

Notes from the NO EMN NCP Conference in Oslo, 3 June 2016:

The future of the European asylum and refugee system

Rethinking asylum and refugee protection¹

The State Secretary for immigration and integration in the *Ministry of Justice and Public Security* **Mr. Vidar Brein-Karlsen**, welcomed the more than 100 participants attending the conference, and said that he expected to be inspired by the conference presentations and discussions when considering how to best follow-up *Stortinget's* (the Norwegian Parliament's) request for the Government to take international initiatives to review international instruments in light of the recent refugee situation. The State Secretary reminded the audience about the situation that had escalated in Europe in 2015 and continued in 2016, and the strain that this had placed on the systems and instruments available to manage the challenges. He said that it is still too early to say whether the measures taken will prove effective, especially as the migration pressures on Europe are still considerable. It seems obvious that new thinking and new tools will be needed that can lead to regional solutions which are cost effective and pose fewer risks to the migrants and asylum seekers.

First session: Legal framework meeting societal challenges.

In his opening contribution **Professor Dr. Guy S. Goodwin-Gill**, *All Souls College, University of Oxford*, stressed that the role of international law is not to be a solution to protection challenges in itself, but to serve as a facilitator for solutions, by offering a framework for countries' actions. In doing so international law limits what states can do, and thereby challenges states' sovereignty. The UN resolution that created UNHCR in 1946, the 1951 Convention and 1967 Protocol are not designed to address the underlying causes of the need for international protection, nor do they address when the need for protection ends, but they do recognize that the right to international protection is among the universal human rights. He argued that rather than aiming to revise the current international instruments, a process which is not necessary and which could undermine them, one should aim at closing some of the many gaps and deficiencies in the international legal system. This would involve e.g. instruments that can address and limit at an early stage the causes for the need for international protection (prevention), an instrument for funding UNHCR's solution strategies; and a legal basis for interim solutions. He expressed the hope that the UN Secretary General's

¹ The conference agenda and a presentation of its resource persons is attached as annex 1.

report to the September 2016 meeting on refugees and migration may offer some urgently needed constructive proposals.

In her opening contribution **Professor Dr. Janne H. Matlary**, *University of Oslo*, stressed that the first obligation of a national government is to protect the territory and citizens of the country it governs. This obligation takes priority over current (international) legislation and conventions, and it means that every state is sovereign in determining who enters its territory and who is to be granted citizenship, e.g. as one protective measure against terrorism. Given the failure to protect effectively the external Schengen border, with the possible exceptions of Storskog and Ceuta/Melilla, the re-establishment of national border controls within the Schengen area is justified and necessary. She also stressed that

- to ‘outsource’ border controls to Russia and Turkey creates major vulnerabilities for Europe, i.e. the Schengen countries.
- a migrant’s first duty should be to build his/her country of origin
- those who have been granted international protection have an obligation to return to their country of origin when the need is no longer present
- the right to apply for protection is a ‘pull factor’
- the primary obligation to provide protection and stop conflicts are with the regional powers

Given that Europe’s states’ first obligation is to their own citizens the right for foreigners to seek asylum must be weighed against the security of citizens and the stability of the European societies. Human trafficker’s criminal activity must be stopped. The pull-factor that Europe allows asylum application rights to everyone that reaches its soil must be addressed. The establishment of ‘safe heavens’ close to conflict areas may be a solution, provided that they are adequately funded and military protected. She also remarked that if the consideration of an asylum seeker’s need for protection is undertaken at such ‘safe heavens’ rather than on the territory of Europe’s states, for later resettlement, then it may be logical to also receive and process asylum applications at their foreign service missions.

Second session: Solutions in the making

In his opening contribution **Deputy Director Peter Diez**, *Migration Policy Department, Ministry of Security and Justice, the Netherlands*, reminded the audience of relevant reference points for addressing the ongoing crisis, from the ‘Roadmap’ for EU action on migratory pressure (April 2012) to the October 2015 ‘Leaders’ Summit’. The priority issues for the resulting strategy being

1. Creating an efficient and simplified system, that is as fair as it can be, i.e. a fair distribution of burdens
2. Prevention of secondary movements
3. Return to the country of origin or a safe neighbouring country, and
4. New alternatives in the external dimension, e.g. through the use of EU leverage in countries of origin and transit, as exemplified with the EU/Turkey agreement.

Underlining that he presented personal views that did not represent an official position of the *European Commission Deputy Head of the Asylum Unit, Stephen Ryan, DG Migration and Home Affairs*, in his opening contribution reminded the audience of the challenges that EU and its member countries are facing, and outlined why there has to be an external dimension to EU's asylum policy that has three main and interlinked motives:

- The humanitarian motive: ensure that EU acts a responsible member of the international community to assist in supporting refugee protection globally
- The solidarity motive: support the third countries that are hosting the greatest number of refugees worldwide
- The migration management motive: better manage migration flows to the EU, in the social, economic and security interests of its members.

