NOVEMBER 23, 2016 12:01AM EST

EU Policies Put Refugees At Risk

An Agenda to Restore Protection

Summary

A lack of leadership, vision, and solidarity based on human rights principles are at the core of the European Union's dismal response to refugee and migration challenges. The mismanagement and politicization of a surge in boat migration in 2015, when over one million migrants and asylum seekers traveled to the EU by sea, has led to a humanitarian and political crisis largely of the EU's own making that needs to be addressed with the utmost urgency.

If chaos characterized the response of the EU and its member states in 2015, wrong-headed and rights-abusing policies have defined 2016. Instead of providing for safe and orderly channels into the EU for asylum seekers and refugees and sharing responsibility for them equitably, the EU and its member states have endorsed policies designed to limit arrivals and to outsource responsibility to regions and countries outside of the EU. The deeply flawed deal with Turkey and problematic cooperation with the Libyan authorities reflect this approach.

A migrant is rescued from the mediteranean sea by a member of Proactiva Open Arms NGO some 20 nautical miles north of Libya on October 3, 2016.
© 2016 Getty Images

Individual member states have rolled back asylum rights at a national level and the European Commission has proposed an overhaul of the common European asylum system that is more informed by a logic of deterrence than a commitment to basic human rights. Far from ensuring the right to family reunification, over the past year numerous EU countries have restricted the right to bring family members to safety, and there is a discernible trend towards granting subsidiary—temporary—protection over refugee status. Proposed changes to the EU directives governing procedures, qualification for asylum, and reception conditions include some positive measures but also measures to punish asylum seekers for moving from one EU country to another, obligatory use of "safe country" and "internal flight alternative" concepts to deny protection, and compulsory reviews to enable revoking refugee status and subsidiary protection.

The European Commission has also advocated changes to EU aid and foreign policy that would direct them towards migration control objectives rather than improving respect for human rights. The Partnership Framework for relations with third countries represents a clear articulation of the EU's goal, significantly re-energized over the past 18 months, to intensify migration cooperation with countries in Africa, the Middle East and Asia with the objectives of preventing irregular migratory flows to Europe and facilitating the removal of rejected asylum seekers and other irregular migrants from EU territory.

In the same period EU member states have largely failed to implement the September 2015 emergency relocation mechanism scheme, which in spite of its limited scope stands as the only effort to date to more equitably share responsibility for the recent arrivals to Greece and Italy. As of mid-November, only 7,224 asylum seekers had been relocated.

To date in 2016, over 343,000 have managed to reach European shores by sea, while at least 4,646 have died or gone missing at sea. A substantial proportion of those arriving come from refugee producing countries such as Syria, Afghanistan and Iraq. Such people are fleeing generalized violence, war, and serious human rights abuses. Many others are seeking to escape economic deprivation and may not qualify for asylum.

The numbers of arrivals are down from 2015, when over one million migrants and asylum seekers survived the dangerous journey to the EU. But 2016 is proving even deadlier than 2015, when at least 3,671 died or went missing in the attempt. Border closures and a deeply flawed deal with Turkey contributed to reducing the numbers of those crossing from Turkey to Greece, while crossings from North Africa, particularly Libya, have kept pace with previous years.

In November 2015, Human Rights Watch urged the EU and its member states to take concrete actions to reduce the need for dangerous journeys, address the crisis at Europe's borders, fix the EU's broken asylum system, and ensure that EU cooperation with other countries improves refugee protection and respect for human rights. This document, one year later, shows that the EU has gone in the opposite direction.

Throughout this document, we use the terms migrant, asylum seeker, and refugee within the meaning of existing international law. The term migrant describes the wide range of people on the move; it is intended as an inclusive rather than an exclusive term. A migrant may also be an asylum seeker or refugee. An asylum seeker is someone who has or intends to apply for international protection in a country other than her own. A refugee is a person who has a well-founded fear of persecution in her country of origin. A migrant who has crossed international borders without a need for international protection may, following a fair procedure in which their individual circumstances have been assessed and their rights have been guaranteed, be returned involuntarily to their country of origin if this return can be done in a safe and dignified manner. All persons, regardless of status, have inalienable human rights.

The Way Forward

EU governments and institutions, including the Commission and Parliament, should set the EU on a new path. This should be grounded in a genuine sense of responsibility in the midst of an unprecedented global displacement crisis, adherence to the human rights values at the core of the EU, and a vision of thriving, pluralistic and tolerant societies.

Specifically, the EU and its member states should:

- Prioritize saving lives at sea through sustained search and rescue operations along the main migration routes in the Mediterranean. Renew efforts to obtain permission to operate in Libyan waters so that EU-flagged vessels can assist in search and rescue operations there.

- Ensure that any efforts to "externalize" migration management do not worsen access to protection and respect for human rights, including by:
  - Designing, implementing, monitoring and reporting publicly on EU migration cooperation arrangements with third countries to ensure this cooperation does not trap people in abusive situations, prevent them from accessing fair asylum procedures, or lead to refoulement.
  - Delinking development aid from migration control in those countries where this linkage appears to be in place.
  - Ensuring that programs developed with security forces and other government agencies in countries of origin do not contribute to human rights violations.
  - Ensuring that migration cooperation with Libyan authorities, including the training of Libyan Coast Guard and Navy officers, has a strong human rights component, with monitoring and accountability for any abuses and independent, impartial and transparent monitoring of conditions and treatment in Libyan detention centers to ensure that they meet basic standards. The EU should suspend the training program if abuses continue.
  - Recognizing that conditions in Turkey do not meet the standards of a safe third country or safe country of asylum and commit to evaluating on the merits all asylum applications by people who have transited Turkey.

