kosovo crisis during the late 1990s and provides a useful starting point for effective collective action.

Thirdly, Europe needs to look at the migration crisis as a development issue.

Addressing the dysphoria around taking refugees requires implementing sensible policies based on macroeconomics. Two recent examples serve to show how effective this can be for a host country in practice. First, an initiative stemming from the International Conference on Central American Refugees, between 1989 and 1995, created opportunities by allowing Guatemalan refugees to cultivate the Yucatan Peninsula. More recently, Uganda granted refugees the right to work and freedom of movement to further integrate refugees within the local community following large-scale migrations from Sudan and Somalia. Both illustrations offer a route to greater sustainability and remove the economic burden of migration.

However, these possible solutions ignore the fact that there is still a profound need to adapt our international legal framework to cope with the fluid nature of this crisis. A fundamental problem is that a large proportion of people fleeing fragile States are outside the 1951 Convention's definition of a refugee, but cannot be described as *voluntary* migrants. Yet surely if people are not afforded any basic rights in their country of origin, then they fall into the same category as refugees?

⁶ Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

In a world of principles, international human rights law needs to offer protection but States are fearful of creating a ‘pull factor’. A shift towards a harmonised international soft law framework would provide at least provide some respite for this vulnerable group within a recognised format. Yet, in a world of shattered States people will continue to flee, irrespective of whether they fit neatly within prescribed legal definitions.

Way-forward

The solution to the contemporary crisis has to be on a number of different levels, but it does not require the creation of another legal labyrinth. Ultimately, any solution must stem from a reaffirmation of the need to uphold asylum and refugee protection and to see these obligations as a shared global responsibility. These principles are aptly inserted into both the Preamble to the International Refugee Convention and Article 80 of the TFEU.

Seeking asylum is not only a universal human right, but also a political principle that has guided nations for hundreds of years and is integral to the values upon which modern Europe was built. As Banksy’s mural of the migration crisis is quietly dismantled in Western-super-Mare, it is worth thinking about the lasting legacy we want to leave for the future of humanity.

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