

**The challenges of mixed migration, access to protection and
responsibility-sharing in the EU
A UNHCR non-paper**

Introduction: Irregular arrivals and ‘particular pressures’

- Over recent years, a number of Member States have called for EU action and support in the face of significant numbers of people arriving irregularly at their frontiers, notably along the EU’s southern borders. The scale of arrivals has often exceeded the capacity of their asylum, reception or integration systems, a situation which the EC describes as one of ‘particular pressure’.
- In many cases, people crossing the Mediterranean, Aegean or Atlantic to reach the EU do so in dangerous circumstances, sometimes in overcrowded, unseaworthy, ill-equipped boats which may be piloted by smugglers who are indifferent to the passengers’ safety. Thousands of people are known to drown each year. This dimension, coupled with the scale of movement in peak periods, make the sea border arrivals a particularly visible phenomenon, which adds to the politically sensitive nature of the issue in many Member States. However, statistics show that large numbers of irregular arrivals also affect countries in the northern regions of Europe.
- Member States acknowledge that migration management must be in accordance with international, regional and *acquis* obligations relating to refugee protection and human rights. EC Treaties, legislation and many political declarations recall the need to respect in particular the principle of *non-refoulement*. However, concrete measures are required to ensure that these principles are observed in practice. In this regard, UNHCR has facilitated discussions among EU and other States regarding protection-sensitive border management policies and practices which can ensure that people seeking asylum can secure access to territory and procedures in which their claims can be determined, and effective protection provided to those are entitled to it. Some of this discussion has been in the context of UNHCR’s 10-Point Plan, put forward by the organisation to stimulate initiatives in the main areas of necessary intervention.
- The 10-Point Plan reflects the fact that the phenomenon of migration and asylum ‘pressures’ is not simple, nor uniform, across affected countries. As such, there is no single or straightforward solution. The profile, numbers and condition of people arriving at different borders vary, suggesting that responses must also be targeted and appropriate. Comparable and reliable data must be used to assess the scale and nature of needs which may exist in different States at different times. While it likely that Member States’ and Frontex analyses include such data, it is not systematically available to others who might be in a position to contribute constructively to the discussion. Its broader distribution could contribute to the development of more precise and better targeted solutions that could address the existing gaps.

- A number of specific ideas have been put forward to date, which are legally, practically and politically feasible, and which could contribute significantly to addressing the current problems. Developed and tested appropriately, such a ‘menu’ of solutions could include the following elements.

1. Relocation within the EU

- The idea of intra-EU relocation or redistribution of people recognised as refugees or in need of other forms of international protection was proposed in the Pact on Immigration and Asylum of October 2008, and endorsed by the ‘Quattro’ states in January 2009. In its Communication on the future Justice and Home Affairs agenda for 2010-2014¹, the EC has proposed such an arrangement, under the heading ‘internal resettlement’.² While the idea remains to be elaborated, it would appear that its main proponents are potential ‘sending’ States, with limited interest evidenced to date by potential ‘receiving’ States. Some Member States have accepted small groups of people granted protection in other States in the past, on an ad hoc basis. Concerns that seem to have impeded a more structured arrangement revolve around the following: that further such offers would overload their own integration infrastructure and other facilities; that relocation will not help address the issue of significant ongoing arrivals and could even serve as a pull factor; that relocation would not encourage ‘sending’ Member States to strengthen their own capacities; and that relocation might take place at the expense of resettlement from third countries of refugees unable to find durable solutions in those countries..
- In order to gain wider support and ensure its feasibility, the proposal requires further development. UNHCR agrees that it should be a voluntary system, involving support from the ERF. Whether and how to move beyond the initial pilot stage of such an arrangement to a more structured system of solidarity through relocation require further consideration and discussion among Member States and other stakeholders. It is clear that such a system would need to provide ample incentives to attract Member States’ commitment in advance.
- Among the questions to be considered around such a scheme is that of the criteria for identification of people who could be the subject of relocation. UNHCR considers that one primary criterion should address people recognised in one Member State who have a link to another Member State (including, for example, through family ties, dependency relationships or other close community connections, which have not otherwise given rise to entitlements under Dublin II or family reunification instruments). A second important criterion should relate to people with special needs, for example regarding treatment of medical conditions or the effects of torture or trauma, which can be more effectively addressed in another Member State. Consideration could also be given to separated children as a specially vulnerable group who might be eligible for relocation, where it is

¹ European Commission, ‘Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen – Wider freedom in a safer environment’, 10 June 2009

² UNHCR uses the term ‘relocation’ for an intra-EU scheme, in preference to ‘internal resettlement’, which may cause confusion with resettlement of refugees from third countries outside the EU to Member States.

determined, on the basis of expert assessments using objective criteria, to be in their best interest.