- Increase safe and legal channels into the EU to reduce demand for smuggling and dangerous journeys, particularly through:
  - Expediting fulfillment of existing resettlement pledges.
  - Adopting a permanent EU resettlement program commensurate with EU capacity and global needs. In the absence of agreement on a collective EU resettlement program, individual countries should join up with others outside of the EU and step up resettlement commitments including through new and innovative programs involving the private sector, the educational sectors, local communities and private sponsorships.
  - Expanding UNHCR's capacity to process more resettlement cases.
  - Moving swiftly to implement alternative legal pathways, such as humanitarian, student, and work visas and private sponsorships, for asylum seekers, migrants and refugees who are not eligible for resettlement or family reunification.

- Address the shortcomings of the emergency relocation plan to ensure proper implementation to the benefit of thousands of asylum seekers currently stranded in Greece and Italy and to relieve those two countries of their disproportionate responsibility by:
  - Accelerating the pace of relocations and setting up a timeline for the implementation of the relocation targets. The European Commission should open infringement procedures against member states that are failing to comply with their relocation obligations.
  - Prioritizing the acceleration of the relocation of unaccompanied migrant children and making unaccompanied children eligible regardless of nationality.
  - Expanding eligibility for relocation from Greece and Italy to other nationals, including Iraqis and Afghans, in need of international protection, and include eligible asylum seekers who arrived in Greece after implementation of the EU Turkey deal.

- Ensure that all beneficiaries of protection already in the EU enjoy the right to family reunification without onerous conditions or waiting periods. There should be no distinction between subsidiary protection and refugee status with respect to family reunification rights.

- Ensure that all proposed reforms of the Common European Asylum System are subjected to rigorous examination, taking into full account the recommendations of civil society organizations and international authorities such as the UNHCR and UN experts, with a view to the highest possible standards with respect to asylum procedures, rights and entitlements of beneficiaries of protection, and reception conditions.

- Oppose the institutionalization of lists of "safe countries of origin," and particularly of an EU-wide list, because it would likely be both politicized and inflexible.

- Reform the Dublin system in a way that addresses the fundamental flaws of the system by, at a minimum, creating incentives for asylum seekers to remain rather than imposing sanctions for onward movement, and providing incentives for EU countries to share responsibility in a more equitable way.

I. Outsourcing Responsibility

In 2016, the EU focused on preventing arrivals and outsourcing responsibility for asylum seekers and refugees to regions and countries outside the EU. EU policy-makers and leaders have justified this focus as a political and practical necessity to re-establish control over Europe's external borders and as a humanitarian imperative to improve the lives of asylum seekers and refugees in other regions and to prevent them from embarking on dangerous migration. Three key policies pursued this year demonstrate the negative human rights consequences of this approach.

The EU-Turkey deal

On 18 March 2016, the EU signed an agreement with Turkey to stem migration including refugee flows to Greece. The EU-Turkey deal commits Turkey to accept the return of all asylum seekers who transited that country and crossed by sea to the Greek islands. In exchange, the EU agreed to provide Turkey billions of euros in aid, visa liberalization for Turkish citizens, and revived negotiations for Turkish accession to the EU. The deal provides for the resettlement of another Syrian refugee from Turkey for each Syrian returned to Turkey under the deal. It further commits the EU to work with Turkey to create a "safe zone" in Syria in which to contain the displaced and to which refugees could be returned from Turkey.

The agreement rests on the flawed premise that Greece and the EU need not evaluate the protection needs of those arriving via the Aegean Sea on the grounds that Turkey is a "safe third country" or "safe first country of asylum." This is not, however, the case in Turkey. Because of the limitations Turkey imposed when it ratified the 1951 Refugee Convention, non-Europeans cannot be fully recognized as refugees. Syrians benefit from a temporary protection regime but face many obstacles to registration, education, employment and health care. A positive January 2016 decision by the Turkish authorities to allow some Syrians with temporary protection status to apply for work permits has had extremely limited impact in practice with only a few thousand actually granted permits. Iraqis and Afghans, and indeed all other non-Europeans, have little chance of enjoying effective protection under the terms of international refugee law. And while Turkey has been generous in hosting now over 2.5 million Syrian refugees, it has since March 2015 virtually sealed its borders with Syria and has violently pushed back women, men and children fleeing the violence in that country.

In practice, the deal's basic flaw has proven near fatal. To date, not a single person has been returned to Turkey on the grounds their asylum application was inadmissible because they could obtain effective protection in Turkey. Greek asylum appeals authorities have consistently ruled that Turkey is not a safe country. In only six cases, asylum appeals committees ruled that individuals—all Syrians—could be returned to Turkey on those grounds. None have yet been forcibly returned. Since the deal went into effect, officially Greece has returned to Turkey only individuals who did not apply for asylum, whose asylum claims were denied on the merits, or who opted to return voluntarily. In late October, Greece allegedly returned at least eight Syrians to Turkey without processing their asylum claims in any way.

But the deal has inflicted significant damage. In the wake of the EU-Turkey deal, the Greek authorities instituted a formal policy of automatic detention for those arriving by sea on the Aegean islands. While that policy, though formally still in place, has relaxed, over 15,000 are living in squalid, unsafe camps on the islands awaiting decisions on their asylum applications. Overall an estimated 60,000 migrants and asylum seekers are stranded in Greece.

