



Ludwig Boltzmann Institute  
Human Rights

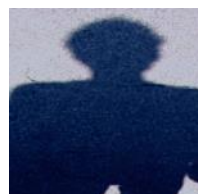
Ludwig Boltzmann Institute  
of Human Rights  
Research Association

---

## **BIM POSITION NO.11**

### **The right to asylum and EU asylum policy**

7 March 2018



This text aims at outlining the perspective of the Ludwig Boltzmann Institute of Human Rights on critical elements of the European Union's (EU) approach towards the institution of asylum. For this purpose, it will examine selected aspects of EU policy and present reflections on a possible way forward based on a conceptualization of the right to asylum.

The development of contemporary international refugee and human rights law is interwoven with the collective European experience. The 1951 Refugee Convention was established against the backdrop of the phenomenon of forced displacement<sup>1</sup> and statelessness caused by both World Wars in Europe. Today, the EU has incorporated a right to asylum in its Charter of Fundamental Rights (FRC), while, with the establishment of the Court of Justice of the European Union (CJEU), a supranational court oversees its application and interpretation. And through the European Court of Human Rights (ECtHR), asylum-seekers find access to an international institution that is designed to protect individual rights.

However, notwithstanding these and further legal and institutional developments, severe challenges remain unresolved. The phenomenon of rightlessness, when asylum-seekers are cast out from the protection of the law and exposed to a violation of their most fundamental human rights, has not been overcome. And while an adversarial and polarized public discourse is gaining force, the politics of "cooperative deterrence"<sup>2</sup> continue to obstruct an adequate access to asylum – within the EU, at its borders, in transit countries, and in countries of origin.

## A right to asylum

Humanity has a long history of asylum. References to the protection provided to individuals by sovereigns are found in the oldest religious scriptures, constituting the source for the normative nature of asylum, as well as in the legal practices of the most ancient civilizations<sup>3</sup>. The specific content and addressees of protection, however, have changed throughout history under the influence of social and political circumstances.<sup>4</sup>

---

<sup>1</sup> See also Nanda Oudejans, 2011, *Asylum, A philosophical inquiry into the international protection of refugees*, Oisterwijk, BOXPress BV, p. 10.

<sup>2</sup> This notion is used to describe "efforts to keep refugees away from wealthy states without formally resiling from treaty obligations"; see James C. Hathaway and Thomas Gammeltoft-Hansen, 2015, *Non-Refoulement in a World of Cooperative Deterrence*, Colum. J. Transnat'l L. 53, no. 2, p. 235-84.

<sup>3</sup> In an early Jewish conception of asylum, asylum was granted to the innocent who took refuge at the altar. In the following, cities were established by law as places of refuge. The religious tradition of asylum later found its continuation in the New Testament, the Quran, and more recently in the scriptures of the Bahá'í Faith. In legal practice, asylum has considerable parallel tradition. The oldest international legal agreement for which content is documented, the Egyptian-Hittite peace treaty ('Kadesh Treaty') from 1258 BC, already contained clauses addressing the protection of individuals, holding that populations should be exchanged between the two powers under the condition of amnesty. In ancient Greece, asylum was an expression of divine power, where human justice led to unsatisfactory situations and the temples served as a refuge. In Rome, the temple provided protection to those outside the pale of law; see Maria-Teresa Gil-Bazo, 2015, *Asylum as a General Principle of International Law*, International Journal of Refugee Law, Vol. 27, No. 1.

<sup>4</sup> During the Age of Enlightenment, a significant shift occurred towards the notion of asylum as an institution for the protection of the politically persecuted. For the longest time asylum was mostly understood as an expression of sovereignty by a state or state-like entity and a respected exception to the principle of a state's sovereignty over its own nationals. Although still contested, a notable development in establishing the notion of a right of individuals to asylum has been accomplished in the end of the last century; *ibid.*

