
EU regional protection programs: Enhancing protection in the region or barring access to the EU territory?

1. Sealing EU borders : the human cost of fortress Europe

The European Commission's Communication of 2 September 2005 on regional protection programs defined new tools to enhance the protection capacity of transit and host countries and to improve Europe's contribution to global refugee protection. This new strategic document comes at the very moment when the European Union seems to be going through a "protection crisis". The idea of developing financial, legal and technical assistance to enhance refugee protection in countries hosting the vast majority of the world's refugee population can only be welcomed. However, despite some positive elements in the proposal, the Commission's credibility is open to question when on the one hand, it preaches respect for refugee rights, while on the other hand remains silent over EU Member States' overly restrictive practices that undermine or even breach their international protection obligations.

Contrary to the picture that is generally painted, EU Member States are *not* going through an "asylum crisis" but rather through a "protection crisis". Indeed, while statistics show a continuous decrease of asylum applications in most EU Member States, these same countries are increasingly tempted to withdraw from their international commitments regarding refugee protection. The year 2004-2005 has been marked by the now infamous crisis on the Italian Island of Lampedusa, with the arrival of hundreds of migrants and asylum-seekers trying to reach Europe after having transited through Libya. The consequence of this critical situation has been the decision of the Italian Government to carry out large-scale operations to return these people to Libya, despite the clear risk of migrants and asylum seekers being ill-treated or detained in appalling conditions.

Similar developments are likely to occur in Malta where the authorities claim their asylum system is under pressure due to the arrival of undocumented migrants and asylum-seekers who have transited through Libya. Despite repeated warnings by the United Nations High Commissioner for Refugees (UNHCR) and Non-Governmental Organisations, the Maltese authorities announced in August 2005 that they were contemplating a suspension of their international obligations under the 1951 Refugee Convention. Amnesty International has also recently published a report on Spain, which includes evidence of clandestine expulsions of foreign nationals and asylum seekers from Ceuta and Melilla, the Spanish enclaves on Moroccan territory.

These examples are only an illustration of a consistent pattern of human rights violations linked to interception, detention and expulsion of foreign nationals, including persons seeking international protection. Amnesty International's documents confirm concerns expressed on numerous occasions by national and international human rights monitoring bodies and other NGOs regarding the lack of adequate procedural safeguards and the often appalling living conditions in detention centres. In this respect, the combination of lack of adequate training of border guards and low levels of procedural safeguards available under the refugee status determination procedures may lead to a quasi-systematic denial of protection. The difficulties in accessing a fair asylum procedure are amplified by the use of the so-called white list of safe countries of origin, and re-admission agreements with transit countries with poor human rights records.

Against this bleak backdrop, Member States' obligations to comply with newly adopted EU standards will be of limited help in enhancing refugee protection in the near future. Despite strong initial commitments embedded in the conclusions of the 1999 Tampere Summit, the overall assessment of the first phase of the harmonisation process between 1999-2004 is rather negative from a human rights perspective.

Instruments adopted during the Tampere era show a creeping confusion between "asylum" and "immigration" procedures and the distortion of the initial objective of the common European asylum system (namely the protection of persons fleeing persecution) to serve the purposes of migration control.

Due to the difficulties in reaching a common agreement on a fair level of protection throughout the European Union, Member States have shown a keen interest not only in co-ordinating their efforts to fight the root causes of forced displacement, but also and primarily in limiting access to their territory by enhancing co-operation with transit countries. Although it is premature to assess the merits of the regional protection programs, an initial analysis of these plans, put into the context of the broader EU external agenda and inter-governmental plans, raises questions about both their feasibility and their potential impact on the international protection regime. While there are limited prospects of bringing order to the movement of people in need of international protection - an inherently "disorderly business" - the external dimension of the common European asylum system also risks impacting negatively on the rights of those the international protection regime is designed to protect.

2. Regional Protection programs: old solutions in a new bottle?

As illustrated above, current discussions surrounding EU actions in regions of origin or transit countries are taking place in a politically charged environment. The idea of exporting the responsibility of processing asylum claims to third countries has been regularly raised by Western industrialised countries since the mid-eighties. An intense debate has been held amongst EU Member States since February 2003 following a proposal from the UK Government to create regional protection zones and centres for processing of asylum requests in third countries. The UK proposal received mixed reactions in the run-up to the Thessaloniki European Council in June 2003. Due to strong opposition from Sweden, Germany and France, no agreement was ever reached amongst EU Member States regarding the external processing centres.