Asylum seekers stand among the remains of a burned tent at the Moria migrant camp, after a fire started in the camp ripped through tents and destroyed containers, on the island of Lesbos, Greece, September 20, 2016. © REUTERS/Giorgos Moutafis

Whether or not the EU-Turkey deal withstands continuing legal challenges and fragile negotiations with Turkey, it is a statement of intent when it comes to EU migration policy. It has sent a message that protection for refugees could be commodified, outsourced, and blocked. It also arguably serves as cover to beleaguered countries of first asylum that have been hosting hundreds of thousands of refugees for years to withdraw their hospitality. In May, the Kenyan government announced plans to speed up the repatriation of Somali refugees and close the Dadaab camp, the largest refugee camp in the world. Since July 2016, Pakistani police and provincial authorities have stepped up pressure against Afghans living in Pakistan in what the United Nations High Commissioner for Refugees (UNHCR) has called a "concerted push" to repatriate a large number of Afghan refugees before the end of the year. Turkey has continued to violently push back Syrians at its borders—tantamount to refoulement under international law—and in September Lebanon proposed a plan to begin returning Syrians to a "safe zone" inside Syria beginning in January 2017.

Partnership Frameworks with Third Countries

In June 2016 the European Commission announced a new partnership framework for relations with third countries. The framework signals an intention to recast

the EU's external relations with countries of origin and transit by placing migration cooperation at the core of foreign policy and development aid. With short-term objectives to "save lives in the Mediterranean sea, increase the rate of returns to countries of origin and transit, and enable migrants and refugees to stay close to home and to avoid taking dangerous journeys," the framework envisions positive and negative incentives for cooperation on curbing migration and refugee flows. It cites the EU-Turkey deal as a model for such cooperation.

The framework represents a clear articulation of the EU's goal, significantly re-energized over the past 18 months, to intensify migration cooperation with countries in Africa, the Middle East and Asia with the objectives of preventing irregular migratory flows to Europe and facilitating the removal of rejected asylum seekers and other irregular migrants from EU territory. The EU is pursuing a wide range of projects with North African countries through the Rabat Process and with sub-Saharan African countries through the Khartoum Process. In November 2015 it launched the EU Trust Fund for Africa to channel millions of euros in aid.

Many of the programs associated with these efforts have laudable goals and, if implemented properly, could improve people's lives and help address some of the drivers of dangerous migration. Projects include ones focused on improving living conditions, education and employment opportunities, and integration measures for refugees living in situations of protracted displacement; educating law enforcement officers about the rights of refugees and asylum seekers; and a range of projects geared towards creating economic opportunities for those who might otherwise migrate for work.

Using cooperation on migration control as the primary measure of EU relations with other countries and making development aid and EU foreign relations as a whole subservient to migration control objectives represents a sharp turn away from a forthright defense of human rights as a central plank of EU foreign policy, as outlined in the EU Action Plan on Human Rights, in ways that could ultimately prove self-defeating by failing to address the human rights abuse that often drive forced migration.

There is a real risk that this approach will create an incentive for countries of origin and transit to engage in abusive policies to block departures or restrict freedom of movement, with a devastating impact on the ability of asylum seekers to reach places of genuine safety and of individuals to exercise their right to leave their own country.

Afghan men stand at the site of a car bomb attack in Kabul, Afghanistan, September 6, 2016.
©REUTERS/Mohammad Ismail/File Photo

The increasing centrality of migration issues in EU foreign policy as well as the linkages between migration cooperation and aid are reflected in EU-Afghanistan relations. Afghans are the second-largest group, after Syrians, applying for asylum in EU countries. Afghans submitted 176,900 new asylum applications in 2015, double the number made in 2014, and submitted roughly 85,300 new applications in the first six months of 2016. The security situation in Afghanistan is precarious, with serious fighting in more than half the country's provinces. Afghan refugees living in Iran and Pakistan face inhospitable conditions, including discrimination, abuse, and coercion to return to Afghanistan. According to Eurostat asylum data, in 2015, the EU-wide protection rate—which includes refugee status, subsidiary protection, and humanitarian leave to stay—for Afghans at first instance was 67 percent. In the first six months of 2016, that rate was down to 54 percent.

In the lead-up to a one-day conference on Afghanistan in early October, the EU signed a "declaration" with Afghanistan on migration cooperation. At the heart of the declaration is a commitment by Afghanistan to facilitate the return of Afghans whose asylum applications have been rejected by EU countries. At the conference, the EU and its member states pledged roughly 5 million euros in aid to Afghanistan over the next four years. Both the EU and Afghanistan denied that the aid was conditioned on migration cooperation. However, a leaked internal European Commission document from March argued that the "leverage of the conference should be used as a positive incentive" for increased cooperation by the Afghan government on migration control, including returns, and that the EU "should stress that to reach the objective of the Brussels Conference to raise financial commitments "at or near current levels" it is critical that substantial progress has been made in the negotiations with the Afghan Government on migration by early summer, giving the Member States and other donors the confidence that Afghanistan is a reliable partner able to deliver."

Training Libyan Coast Guard

On June 20, 2016, the EU expanded the mandate of its anti-smuggling naval operation in the central Mediterranean, EUNAVFOR MED Operation Sophia, to include training the Libyan Coast Guards and Navy "to enhance their capability to disrupt smuggling and trafficking in Libya and to perform search and rescue activities to save lives so that security in the Libyan territorial waters improves."

During the first year of its mandate Operation Sophia appears to have limited impact on smuggling, in part because it has not been given permission by Libyan authorities to operate in Libyan territorial waters, but it has been involved in significant numbers of rescue efforts in the central Mediterranean Sea, helping to save tens of thousands of lives.