The contemporary understanding of asylum is largely shaped by the experiences of statelessness and displacement caused by the First and Second World War when the specific dilemma in the relationship between refugees and states became apparent. “A refugee is an anomaly in international law”, the International Refugee Organization wrote in 1949, “and it is often impossible to deal with him in accordance with the legal provisions designed to apply to aliens who receive assistance from their national authorities.” The refugee had lost the protection of the country of origin, and, with this, also the protection of the entire system of international law. To contribute to social stability, to promote burden-sharing, and to set conditions under (state) control, states decided that it was in their mutual interest to establish a legal basis for the protection and assimilation of the millions of displaced persons as an exception to the norm of communal closure, leading to agreements on the 1933 and eventually the 1951 Refugee Convention.<sup>5</sup>

It is a common misunderstanding that the protection the Refugee Convention provides to refugees is (only) the protection from persecution. While the criteria under which a person shall be regarded a refugee revolve around the notion of (well-founded fear of) persecution, the absence of such persecution, however, does not resolve the fundamental predicament of rightlessness that has accrued as a result of persecution. The aim of the Convention is hence not only to protect a refugee from persecution in his or her country of origin, it rather also strives to reconnect the refugee to the international system by requesting states to provide the legal protection that was lost as a consequence of persecution and displacement, that refugees again “shall enjoy fundamental rights and freedoms without discrimination.”<sup>6</sup> In this context, when the Convention requests states to “facilitate the assimilation and naturalization of refugees”<sup>7</sup>, it advocates a conception of asylum that aspires to full equality before the law, to the incorporation in a new political and legal community.<sup>8</sup>

In the EU, refugee status was complemented by the status of subsidiary protection to provide protection to those who would face a real risk of suffering serious harm in case of return, but who do not qualify as refugees.<sup>9</sup> The establishment of this status can be seen as an effort to align the asylum framework with the demands of the broader principle of *non-refoulement* in international law<sup>10</sup>, particularly as derived from Art 3 ECHR and the respective case-law of

---

<sup>5</sup> See James C. Hathaway, 2005, *The Rights of Refugees under International Law*, Cambridge, p. 85.

<sup>6</sup> Preamble of the Refugee Convention.

<sup>7</sup> Art 34 Refugee Convention; although Art 34 does not include a formal duty of states, it clarifies the underlying principle that eventually refugees should be provided political rights; see also United Nations, *Memorandum by the Secretary-General to the Ad Hoc Committee on Statelessness and Related Problems*, 1950, UN Doc. E/AC.32/2, 50; Jean-François Durieux, 2013, *Three Asylum Paradigms*, *International Journal on Minority and Group Rights* 20, 147-177; James C. Hathaway, 2012, *The Rights of Refugees under International Law*, Cambridge, p. 977 et seq.

<sup>8</sup> Similarly Hannah Arendt has famously called for a “right to have rights”, the right to belong to an organized political community; for an elaboration of the relationship between the “right to have rights” and the institution of asylum, see Oudejans, 2011.

<sup>9</sup> See Art 15-18 of Directive 2011/95/EU.

<sup>10</sup> According to the *non-refoulement* principle, states may not return any person to face the risk of a serious human rights violation; beyond Art 33 of the Refugee Convention it is codified in a number of human rights instru-

the ECtHR.<sup>11</sup> A person entitled to subsidiary protection, like the refugee, is effectively unable to (re-)establish a meaningful link to his or her country of origin. It is thus reasonable to provide refugees and other individuals who must not be returned the same legal protection and include both statuses within the same notion of asylum.<sup>12</sup>

Since the creation of this legal framework for addressing the phenomenon of the rightlessness of displaced individuals, the process of globalization has continued with significant force, leading to increased interdependency in virtually all fields of collective life. However, notwithstanding the existence of institutions such as the ECtHR and the CJEU, nation-states persist in effectively dominating the actual access to and guaranteeing of human rights. Amongst others through externalizing migration control, coordinated and encompassing efforts are made to avoid legal responsibility towards asylum-seekers.<sup>13</sup>

At a more fundamental level, then, the rightlessness of asylum-seekers elucidates the systemic deficiency of the international order. Hereto Hannah Arendt has pointedly observed that “as long as mankind is nationally and territorially organized in states, a stateless person is not simply expelled from one country, native or adopted, but from all countries [...] which means he is actually expelled from humanity.”<sup>14</sup>