- In all cases, it will be important that the consent of the person involved is obtained before relocation. This will ensure that relocation leads to a durable solution and effective integration into the receiving State. This is to the benefit not only of the individual but also the host society which he or she will join.
- An important group which could be considered for priority relocation would be people rescued or intercepted at sea who have been found to need protection. Acceptance of this could help alleviate concerns and avert disputes about responsibility for disembarkation. .
- As the idea is developed , consideration could be given to the feasibility of a ‘distribution key’ for people recognised as needing protection, notably in cases of demonstrated and acknowledged strains on specific States’ integration capacity. Such a distribution mechanism or ‘key’ might take into account a number of relevant factors, potentially GDP; territorial area; natural and other resources; population; capacity of infrastructure relevant to the provision of protection and integration facilities; annual totals of spontaneously-arriving asylum seekers; resettlement commitments and others.
- In further development of this idea, it could be worthwhile revisiting the rationale and basis for UNHCR’s 2003 and subsequent ‘EU Prong’ proposals. In the present discussions, however, it is noted that the relocation mechanism would focus on recognised protection beneficiaries, rather than asylum seekers. The idea of redistributing asylum seekers, although discussed in some quarters, is seen by many Member States as unworkable and/or undesirable, not least due to the legal and practical complexities, as well as difficulties in reconciling it with the Dublin II system.

2. Family reunification within the EU

- EC and national family reunification instruments and procedures provide an important means by which people recognised in one State may be permitted to join relatives, and benefit from the associated support networks, in another Member State. UNHCR would encourage review of ways to streamline family reunification procedures within the EU, to ensure they are accessible and swift, with requirements which are able effectively to be met by refugees. There are, for example, areas in which the existing legal norms should be adjusted to fill gaps. These include the absence of a right to family unification for people granted subsidiary protection under the EC Family Reunification Directive.
- Such action would not only promote the enjoyment of the right to family life, a right enshrined in the ECHR, but would also enable third country nationals to utilise pre-existing social and psychological support systems.
- Facilitated family reunification within the Union could also be achieved through simpler streamlined administrative procedures and shorter waiting periods; enhanced

communication between Member States on reunification cases; and limits on the costs to applicants and documentation required to satisfy its requirements.

3. Dublin II Regulation

- The Dublin II Regulation sets out criteria for the allocation of responsibility among Member States for dealing with asylum claims. As exceptions to the specific rules determining which State is bound to deal with a claim, the Regulation permits participating States to elect to bring together family members and other dependent relatives on humanitarian grounds (article 15). It also confers a general discretionary power on a Member State to elect to deal with a claim, even if it is not bound to do so under the responsibility criteria.
- These provisions provide a mechanism under which Dublin II participating States may, in cases where it would help another State, elect to assume responsibility for some claims – and alleviate some of the pressures that could otherwise result from a strict application of the responsibility criteria. Some examinations have suggested that these discretionary provisions, which permit ‘responsibility-sharing’ actions in such specific cases, are infrequently utilised by some Member States. Wider use of these elective provisions should be promoted, in cases where this could help ensure that Dublin does not result in disproportionate caseloads being transferred to some receiving States.
- Amendments to the Dublin system were put forward by the EC in its proposal of December 2008. A number of these suggested provisions, if adopted, could also contribute to ensuring more effective responsibility sharing with regard to asylum claims. They include, for instance, proposals to broaden the definition of family members who should be reunited under the Dublin II rules and to set out clearer obligations to bring together people in relationships of dependency. A further useful provision concerns suspension of Dublin II transfers in cases where a Member State would request it on the grounds of ‘particular pressure’ on their asylum systems.

4. Asylum support teams

- The EC’s proposal of 18 February 2009 for a Regulation establishing the European Asylum Support Office (EASO) foresees that the EASO will be responsible in future for coordinating the activities of ‘asylum support teams’ which could lend assistance in cases of ‘particular pressures’. Given that the EASO is not expected to be in full operation before 2010, consideration could be given to developing and implementing a ‘pilot’ support team arrangement.³
- A detailed needs assessment with respect to asylum reception and processing capacities in any concerned Member State would constitute a vital first step. On this basis, it could be

³ In the same way that EASO-linked activities including the COI portal and training have been launched prior to its establishment, such a pilot arrangement could both address immediate demands and provide an informed basis for further preparation of the idea.

determined if assistance from other Member States could be deployed. While such personnel could not, without the necessary legal basis, take part in decision-making under national law, they could potentially provide other forms of help, including:

- Registration of personal data, travel information and any intention to seek asylum
 - COI expertise/information (via facilities in the Member State in question, or via appropriate technology from other locations)
 - Translation assistance
 - Targeted assistance for people with special needs (including potentially counselling for trauma victims; other forms of medical help).
- Other Member States would be invited to nominate experts from their countries, including both officials and non-governmental partners, to provide the specifically-needed help. Such teams could alleviate at least some of the strains facing Member States at the external frontiers at present. They would also have the value of providing a tangible sign of solidarity to those Member States which are calling for more EU support.