The first phase of the plan envisions training 100 officers on EU vessels in international waters. Trainings began in late October, following screening of

candidates put forward by the UN-backed and EU-recognized Government of National Accord (GNA), one of three competing authorities in Libya.

Improving the capacity of Libyan authorities to perform search and rescue operations is vital. At present, all of the EU-flagged vessels performing, either by mandate or by necessity, search and rescue operations in the central Mediterranean are allowed to patrol only in international waters. Libyan authorities have clear obligations to perform these functions in its designated search-and-rescue area, where numerous incidents of distress and tragedies have occurred; efforts to ensure Libyan capacity to do so could save many lives.

Detainees in Libya's al-Hamra migrant detention center, one of nineteen official detention centers where migrants and asylum seekers are held, near the town of Gharayan, crowd the entrance to the shipping container where many detained for months on April 15, 2014.

© 2014 Daniel Etter/Redux.

However, the logic behind EU efforts appears primarily to be deterrence and prevention of arrivals on EU shores. EU-flagged vessels are bound by the principle of non-refoulement, which bars returning anyone to a place where they face threats to their lives and freedoms. There is no dispute, either in law or in practice, that no one intercepted or rescued by EU ships can be returned to Libya, a country riven by lawlessness and violence, where migrants and asylum seekers face severe abuses by government officials, smugglers, and members of militias and criminal gangs. That would be the case even if they were rescued in Libyan waters by EU ships. But people rescued in Libyan waters by Libyan authorities or intercepted and prevented from leaving those waters do not trigger any EU state responsibility and therefore no non-refoulement obligations towards those migrants and asylum seekers. The fact that Libya is not a party to the Refugee Convention and lacks a refugee law or functioning asylum system is not relevant in this context as those rescued by Libyan authorities in Libyan waters would not have left Libyan territory.

Human Rights Watch and others have documented extreme overcrowding, filthy conditions, and insufficient food in Libyan migrant detention centers run by the Department for Combating Illegal Migration (DCIM), under the Interior Ministry based in Tripoli. According to an international task force that visits the facilities, DCIM runs approximately 20 centers, most in western Libya. Militias and smugglers run many other non-official detention facilities.

Abuses reported by former detainees include beatings, forced labor, and sexual violence against men and women. There are also reports of fatal use of force against detainees who attempt to escape. In September, the head of the UN mission in Libya, UNSMIL, called the plight of migrants, refugees and asylum seekers in Libya "horrific" and said the mission seeks "the end to arbitrary detention…the closure of a number of detention centres and increased protection of those detained…In these detention centres, women are particularly exposed to abuses including sexual violence." The UN deputy high commissioner for human rights called on Libya and the EU to ensure that migration cooperation "fully respects human rights and does not effectively facilitate arbitrary detention in centres where abuses are rampant."

The general chaos and violence in Libya prompted the United Nations refugee agency, UNHCR, in October 2015 to call on all countries to "allow civilians fleeing Libya (Libyan nationals, habitual residents…and third country nationals) access to their territories." That call is as relevant today as it was one year ago. Anyone brought to the EU who is found to not qualify for any kind of protection or does not have a valid claim to remain can be returned to their country of origin following a fair procedure.

II. Failing to Facilitate Safe Passage

Hundreds of thousands of people continue to risk their lives to reach the EU. At the time of writing, over 4,646 people had perished or gone missing at sea in 2016. This figure, unconscionably high, does not include the many unaccounted for along the land routes through the Middle East, Asia, and Africa as they attempt to reach a country from which to embark on the boat journey.

Enormous efforts have been made since 2014 to save lives at sea, starting with Italy's humanitarian operation Mare Nostrum. Italy continues to play a vital role in search and rescue, through active patrolling and rescue operations and in coordinating operations by the plethora of actors now engaged in these activities. Numerous nongovernmental organizations have dedicated search and rescue missions in the central Mediterranean, the world's deadliest migration route. The EU's external border agency Frontex — replaced in early October by the new European Border and Coast Guard — and EUNAVFOR MED, have also participated in many life-saving rescue efforts despite the fact neither has an explicit search and rescue mandate.

Some EU officials and European political leaders argue that the EU-Turkey and EU migration cooperation with transit countries to prevent departures are also motivated by the desire to save lives, ignoring the push factors driving flows to Europe and the fact that the Mediterranean in 2016 is proving even deadlier than 2015 despite lower numbers of arrivals. UNHCR estimated in late October that the likelihood of dying at sea in 2016 was 1 in 88, while in 2015 the likelihood was 1 in 269. Shipwrecks throughout November have increased the likelihood of dying or going missing to 1 in 74.

The notion of safe and legal channels has become part of the lexicon when talking about EU migration and asylum policy, reflecting some level of acceptance that the availability of more ways for migrants, asylum seekers, and refugees to reach the EU without having to risk their lives or resort to criminal networks could

reduce the use of dangerous migration avenues. There has been little progress to date, however, on reinforcing existing pathways and creating new ones. Humanitarian visas, private sponsorships, student visas, and labor mobility schemes are important options yet to be fully endorsed and utilized. Here we focus on a critical and underutilized pathway: resettlement of recognized refugees.