Against this historical and conceptual backdrop, the institution of asylum is an expression of the realization that individuals and groups who have lost the effective protection of their country of origin must have access to a new place that again embeds them in a common legal and political framework. It signals the awareness of states that they have a responsibility towards individuals who would else live “outside the pale of the law”.<sup>15</sup>

At the international level, there indeed exists no legal text of universal scope that explicitly deals with a right to asylum, and the Universal Declaration of Human Rights (UDHR), in Art 14, merely recognizes a right to seek and enjoy asylum, but not a right to be granted asylum. However, particularly through the

---

ments, including the 1966 International Covenant on Civil and Political Rights, the 1984 Convention Against Torture, the 1989 Convention on the Rights of the Child, the 1989 American Convention on Human Rights and the 1950 European Convention on Human Rights.

<sup>11</sup> For an analysis of the notion of subsidiary protection in relation to the ECHR and ECtHR case-law, see International Association of Refugee Law Judges European Chapter (IARLJ-Europe), 2016, Qualification for International Protection (Directive 2011/95/EU), available at <https://www.easo.europa.eu/sites/default/files/QIP%20-%20JA.pdf> (accessed on 7 March 2018).

<sup>12</sup> According to Recital 39 of Directive 2011/95/EU “[...] with the exception of derogations which are necessary and objectively justified, beneficiaries of subsidiary protection status should be granted the same rights and benefits as those enjoyed by refugees under this Directive, and should be subject to the same conditions of eligibility”; it must be noted, that despite there not being any legitimate reason to protect refugees better than those who cannot be returned based on the broader principle of *non-refoulement*, since they all share the same need for international protection, EU law still draws a distinction between asylum status and subsidiary protection status (see Art 78 Treaty on the Functioning of the European Union (TFEU)) and that individuals entitled to subsidiary protection often still fall within a discriminatory regime; see for example also María-Teresa Gil-Bazo, *Refugee status, subsidiary protection, and the right to be granted asylum under EC law*, available at <http://www.unhcr.org/research/working/455993882/refugee-status-subsiary-protection-right-granted-asylum-under-ec-law.html> (accessed on 8 January 2018).

<sup>13</sup> See for example Hathaway and Gammeltoft-Hansen, 2015.

<sup>14</sup> Hannah Arendt, 1982, *For the Love of the World*, p. 275; please note that Arendt uses the terms ‘stateless person’ and ‘refugee’ coextensively.

<sup>15</sup> Hannah Arendt, 1968, *The Origins of Totalitarianism*, p. 277, 283 and 286.

impact of the Refugee Convention and international human rights norms, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), the assumption that asylum is an exclusive right of states has been challenged. Moreover, the right to asylum is embedded in regional human rights documents<sup>16</sup> as well as numerous constitutions worldwide<sup>17</sup>.

Acting upon the EU's international obligations as well as the constitutional traditions of Member States, the establishment of a right to asylum in Art 18 FRC constitutes a considerable achievement.<sup>18</sup> The essential value of the strengthening and consolidation of this right of the individual within the EU, different from an exclusive right of states, must not be underestimated. It not only provides a solid foundation for an immediate answer to the international displacement of populations and the symptom of rightlessness. The repeated claiming of this right also reminds EU and Member State institutions of the urgent need to address the basic deficiencies of the current political order.

The right to asylum, as a fundamental right guaranteed by Art 18 FRC, serves as a benchmark and a moral compass for all measures of the EU in the field of asylum, including both the establishment of a protection framework as well as border and security policies. To be effective in providing the displaced access to a new place of their own, the scope of the right to asylum must needs be broad and encompass the movement of asylum-seekers from the country of origin to full integration within the EU.

Bearing in mind that the right to asylum is entrenched within EU law and that it reinforces and consolidates international human rights norms, it indeed contains more than the principle of *non-refoulement*. It also provides the right to leave other countries (and access territories in search for protection<sup>19</sup>), to a fair and effective asylum procedure, to adequate reception, to refugee and subsidiary protection status, to fundamental rights and freedoms, as well as to a secure status.<sup>20</sup>

### Critical elements of EU asylum policy

A sophisticated framework of EU policy in the field of asylum has been created within the last two decades, providing legislation on a wide range of issues.<sup>21</sup> While the different policy areas adhere to different logics and demands, they

---

<sup>16</sup> See Art 22(7) of the American Convention on Human Rights or Art 12(3) of the African Charter on Human and Peoples' Rights.