5. Return

- Removal of people who do not seek protection, or who have been found not to have protection needs or other rights to remain, could also alleviate some of the capacity- and resource-related challenges faced by some Member States. With the availability of EC financial assistance under the Return Fund, greater scope exists for Member States to work collaboratively to increase the effectiveness of return efforts. This may in turn permit authorities to address the needs of people who are entitled to protection, with more political space and resources available to do so.
- Excom Conclusion 96 sets out the parameters for UNHCR's involvement in relation to the return of persons not of concern to UNHCR. UNHCR could consider engagement in counselling, facilitation of dialogue with countries of origin as well as monitoring of the situation post-return, among other actions. UNHCR's involvement in return or non-refugees would need to be clearly explained to NGO counterparts and the media.

6. Effective use of EC funds

- While extensive financial resources have been made available over recent years through ERF and emergency funding arrangements, it may be useful to conduct an evaluation of the results of such funding, with a view to identifying ways to use such funds in the most practical and effective ways.
- Such a review could be undertaken by the EC, and include an inventory of all of the relevant allocations, as well as the projects submitted in response, in order to establish a picture of which countries have been able to utilise them to address these processes. This could allow scope for cross-fertilisation, whereby approaches used successfully in one context could be replicated elsewhere. In consultation with the affected States and other stakeholders, a strategic plan could be made for use of presently available and anticipated

resources, as well as for locating more funding if needed. Consideration could be given thereafter to providing targeted help to affected countries to develop project plans and support their implementation, in partnership with other Member States, organisations and/or non-governmental partners.

7. Free movement rights for people granted international protection

- At present, grants of international protection in one Member State are not accorded legal recognition in another Member State of the Union. UNHCR supports the establishment of a system of mutual recognition of positive asylum decisions, to ensure that people recognised in one Member States enjoy legal protections which are linked to their status in other Member States. Such mutual recognition should result in increased free movement rights for such beneficiaries, after a defined period of time. This would bring their entitlements more closely into line with those of other third country nationals, who are entitled to establish themselves in other Member States after fixed periods of legal residence in the Member State which admitted them.
- This step could contribute to alleviating the particular pressures felt by some Member States as a result of granting protection to significant numbers of applicants. Such mutual recognition and enhanced free movement rights would provide protection beneficiaries with opportunities to take up residence in other Member States, where they fulfill the legal requirements for third country nationals to do so.

8. Cooperation with third countries

- UNHCR continues to support cooperation with third countries, including under the auspices of the so-called 'external dimension' of asylum and migration, as a central element of EU JHA policy. For UNHCR, the EU's contributions to asylum and protection capacity-building in other countries and regions, as well as resettlement of refugees from countries of first asylum outside the Union, are a demonstration of its commitment to supporting the international protection system as a whole.
- UNHCR agrees that third countries can and should be encouraged to accept their responsibilities with regard to migration management, including through cooperation on return of their nationals, and establishment of effective border arrangements which include safeguards for people in need of international protection. The EU leads by example in this field, and its authority as a partner in capacity-building activities is widely acknowledged.
- These standards should not be undermined by policies which may appear to offer short-term benefits, but which could ultimately undermine respect for refugee protection norms in a wider context. In addition to the risk of legal consequences for actions potentially contrary to international obligations, there is the danger that showing disrespect for international law discourages other States from upholding it. That could lead to a situation where other States perceive their international obligations vis a vis the EU as less than unqualified, with negative consequences for all involved.

- Resettlement from third countries in regions of origin and transit of refugees represents an important contribution by EU Member States to responsibility-sharing at an international level. Many third countries host refugees in numbers which are exponentially larger, in absolute and population-relative terms, than those present in Member States. While some progress has been made on increasing resettlement to the EU, efforts are still needed to expand both the number of Member States involved in resettlement and the number of refugees resettled to those States, which currently stands at less than 10% of refugees resettled worldwide. Positive efforts to increase responsibility-sharing within the EU should thus be accompanied by, and not take the place of, the provision of resettlement places for refugees from third countries.

EULO
16 June 2009