Refugee Resettlement

Resettlement out of countries of first refuge, while discretionary and not a legal obligation, is a key way to help recognized refugees, particularly those most vulnerable, rebuild their lives without having to risk dangerous journeys. It is also an expression of solidarity with countries of first arrival that are bearing a disproportionate responsibility in hosting refugees and asylum seekers from countries mired in conflict like Syria. The UN agency for refugees, UNHCR, estimated that over 1.1 million refugees were in need of resettlement in 2016. Despite some efforts since 2015, the EU has largely failed to overcome its poor record in providing resettlement places commensurate with its capacity and the overwhelming need.

A rescue boat of the Spanish NGO Proactiva approaches an overcrowded wooden vessel off the Libyan coast, August 29, 2016.
©REUTERS/Giorgos Moutafis

The EU adopted in July 2015 an EU-wide plan to resettle 22,500 recognized refugees from other parts of the world over the following two years. In the first year of the plan, only 8,268 refugees were actually resettled; by the end of September 2016, that number had risen to 10,695. This includes Syrians resettled from Turkey under the one-for-one mechanism created under the EU-Turkey deal. Spain, France, and the Czech Republic underperformed, while nine EU countries—Slovakia, Slovenia, Romania, Bulgaria, Hungary, Cyprus, Croatia, Malta, and Poland—failed to resettle a single person under the plan. Some EU countries maintain resettlement programs that operate outside of the EU resettlement plan.

The 18 March EU-Turkey deal, which included a commitment to "resettle, for every Syrian readmitted by Turkey from Greek islands, another Syrian from Turkey to the EU member states," also sent the wrong message that Syrian refugees are interchangeable. Instead, the EU could have committed to unconditionally and significantly increasing refugee resettlement from Turkey and other front-line states.

EU countries missed the opportunities of the United Nations high-level summit for refugees and migrants and the Leaders' Summit on refugees convened by the United States Obama administration, both in September. Prominent EU leaders, such as President of the European Council Donald Tusk and UK Primer Minister Teresa May emphasized border control and keeping refugees in neighboring countries. Only 18 out of 28 EU member states participated in the US-organized summit, which required participants to make specific pledges to reach target goals to increase humanitarian aid to countries hosting large numbers of refugees and to step up resettlement out of those countries. The concrete pledges have not yet been made public, but available information suggests that most EU countries participated on the basis of existing commitments, without any new pledges with respect to resettlement. On the eve of the summits, Denmark announced it was suspending its national resettlement program.

Families waiting for a bottle of water and a sandwich per person at a camp in Idomeni, Greece, March 2016.
© Zalmaï

In July 2016, the European Commission proposed a permanent, common EU resettlement framework. The proposal, which has yet to be examined by the European Parliament or the Council, foresees the adoption of an EU regulation, binding on all EU member states, and annual resettlement targets. The European Council would adopt each year a maximum—not a minimum—number of persons to be resettled, the countries from which resettlement should take place, and how many each EU member state should take. EU funds via the Asylum, Migration and Integration Funds would be deployed to assist countries undertaking resettlement. Positively, the Commission proposal foresees an expedited procedure for humanitarian admission of persons with urgent legal or physical protection needs.

The Commission proposal, while a step in the right direction, contains troubling provisions. First, it argues that the choice of countries from which the EU should resettle refugees should be based on the "effective cooperation" of those governments with EU migration control imperatives, including "efforts to reduce the number of third-country nationals or stateless persons irregularly crossing the Union's border from its territory" and "cooperation with the Union on readmission and return of third-country nationals or stateless persons." This is in keeping with one of the stated objectives of the resettlement framework, namely to "help achieve the Union's foreign policy objectives by increasing the Union's leverage vis-à-vis third countries." Holding refugees' resettlement options hostage to their host country's level of cooperation with EU interests is an unacceptable perversion of the principle of sharing responsibility and providing durable solutions to the most vulnerable refugees.

The proposal would exclude from eligibility for resettlement anyone who tried to enter the EU irregularly during the five years prior to a resettlement request and anyone who has been refused resettlement by an EU member state within those same five years. The proposal also includes a vaguely-worded exclusion clause for anyone "for whom there are reasonable grounds for considering that they are a danger to the community, public policy, security, public health, or the international relations of the Member State examining the resettlement file," and would allow a member state to effectively block resettlement of a particular individual by another member state.

III. Lowering Standards in the Common European Asylum System

Despite common, binding EU asylum standards, inadequate implementation and enforcement mean there are deep disparities among EU member states with respect to procedures, reception conditions, and treatment of asylum seekers. These disparities are at the root of the distortions in the EU asylum system and explain many of the tensions and divisions among EU member states when it comes to addressing migration and asylum challenges.

Asylum seekers face a protection lottery in the EU. While Syrians are virtually guaranteed some form of protection across the region—with some stark exceptions, like Hungary where Syrians have only a 50 percent chance—nationals from other refugee-producing countries have vastly different chances depending on where they apply. Somalis for example have an almost 100 percent protection rate in Italy, while only 25 percent in France. Afghans also enjoy extremely high protection rates in Italy, but have a less than 50 percent chance in the UK, Greece, and the Netherlands, and under 25 percent in Hungary. Germany grants Iraqis some form of protection in almost 100 percent of the cases, while the UK, Sweden, and Greece grant protection in under 30 percent of the cases they adjudicate. Eritreans enjoy very high rates of protection in Sweden, Austria, Germany, Italy, and even Hungary, but under 40 percent who apply in France receive a positive decision.

Rather than focusing on raising standards across the EU, over the past year national governments and EU institutions have largely embraced what can only be characterized as a race to the bottom. The European Commission has taken modest steps to enforce the EU asylum law through infringement proceedings but the result has generally been inconclusive. Meanwhile the notion that full respect for asylum seekers' rights serves as a pull factor appears to have taken hold, such that even traditional leaders in the field, such as Sweden and Austria, have adopted policies to limit rights in an apparent effort to brand themselves as unattractive destinations.