<sup>17</sup> See Maria-Teresa Gil-Bazo, 2015, p. 23.

<sup>18</sup> It must be noted that, according to Art 78(1) TFEU, the policy of the EU in regards to international protection must be in accordance with the Refugee Convention and other relevant human rights treaties.

<sup>19</sup> The right to access territories of states to apply for asylum can be seen as a necessary corollary to the right to asylum; see also Moreno-Lax, 2017, *Accessing Asylum in Europe*, Oxford, p. 389.

<sup>20</sup> See for example UNHCR public statement in relation to *Zuheyr Freyeh Halaf v. the Bulgarian State Agency for Refugees* pending before the CJEU; Moreno-Lax, 2017; and Maarten den Heijer, 2014, Article 18 – Right to Asylum, in: Steve Peers, Tamara Hervej, Jeff Kenner, Angela Ward (ed.), *The EU Charter of Fundamental Rights*, p. 562-585; regarding the connection between the principle of *non-refoulement* and access to asylum procedures, see also the Concurring Opinion of Judge Pinto de Albuquerque in the case of *Hirsi Jamaa and Others v. Italy*, ECHR, Application no. 27765/09, 23 February 2012.

<sup>21</sup> From harmonizing protection statuses and asylum procedures, establishing criteria and mechanisms for distributing responsibility, as well as setting reception condition standards, to measures of pre-border control and cooperation with third countries (see Art 77 and 78 TFEU).

affect – individually and in their entirety – the right to asylum. However, it is not the aim of this text to analyse in detail all measures, policies or legal instruments that were created by the EU in this field. Rather, it will attempt to shed light on selected and interconnected elements that impair the right to asylum by design.<sup>22</sup>

In the absence of effective and orderly pathways to access asylum in the EU and a shift towards the notions of vulnerability and humanitarianism<sup>23</sup>, the externalization of migration control, the notion of safe third country and the Dublin system exemplify the broader concern that, despite the persistence of the rightlessness of asylum-seekers, the aims of deterrence and security are often prioritized.<sup>24</sup> Considering the vital role of the institution of (a right to) asylum in averting the immediate effects of rightlessness, they need to be discussed and weighed at this level of principle.

### **The externalization of migration control**

Amongst these elements, the externalization of migration control – the attempt to prevent migrants, including asylum-seekers, from entering the legal jurisdiction or territory of the EU – is most critical, as it strives to fully eschew the responsibility of the EU and its Member States to guarantee the right to asylum. The EU's efforts to relocate its own borders to third countries through specific extraterritorial measures of pre-border control – including visa policies, carrier sanctions, maritime interdiction and cooperation with third countries – have immediate effects on the fundamental rights of asylum-seekers. These policies comply with an underlying logic of fighting illegal immigration and securing borders, emphasizing constant surveillance and insinuating that migrants intend to circumvent border checks. Thus, if they apply to migrants and asylum-seekers alike in a situation where regular asylum paths are not in place, the right to asylum is severely damaged.<sup>25</sup>

It can further be observed that cooperation with third countries to establish rigorous restrictions to freedom of movement without possibilities of local integration can result in situations of limbo and rightlessness for asylum-seekers, being barred from moving forward or backward.<sup>26</sup> For example, the attempt of

---

<sup>22</sup> Elements of EU asylum policy such as the harmonization of reception conditions, procedures and qualification standards can similarly have negative effects on the right to asylum or violate it in some instances; however, in contrast to the elements discussed in this text, they are not primarily designed with a view on deterrence.

<sup>23</sup> By this the process of turning refugees from political and legal subjects into vulnerable objects of humanitarian assistance is meant; see for example Ayten Gündoğdu, 2015, *Rightlessness in an Age of Rights*, Oxford University Press, 75 et seq; Didier Fassin, 2011, *Humanitarian Reason. A Moral History of the Present*, Berkeley; for reflections on current EU policy, see Alessandra Sciarba and Filippo Furri, 2017, *Human Rights Beyond Humanitarianism: The Radical Challenge to the Right to Asylum in the Mediterranean Zone*, Antipode; Feyzi Baban, Suzan Ilcan and Kim Rygiel, 2017, *Playing Border Politics with Urban Syrian Refugees*, available at <http://movements-journal.org/issues/05.turkey/06.baban,ilcan,rygiel--playing-border-politics-with-urban-syrian-refugees.html> (accessed on 3 January 2018).