However, there have been on-going discussions regarding the need to address root causes of refugee flows. In June 2004, the Commission issued a communication on improving access to durable solutions for refugees, which further explored ways of enhancing protection capacity in countries hosting large numbers of refugees. The concept of regional protection programs (RPPs) was then endorsed by the November 2004 European Council in the Hague Program, which stresses the need for the EU to contribute to a more equitable and effective international protection system and provide access to protection and durable solutions at the earliest possible stage.

The September 2005 communication provides the general framework for the development of RPPs that are to be implemented in close co-operation with the UNHCR, and other relevant international organisations. Such plans are to be designed according to the specific situation and needs of the host country. Amongst the core constituent activities, RPPs could include a registration scheme for all persons of concern to UNHCR in the area, projects to enhance reception conditions, and assistance to the local community hosting the refugees. The 2005 communication also stresses the need to develop specific schemes to improve assistance transit countries. However, Member States have not yet reached an agreement on the desirability of including a readmission clause in RPPs. Given that the 2005 communication does not include operational details, it will only be seen in practice whether RPPs actually improve the coherence of the protection action already undertaken by the European Union under assistance, development and humanitarian programs.

However, the RPP proposal raises many questions.

First and foremost, the proposal includes very little as regards the commitment of EU Member States to host refugees under resettlement schemes, despite an earlier announcement that RPPs would include some significant steps to improve solidarity with countries hosting large numbers of refugees.

Secondly, there is the issue of the overall impact of RPPs on refugee protection. Keeping refugees close to their regions of origin is seen as a panacea from the perspective of European governments that are

keen to limit the numbers of migrants and asylum seekers. However, the presence of a large community of refugees may have a detrimental impact on the political stability of the host societies. In this respect, the European Commission and EU Member States should carefully weigh the long-term consequences of RPPs. Assistance programs for local communities can only work with a sustained and open dialogue with host countries at an early stage. Besides, in the absence of a commonly agreed definition under international law, the notion of "regional protection" raises questions regarding the definition of what constitutes an effective protection and who will be in charge of assessing refugee needs.

In this respect, the possible launch of a pilot RPP in Western Newly Independent States (NIS) raises strong concerns given the persistent difficulties existing in Ukraine and very problematic human rights situations prevailing in Moldova or Belarus, a country which has no diplomatic relationship with the European Union. The Commission's proposal also seems to pay little attention to recent developments in regions of origin. Despite restrictive changes to its asylum policy, Tanzania may be considered as an option for launching an RPP in Africa. However, it should be recalled that in 2004, the Tanzanian authorities denied adequate protection to refugees from the Great Lakes and have drastically reduced humanitarian assistance for Burundian refugees already present in the Tanzanian territory.

Also central to the debate is the question of whether countries chosen to host RPPs would be labelled as "safe havens", thus allowing EU States not to process asylum claims lodged by individuals having transited through these countries. On the day when the communication was issued, Commissioner Frattini gave oral assurances that RPPs would not bar access to asylum procedures in EU Member States. While it is true that the proposal does not refer to external processing, this statement is up for discussion given that it is ultimately for States to decide whether a third country can be considered as safe. Indeed, Member States have failed to agree on a common list of safe third countries - they have only agreed on a set of common criteria. Under current EU law, the European Commission would therefore have no competence to object to States' practice to intercept and return asylum seekers back to a region hosting a RPP provided that this region could be considered as safe under the common criteria.

Furthermore, the proposals for RPPs must be seen in the broader political context where there is continuing ambiguity regarding transit countries. Some Member States are keen to look at the possibility of strengthening a "buffer zone" of first asylum countries surrounding the EU, especially in the Mediterranean area (Morocco, Libya) and in Western NIS. Most noticeably, in 2004, Germany's position changed and it supported proposals for external processing. The 2004 Hague European Council invited the Commission, in close co-operation with the UNHCR, to study the merits and feasibility of joint processing of asylum applications outside EU territory. Current States' practice shows the danger of diverting the initial objective of co-operation with regions of origin and countries of transit, i.e. tackling root causes of forced displacement, in order to prevent asylum seekers and migrants from getting access to EU territory. The recent example of Libya shows that the Council and the Commission appear to be rushing into the development of operational co-operation with specific countries, while the specific parameters of the external dimension of the common European asylum policy have yet to be defined. Where human rights abuse is one of the causes of forced displacements, the purely migration-control driven policy developed so far is likely to undermine the credibility and viability of the global EU human rights agenda. More importantly, there is every reason to remain vigilant about the risks for the people concerned of putting the responsibility of refugee protection squarely on countries where responsibility, enforceability and accountability for effective protection is like to be diminished, weak or unclear.

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