Migrants from Eritrea on an overcrowded wooden vessel during a rescue operation off the Libyan, August 29, 2016.

©REUTERS/Giorgos Moutafis

There is a discernible trend towards granting subsidiary protection over full refugee status. Subsidiary protection is available to those who do not qualify as refugees under the 1951 Refugee Convention but would face a real risk of "serious harm" in their country of origin, including from threats of indiscriminate violence arising from armed conflict. While refugees and those with subsidiary protection are recognized as victims of forced displacement, they enjoy differing rights under EU and national laws, including notably with respect to family reunification.

Overall EU statistics for protection rates at first instance for five top asylum seeking nationalities—Syrians, Afghans, Iraqis, Eritreans, and Somalis—demonstrate a trend towards granting subsidiary protection over refugee status, notably in the first six months of 2016. This trend is particularly marked for Syrians.

In 2015, 83 percent of Syrians were granted refugee status and 17 percent subsidiary protection. In the first six months of 2016, 77 percent were granted refugee status versus 23 percent subsidiary protection. In the second quarter of 2016 alone, the increase is dramatic: 63 percent refugee versus 37 percent subsidiary protection.

This is largely driven by a clear change in Germany, which processed by far the largest number of Syrian asylum applications. According to official German data, in January almost 99 percent of Syrians were granted refugee status and less than 1 percent subsidiary protection at first instance. By September, 27 percent were granted refugee status and 71 percent subsidiary protection.

Source: Eurostat
Note: Graphs based on official EU data showing the trend toward granting asylum seekers subsidiary protection rather than refugee status, particularly for Syrians and Iraqis.

Ensuring the right to family reunification for beneficiaries of protection already in the EU could help reduce the number of people, including chi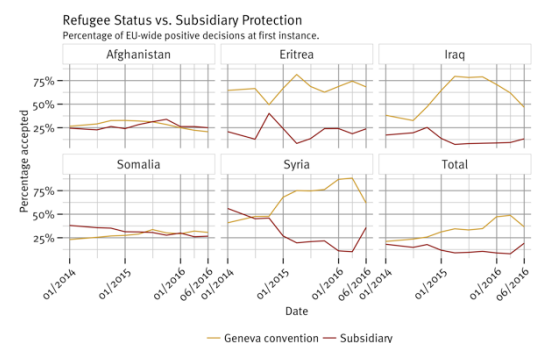ldren, who risk their lives to travel to Europe. The UN refugee agency, UNHCR, has emphasized the importance of family reunification for an effective integration process. Existing rules give recognized refugees the right to apply for family reunification as soon as they are granted status and with a minimum of conditions.

In contrast, foreign residents must comply with income requirements before they can begin the procedure and with waiting periods that are often lengthy. Persons

with subsidiary (temporary) protection do not have the same rights to family reunion as those with refugee status, but many EU member states have used their discretion to assure this right, though often with onerous requirements and conditions. The European Commission has in the past underlined member states to grant similar rights to family reunification to refugees and those benefitting from subsidiary protection. EU law defines the family unit narrowly, making eligible only nuclear family members, including through adoption and in common law unions, that existed in the country of origin prior to leaving.

Far from facilitating family reunification, over the past year numerous EU countries have restricted the right to bring family members to safety. Denmark, Austria, Finland, Germany, and Sweden have instituted or increased waiting periods for both refugees and those with subsidiary protection, while some countries have imposed a requirement to demonstrate sufficient resources. Irish law was amended to eliminate the discretion to allow family reunification for extended family members.

As part of broader reforms to EU asylum laws, discussed below, the European Commission has proposed an amendment that would acknowledge family relationships forged not only in countries of origin but also in the period before a beneficiary of protection reached the EU. This change is welcome, as it recognizes that family ties may have been created while in transit, but modifies only the discretionary power of member states to consider family reunification for close relatives beyond nuclear family members; it does not impose an obligation on member states to do so.

The European Commission has proposed a raft of adjustments to the Common European Asylum System, all of which must still undergo the full examination procedure in the European Parliament and Council. The current European Asylum Support Office would be transformed into an EU Agency for Asylum with a broader mandate, including to work towards greater harmonization in protection rates across the EU. Proposed changes to the EU directives governing procedures, qualification for asylum, and reception conditions include positive measures such as granting asylum seekers the right to work after six months and strengthened guarantees such as the right to a personal interview and free legal aid, and the obligation to appoint a guardian for unaccompanied children within five days. However, proposals also include expanded justifications for detention or restriction on freedom of movement, measures to punish asylum seekers for moving from one EU country to another, and compulsory reviews to enable revoking refugee status and subsidiary protection.

In addition, the proposals include an explicit stipulation that persons who were granted protection do not have the right to move to another EU country, and a plan to amend a separate directive on long term residency to ensure that those who do move to another country must wait longer to have the right to request permanent residency. The Commission is pressing to consolidate the use of "safe country concepts" to expedite and justify denial of asylum in the EU.