He stressed that the UNHCR's 'durable solutions' (voluntary repatriation, local integration and resettlement, in that order of priority) still provide the best reference point for measures to tackle the forced migration/refugee challenges, but that EU migration management must take into account

- The mixed motives for migration: forced displacement and economic drivers
- Increased ease (lower costs) of travel and the social media
- Growth of 'a facilitation industry' (smuggling)
- Europe's geographic location
- That effective border management depends on cooperation

He outlined the following forms of policy measures that can be used to achieve the EU external policy objectives:

- Advocacy of adherence by third countries with international standards and engagement in international initiatives
- Leveraging EU positions in trade, mobility dialogues, enlargements, foreign policies, to take conflict resolution initiatives, and encourage return, voluntary repatriation or local integration
- Humanitarian aid and capacity building in third countries, e.g. through the *Regional Development and Protection Programmes (RDPPs)*
- Resettlement and solidarity with host countries in protracted refugee situations, cf. the July 2015 resettlement conclusions
- Bilateral migration management arrangements and possible new multilateral management arrangements, e.g. the EU/Turkey agreement

and indicated that 'soft' advocacy in international fora, neighbourhood policies, enlargement negotiations and visa liberalization processes all might have a role to play.

In his opening contribution **Professor Paul Collier**, *University of Oxford*, stressed that it was important to distinguish between migration and asylum movements, as the former are driven by income differences and prospects for a better life, and requires resources (knowledge, contacts, financing), and the latter are driven by fragile states and conflicts. The prospects for the next decade are that per capita income gaps will widen and that diasporas will integrate more slowly than before. Both developments will contribute to increasing migration pressures

to Europe. To prevent fragile states and conflicts to emerge is difficult, but easier and less expensive than coping with the consequences. He stressed the moral obligation to rescue those displaced by violence and whose home is not safe, and the need to restore a normal situation and to preserve human dignity to the extent possible, even though all conflicts stop eventually. The morality of migration is more complex, as everyone has the right to leave ones country, but there is no moral right to arrive in another. He stressed that any sensible solutions would have to involve viable jobs for the migrants and refugees. The current migration and asylum policies of the EU contribute to emptying the origin states of their human resources and middle classes. The international legal regime is still (partly) relevant and valid, even if it has been stretched and has contributed to the current developments.

Third session: The way forward – rethinking asylum and refugee protection

In his initial contribution **Director General Frode Forfang**, *Norwegian Directorate of Immigration*, took as his point of the departure the paradox of the current asylum regimes: while everyone has the right to seek asylum all countries do its best to prevent anyone from reaching its territory to exercise that right. One consequence is that there is a ‘race to the bottom’ to avoid having to cope with asylum seekers, including introducing policies that delay or hinder integration of those who are actually granted protection. Therefore something has to change, and one strategy that should be explored is to move from spontaneous asylum applications on the national territory to a managed system of resettlement. This could be based on the establishing in a country close to the conflict the asylum seeker’s identity and need for protection. He also said that this system could not be combined with the current one, and suggested that the right to apply for asylum on a country’s territory is a pull factor also for ‘economic’ migrants, and a business opportunity for the smugglers of people. Restricting this right may lead to a more positive attitude towards accepting resettled refugees. He recognized that for a scheme like this to work there would be a large number of legal and operational problems to resolve, and European countries probably would need to accept an order of magnitude larger number of resettled refugees than they did in 2015. In a comment he observed that the current large surge in irregular migrants from West-Africa to southern Europe may be linked to the large informal labour markets existing in some of these countries. Investment in reception and case handling capacities in the region where conflicts and fragile states are located, and the prevention of secondary movements, requires much more resources than are currently available for this.

In his second contribution **Professor Paul Collier**, repeated that all conflicts end eventually, but until they do there is a need to cope with such manmade disasters, as well with the environmental/natural ones, in a manner that preserves the dignity of the victims. The main mechanism for doing so is to ensure that victims quickly get meaningful jobs, in the host communities’/countries’ camps or elsewhere, without representing a threat to the livelihood of the local population. Thus, the best policies for EU are to support investments in economic and meaningful activities where asylum seekers and refugees can work legally. Modern globalization means that firms from ‘rich’ countries can invest in ‘poor’ ones, provided that the products have access to the markets in the ‘rich’ countries. When the conflict(s) end, such companies may get an opportunity to move the activities with the refugee workers to their

place of origin, thus contributing to its reconstruction. He stressed that emigration is not a solution to economic and political hopelessness: trade and investments for economic development are. Societies cannot be saved by others, only helped or hindered. He also observed that the current OECD-rules allowing some of the resources used at home to care for asylum seekers to be regarded as ‘development aid’ result in a misallocation of resources away from the countries needing these funds for development.

In his second contribution **Professor Dr. Guy S. Goodwin-Gill** said that the proposals for capping the spontaneous applications for asylum ignore the problem of handling the extra numbers, as long as the essential agreements and mechanisms for international cooperation are not effective, as a consequence of opposition to an ‘internationalization’ of migration management and certain key migration issues. States have so far paid lip-service to cooperation, but have avoided committing themselves: there is not much ‘common’ in the *Common European Asylum System (CEAS)*. It remains to be seen whether the EASO organized assistance to Greece may provide experiences to be developed further towards the supplementary fairness adjustment mechanisms envisaged. He stressed the need to think positively and opportunistically “outside the box”, to ensure permanent funding for UNHCR and to mobilize funding through the *World Bank*, given the importance of jobs and work, both when the refugees are outside the country of origin and following their eventual return, hopefully.

In the discussion it was noted that it is important to establish effective and safe return mechanisms for persons who are found not to be in need of protection, as well as effective cooperation between (potential) host countries for those who are prevented from applying for asylum spontaneously, as many may otherwise end up in a long lasting ‘limbo’. The fate of the Palestinians was referred to as an example of a situation that has to be avoided.

Concluding remark

That most of the participants were in attendance to the very end of the conference, on a late and sunny Friday afternoon, indicates that they found the contributions and discussions stimulating and timely.