<sup>24</sup> See Thomas Gammeltoft-Hansen and Nikolas F. Tan, 2017, *The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy*, JMHS Volume 5 Number 1, 28-56.

<sup>25</sup> The EU policy of externalization has introduced an asymmetry between policing, border management and surveillance on the one and the protection of refugees on the other side, while in practice not recognizing the need to adhere to the standard set by the right to asylum and other fundamental rights guarantees; for a detailed analysis, see Moreno-Lax, 2017.

<sup>26</sup> For a detailed analyses of the effects of externalization on the rights of migrants and asylum-seekers, see Moreno-Lax, 2017; Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen, 2017, *Human rights and the dark*

raising the policing capacities of authorities in third countries to prevent asylum-seekers from departing towards the EU – while the same authorities are unable to protect the most fundamental human rights and freedoms of migrants – has perpetuated an intolerable situation of gross human rights violations in the direct neighbourhood of the EU.<sup>27</sup> Notwithstanding this state of calamity, such policy of deterrence also counteracts the right of asylum-seekers to leave countries in search of protection. That interception occurs through third-country actors in their territories or territorial waters does not release the EU and its Member States from their responsibilities.<sup>28</sup>

### The notion of safe third country

The idea of returning asylum-seekers to third countries without assessing their asylum claims in substance stems from a controversial and rather flawed interpretation of the Refugee Convention. It assumes that a refugee is not allowed to choose the country of asylum, but that he or she should remain in the first country that is able to provide protection.<sup>29</sup> And, following the logic of externalization, the focus on the notion of the safe third country logically fits the broader aim of avoiding responsibility, solidifying the presumption that reducing the number of individuals who receive asylum within the EU should take precedence over access to asylum.<sup>30</sup>

The effect the prioritization of this notion has on the status of asylum-seekers as rights-bearing subjects is concerning, particularly when it is embedded in a financial or political deal with third countries that may be labelled as safe, but that have not even ratified the Refugee Convention and are not willing or able to provide full integration within the host society. Defining returns to such countries as a main goal of EU asylum policy naturally creates barriers to accessing asylum. The underlying assertion that states may choose to admit individuals

---

*side of globalisation*, New York; Bill Frelick, Ian M. Kysel, and Jennifer Podkul, 2016, *The Impact of Externalization of Migration Controls on the Rights of Asylum-seekers and Other Migrants*, available at <https://www.hrw.org/news/2016/12/06/impact-externalization-migration-controls-rights-asylum-seekers-and-other-migrants> (accessed on 2 January 2018); and Henriette Ruhrmann and David FitzGerald, 2016, *The Externalization of Europe's Borders in the Refugee Crises*, Working Paper 194, Center for Comparative Immigration Studies, available at <https://ccis.ucsd.edu/files/wp194.pdf> (accessed on 4 January 2018).

<sup>27</sup> As the most disturbing recent example of such approach, the attempts of the EU and individual Member States to cooperate with and support state and non-state actors in Libya to prevent asylum-seekers from accessing asylum within the EU should be mentioned.

<sup>28</sup> As Moreno-Lax, 2017, p. 474, has shown, “the (passive) right to non-refoulement [...] is complemented by an (active) right of the individual to asylum under EU law that necessarily implies a related entitlement to gain effective access to international protection”; for the question of the responsibility of EU Member States in regards to departure prevention and pull-back measures committed by third countries in cooperative migration control see Nora Markard, 2016, *The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries*, EJIL, Vol. 27 No. 3, p. 591-616; and, more generally regarding the human rights obligations of EU Member States in their attempt towards migration control outside the EU, see for example den Heijer, 2012, *Europe and Extraterritorial Asylum*, Hart Publishing, Oxford and Portland, 2012.