Under the Commission's proposed new regulation on asylum procedures, EU member states would be required to reject as inadmissible applications from persons who were previously in a "first country of asylum"—a country where the person enjoyed and can still enjoy refugee status or "sufficient protection"—or a "safe third country"—a country where the person's life and liberty are not threatened, there is no risk they would be refouled to their country of origin, and "the possibility exists to receive protection in accordance with the substantive standards" of the Refugee Convention. At the same time, the Commission has proposed the establishment of an EU-wide list of "safe countries of origin" that would obligate member states to apply fast-track procedures to nationals of countries on the list on the presumption they are not in need of international protection. In the same vein, the Commission has proposed that member states be obliged to assess whether individual asylum seekers have an "internal flight alternative" in an area of their own country where they could find safety.

IV. Failed Responsibility Sharing and the Broken "Dublin" System

The crisis in 2015 highlighted a key shortcoming in the European asylum system: the failure to share responsibility fairly across all EU member states.

A key reason for this failure is the Dublin Regulation, a mechanism for allocating responsibility for the examination of asylum claims among EU member states. The Dublin system, in place since 1995, has undergone reforms over the years, but the current so-called Dublin III Regulation retains the core rule that the first country of arrival in the EU is generally responsible for examining an asylum application. There is broad consensus that the Dublin system has been ineffective in preventing secondary movement of asylum seekers from first countries of arrival to their preferred destination countries, and has been inefficient and inhumane in forcibly transferring asylum seekers back to those countries of first arrival, without achieving a fair distribution of responsibility across the Union.

A handful of EU countries, including countries on the EU's external borders and preferred destination countries, process the lion's share of asylum applications every year. In 2015 many EU countries attempted to avoid taking greater responsibility for asylum seekers, while in 2016 border closures and increased border controls are effectively trapping people in Greece and Italy. The emergency relocation scheme adopted in 2015 has so far failed to function as needed, contributing to deteriorating conditions in Greece and increased strain on Italy's asylum system.

Initially designed to relocate 160,000 asylum seekers out of countries experiencing significant pressure, the plan currently foresees the transfer of 106,000 asylum seekers out of Greece and Italy. The remaining 54,000 were meant initially to be relocated from Hungary but Hungary refused to benefit from (or participate in) the plan, and that number has still not been reassigned. As of mid-November 2016, EU countries had made available under 19,000 places, and only

A man rests inside a tent at the Souda municipality-run refugee camp on the

7,224 had actually been relocated. At the same time, the Commission has repeatedly stated its objective to resume transfers back to Greece of asylum seekers who irregularly travelled onward to another EU country, under the Dublin regulation discussed below. Most EU countries suspended these transfers following a 2011 ruling by the European Court of Human Rights. Transfers to Italy have continued under the Dublin regulation.

The emergency scheme rests on major design flaws. One notable flaw is that it places the onus of registration on countries of first arrival. Another is that only asylum seekers from countries with an EU-wide recognition rate of at least 75 percent are eligible to benefit from it. The latter aspect is both arbitrary and discriminatory, and has led to unjustifiable inclusions (Costa Ricans) and problematic exclusions (Afghans) based on the vagaries of the number of applicants and disparities among EU countries with regard to guidance on the situation in countries of origin, quality of the examination, and the individual circumstances and quality of legal representation of asylum seekers of the same nationality. In addition, all asylum seekers who arrived in Greece after the EU-Turkey deal are excluded from the relocation scheme, regardless of their nationality.

The political difficulties with the scheme, which was adopted by qualified majority in the EU Council—and has been the subject of challenge in the EU Court of Justice by Hungary and Slovakia, as well as a failed referendum in Hungary—are symptomatic of the wider challenge of responsibility sharing across EU member states.

In May, the Commission proposed further modification of the Dublin Regulation. The proposal places overwhelming emphasis on repressing secondary movements, through disincentives and punishment, while reinforcing the primary responsibility of first EU countries of arrival. At the heart of the reform is a new, explicit obligation that a person must apply for asylum in the first country of arrival to clarify "that an applicant neither has the right to choose the Member State of application nor the Member State responsible for examining the application." While cast as a measure to prevent secondary movement, this provision further cements a dynamic that has in fact contributed to this very phenomenon. This is because it fails to take into adequate consideration the preferences of asylum seekers themselves, based on family, cultural, and linguistic ties or other considerations, all of which are key to long-term integration prospects.

Asylum seekers subject to transfer back to the first country of arrival would have no rights to material reception assistance beyond emergency health care until they are transferred, and their application would be examined under an accelerated procedure normally reserved for claims that are considered manifestly unfounded. In addition, asylum seekers who withdraw an application submitted in the first country of entry in order to apply in another EU country, or who in the view of the first country of entry had withdrawn or abandoned their first application and who had then been transferred back to the first country of entry under the Dublin regulation, would have their application treated as a "subsequent application." This imposes a presumption that the application will be considered inadmissible unless the applicant presents new facts and circumstances. In this way, the new rules would effectively weaken asylum claims brought by individuals for the sole reason that they moved from one EU country to another.

With the elimination under the proposals of the current provision that says that responsibility expires 12 months after arrival, countries of first arrival would retain virtually perpetual responsibility for the asylum seeker. Current rules allow EU countries to take responsibility for applicants on their territory, even if they applied in or transited another EU country, on broad "humanitarian" grounds as well as to ensure family unity. Under the proposal, the discretionary scope for countries to do so would be limited to cases involving family unity concerns. The proposal retains the current rule that transfers may be blocked only on the limited grounds that there are "systemic flaws…resulting in a risk of inhuman or degrading treatment," while at the same time limiting the right to appeal against transfer decisions. More positively, the proposal would expand the definition of family to include siblings and family relations formed in transit from one's country of origin to the EU.