<sup>29</sup> While the 1951 Refugee Convention does not provide for the free choice of a country of asylum, there is no obligation for a protection seeker to apply for asylum in a place of transit; see Violeta Moreno-Lax, 2015, The Legality of the “Safe Third Country” Notion Contested: Insights from the Law of Treaties, in Goodwin-Gill and Weckel (eds), *Migration and Refugee protection in the 21<sup>st</sup> Century*, The Hague Academy of International Law Centre for Research, Martinus Nijhoff, p. 69; and Agnès Hurwitz, *The Collective Responsibility of States to Protect Refugees*, 2011, Oxford University Press, p. 127 et seq.

<sup>30</sup> For a critical analysis of the relationship between the notion of safe third country and access to asylum, see AEDH/EuroMed Rights/FIDH, 2016, “Safe” countries: A denial of the right of asylum, available at <http://www.ohchr.org/Documents/Issues/MHR/ReportLargeMovements/FIDH2%20.pdf> (accessed on 7 March 2018).



in need of protection solely based on political and economic interests is fortified. Under such premises, asylum-seekers are likely to be treated as a commodity at worst or under the banner of humanitarianism at best. In the application of this notion, situations of rightlessness and limbo are created even on the soil of EU Member States, when the procedure to determine whether a person must be returned or admitted is prolonged while the right to freedom of movement is violated.<sup>31</sup>

## The Dublin system

The Dublin system is a sophisticated mechanism for the implementation of the broader notion of safe (third) country within the EU. It is designed as a pre-procedure in which the responsibility of a single Member State shall be determined, based on a set of hierarchical criteria, before the asylum claim is assessed in substance. Although the main aims of the system, to avoid refugees in orbit<sup>32</sup> and forum shopping<sup>33</sup>, are laudable, its concrete functioning leads to considerable obstacles for an adequate access to asylum.

Notwithstanding sustained criticism, the system continues to rely on the principle that responsibility should usually fall on the Member State that is responsible for the entry of the asylum-seeker in the EU. In absence of other links, the “illegal” crossing of the external Schengen border thus determines the responsibility of a Member State.<sup>34</sup> Clearly, this mechanism creates a situation in which few Member States at the main routes, that should control external borders, would assume responsibility for the greatest share of asylum applications within the EU. Moreover, the Dublin system has so far not proven effective in the actual distribution of responsibility among the Member States.<sup>35</sup>

To the contrary, in many cases, the system has even led to serious violations of human rights of asylum-seekers. Through its application, asylum-seekers are asked to wait often for months or even years, before they can access the actual procedure. Forcing asylum-seekers into a stand-by position impairs the prospect of integration and obtaining a secure legal status in the country of

---

<sup>31</sup> Here, the so called EU-Turkey deal comes to mind; albeit it may have contributed to less drownings of migrants, it is effectively undermining the legal status of asylum-seekers, whose access to asylum both within the EU and Turkey is barred; for a more detailed analyses, see for example Gerda Heck and Sabine Hess, 2017, *Tracing the Effects of the EU-Turkey Deal*, available at <http://movements-journal.org/issues/05.turkey/04.heck,hess--tracing-the-effects-of-the-eu-turkey-deal.pdf> (accessed on 2 January 2018); Maybritt Jill Alpes, Sevda Tunaboylu and Ilse van Liempt, 2017, *Human Rights Violations by Design: EU-Turkey Statement Prioritises Returns from Greece Over Access to Asylum*, available at <http://www.statewatch.org/news/2017/nov/eui-greece-turkey.pdf> (accessed on 9 January 2018), and Baban/Ilcan/Rygiel, 2017.

<sup>32</sup> A situation in which no Member State takes responsibility for an asylum claim.

<sup>33</sup> A situation in which several asylum procedures in different Member States are conducted.

<sup>34</sup> See Art 13 Regulation 604/2013.

<sup>35</sup> For an analysis of Dublin statistics in 2017, see Aida, 2017, *The Dublin system in 2016*, available at <https://www.ecre.org/the-dublin-system-and-its-dysfunctions-the-human-faces/> (access on 1 January 2018); in the “Wikström report”, the European Parliament puts forward suggestions towards “fundamental and structural reform” of the Dublin System, introducing an “incentives-based” approach and deleting the criterion of illegal entry, see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A8-2017-0345+0+DOC+PDF+V0//EN> (accessed 17 January 2018).



residence. While awaiting admission, individuals subjected to Dublin procedures risk being dismissed as second-class asylum-seekers, facing infringements of their rights to freedom of movement or family life, amongst others.<sup>36</sup>

## Way forward

Today the increasing misery of forced displacement bears severe unresolved challenges. And calling into mind the history of the institution of asylum and its normative nature, it is striking that the right to asylum is under severe pressure in the EU. This issue can be addressed with a view on both fundamental as well as symptomatic and immediate progress.

In a long-term context, the EU and its Member States must first and foremost address the insistence on national sovereignty and interest as a root cause of rightlessness. Drawing from the collective experience in Europe that upholding the principle of solidarity is a necessity when dealing with the phenomenon of displacement, the EU and its Member States can play a crucial role towards the establishment of new forms of international cooperation and agreement that prioritize protection and integration over migration control and deterrence. Certainly, the EU can be seen as an attempt at tackling the political and economic downsides of nationalism, as an endeavour to learn about and implement more encompassing forms of cooperation and organization. The value of this Union, that has given rise to concepts such as EU citizenship and that has fostered the process of European integration, must hence be unequivocally acknowledged. The global phenomenon of displacement, however, requires a global perspective. Solidarity within the EU<sup>37</sup> might be worth striving for, but if this solidarity comes along with isolation and communal closure towards the global, perpetuating the “deterrence paradigm” in a period of crisis<sup>38</sup>, it essentially fails not only in upholding the right to asylum but also in overcoming the systemic flaws of the international order.

Such an endeavour of addressing structural as well as ideological barriers and learning about global solutions can best take form within a discourse that eschews divisiveness and challenges the idea of the particularity of interests. A polarized debate that plays off populations against asylum-seekers, ascribing them bad intent, that routinely discredits individual state governments for their response to a complex reality, or that aims at solutions in disregard of global interdependence, cannot meaningfully contribute to this process of learning. Thus, the task of creating and cultivating spaces in which a sound conversation on asylum from a global perspective can evolve at all levels should be actively followed.

The international legal framework currently in place, most notably the Refugee Convention and the ECHR, has answered to the protection needs of millions. In the absence of more encompassing resolutions, the institution of asylum,

---

<sup>36</sup> For an analysis of the effects of the Dublin system on the fundamental rights of asylum-seekers, see ECRE, 2013, *Lives on Hold*, available at <http://www.refworld.org/pdfid/513ef9632.pdf> (accessed on 2 January 2018).

<sup>37</sup> Art 80 TFEU determines that the EU policies in the areas of border, asylum and immigration and their implementation “shall be governed by the principle of solidarity and fair sharing of responsibility”.

<sup>38</sup> Gammeltoft-Hansen and Tan, 2017.

when understood as an encompassing right of individuals to access permanent refuge and the protection of the law, continues to bear the potential of addressing rightlessness as a symptom and even promoting solidarity and cooperation within the current institutional and structural arrangement. In this context, the essential role and value of the right to asylum in Art 18 FRC must still be realized.

In a short-term, then, it is of course to be hoped that the establishment of an orderly access to asylum, for example through strengthening resettlement programmes or establishing access to asylum through visa procedures, will occupy the necessary priority in the EU's immediate efforts. In any case, the entirety of measures that affect asylum-seekers in their relationship with the EU and its Member States must be weighed against the demands of the right to asylum. Promoting humanitarian action while impeding the movement of asylum-seekers towards EU territory or jurisdiction and full integration within the EU cannot satisfy this fundamental right. Critical elements, the externalization of migration control and others, should thus be reconsidered in this light.

This text was drafted by *Adel-Naim Reyhani*, researcher at the Ludwig Boltzmann Institute of Human Rights.

© **Ludwig Boltzmann Institute of Human Rights**

A: Freyung 6 (Schottenhof), Hof 1, Stiege II, 1010 Vienna, Austria

T: +43 (0) 1 42 77 274 20, F: + 43 (0) 1 4277 27429. E: [bim.office@univie.ac.at](mailto:bim.office@univie.ac.at), W: <http://bim.lbg.ac.at>

Cover photo: Steffi Dittrich

Vienna, March 2018