Of particular concern are provisions relating to unaccompanied children. Under the proposal, only the country where an unaccompanied child "is obliged to be present" has the duty to ensure legal representation and assistance with respect to decisions about where he or she must undergo an asylum adjudication. Unlike under the current Dublin regulation, no such duty is imposed on the country where the child physically is. Furthermore, unaccompanied children who do not have family members in an EU country should as a rule be transferred back to the country in which they first lodged an asylum application, "unless it is demonstrated that this is not in the best interests of the minor." This effectively places the burden of proof on the child, under a procedure that does not guarantee effective representation.

To address the concentration of asylum seekers in a handful of EU countries—i.e. countries of first arrival and the destination countries most favored by asylum seekers—the Commission proposes what it calls a "corrective mechanism" that would be triggered when a country is determined to have surpassed 150 percent of its capacity to accommodate and process asylum seekers. Unlike the emergency relocation plan, this mechanism would not limit eligibility according to nationality. All other EU countries would be required to help alleviate the stress by taking a number of asylum seekers determined on the basis of complex calculations. The proposal includes an opt-out for countries who demonstrate that they are at 100 percent capacity and choose to "pay not to play" by paying a pre-established amount of euros per asylum seeker they refuse to relocate. Informed by the concept of "flexible solidarity" championed by the Visegrad countries —Poland, Slovakia, Czech Republic, and Hungary—it is difficult to foresee how this provision, or indeed the entire scheme, could help achieve the objective of greater and more equitable sharing of responsibility for asylum seekers across the EU.

Region / Country

- [Europe/Central Asia](#)
- [European Union](#)

Topic

- [Refugee Rights](#)
- [Asylum Seekers](#)
- [Migrants](#)

Tags

- [Europe's Migration Crisis](#)

Source URL: https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk

Links

[1] https://www.hrw.org/view-mode/modal/296831

[2] https://www.hrw.org/news/2015/11/23/turkey-syrians-pushed-back-border

[3] https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers

[4] https://www.amnesty.org/en/latest/news/2016/10/greece-evidence-points-to-illegal-forced-returns-of-syrian-refugees-to-turkey/

[5] https://www.hrw.org/view-mode/modal/296807

[6] https://www.hrw.org/news/2016/09/14/kenya-involuntary-refugee-returns-somalia

[7] https://www.hrw.org/news/2016/09/14/pakistan-coerced-refugee-return-endangers-thousands

[8] http://www.unhcr.org/en-us/news/latest/2016/6/576bd0a84/decades-pakistan-afghan-refugees-set-return.html

[9] http://www.aina.org/news/20160920134206.htm

[10] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160607/communication_external_aspects_eam_towards_new_migration_ompact_en.pdf

[11] https://www.hrw.org/view-mode/modal/296808

[12] https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf

[13] http://statewatch.org/news/2016/sep/eu-council-afghanistan-readmission-6738-16.pdf

[14] https://www.hrw.org/view-mode/modal/221208

[15] http://www.consilium.europa.eu/en/press/press-releases/2016/06/20-fac-eunavfor-med-sophia/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EUNAVFOR%20MED%20Operation%20Sophia%3A%20mandate%20extended%20by%20one%20year%2C%20two%20new%20tasks%20added

[16] https://ec.europa.eu/transparency/regdoc/rep/3/2016/EN/3-2016-5112-EN-F1-1.PDF

[17] https://www.humanitarianresponse.info/system/files/documents/files/unhcr_detention_task_force_may2016.pdf

[18] http://unsmil.unmissions.org/Default.aspx?tabid=5662&ctl=Details&mid=6187&ItemID=2099735&language=en-US

[19] https://unsmil.unmissions.org/Default.aspx?tabid=5662&ctl=Details&mid=6187&ItemID=2099737&language=en-US

[20] http://www.refworld.org/docid/561cd8804.html

[21] http://missingmigrants.iom.int/

[22] http://www.unhcr.org/news/latest/2016/10/580f3e684/mediterranean-death-toll-soars-2016-deadliest-year.html

[23] https://www.hrw.org/view-mode/modal/296813

[24] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160928/factsheet_relocation_and_resettlement_-_state_of_play_en.pdf

[25] https://www.hrw.org/view-mode/modal/296810

[26] https://www.hrw.org/view-mode/modal/296816

[27] https://www.hrw.org/view-mode/modal/296814

[28] http://www.unhcr.org/protection/operations/56a9decf5/integration-fundamental-component-supporting-diverse-societies.html

[29] http://www.europarl.europa.eu/meetdocs/2014_2019/documents/com/com_com(2014)0210_/com_com(2014)0210_en.pdf

[30] https://www.hrw.org/view-mode/modal/296811

[31] https://twitter.com/intent/tweet?text=EU%20Policies%20Put%20Refugees%20At%20Risk%20-%20https%3A//www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk

[32] https://www.facebook.com/sharer.php?u=https%3A//www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk

[33] whatsapp://send?text=EU%20Policies%20Put%20Refugees%20At%20Risk%20-%20https%3A//www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk

[34] mailto:?subject=EU%20Policies%20Put%20Refugees%20At%20Risk&body=https%3A//www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk

[35] http://www.linkedin.com/shareArticle?mini=true&url=https%3A//www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk&title=EU%20Policies%20Put%20Refugees%20At%20Risk

[36] https://plus.google.com/share?url=https%3A//www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk

[37] http://reddit.com/submit?url=https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk&title=EU Policies Put Refugees At Risk

[38] https://telegram.me/share/url?url=https://www.hrw.org/news/2016/11/23/eu-policies-put-refugees-risk&text=EU Policies Put Refugees At Risk