



Protect

The Right to International Protection

Policy Brief

No. 1, June 2021

Devising Governance Mechanisms for International Refugee Protection



protect-project.eu



This project has received funding from the European Union's Horizon 2020 research and innovation program under grant agreement No 870761.



PROTECT POLICY BRIEF No. 1

Published by the PROTECT Consortium.

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To cite this publication:

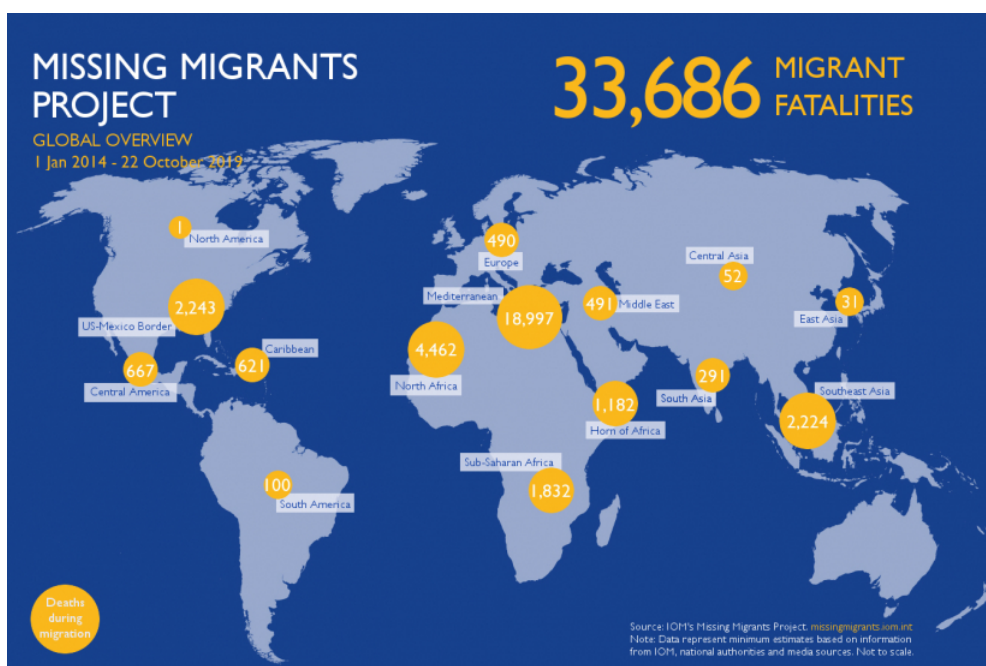
Sicakkan, Hakan G., Elspeth Guild, Nicolette Busuttil, Pierre Van Wolleghem. (2021). Devising Governance Mechanisms Refugee Protection. PROTECT Policy Brief No.1/2021. Bergen: PROTECT Consortium.



Devising Governance Mechanisms for International Refugee Protection

1. Introduction

The international refugee protection system is facing serious challenges. According to UNHCR, 68 percent of the refugees originate from just five countries: Syria (6.7 m), Venezuela (4 m), Afghanistan (2.6), South Sudan (2.2 m), and Myanmar (1.1 m). 86 percent of the refugee population are hosted by developing countries that do not have a capacity provide the basic human living conditions. 73 percent are accommodated in countries neighbouring the conflict zones. 39 percent of the refugee population are hosted by just five countries: Turkey (3.7 m), Colombia (1.7 m), Pakistan (1.4 m), Uganda (1.4 m), and Germany (1.2 m). Nearly half of all refugees are children. Since 1 January 2014, more than 34,000 migrant deaths near border zones have been officially registered, excluding the number of missing migrants. The mobility restrictions, curfews, and lock-downs introduced as part of Covid-19 measures further limited refugees' access to safe territory, acceptable living conditions, and basic health services.



Source: Migration data portal

These statistics have apparent policy implications regarding refugees who have not knocked on our own doors yet. First, investing more resources in peacebuilding, conflict resolution, and preventive diplomacy in conflict zones may decrease the number of refugees significantly. Second, humanitarian action in conflict areas and neighbouring countries may help improve the refugees' living conditions until more stable solutions are found. Third, providing financial, material, personnel, and know-how support to countries that host large refugee populations may improve refugees' living conditions and lessen the burden of these countries. Fourth, funding refugee-protecting NGOs generously may further improve refugee protection. Other measures at stake are prevention of human-smuggling, providing legal pathways for migrants' access to protection, facilitating safe returns of the refugees to their home countries, resettling refugees from overburdened refugee hosting countries, and responding to the needs of the vulnerable refugee groups like children, pregnant women, disabled, elderly, and people that need special healthcare. These are some of the conventional protection policies that have since the 1950s been generously implemented by many individual states, especially by European countries.

However, uneven burden distribution between the world's states is still a persistent policy challenge. No matter how well-targeted they are, the above-mentioned protection policies and efforts of individual states lack the scope that is needed to respond adequately to major protection challenges. This is especially the case in times of mass refugee inflows such as the migration crisis that started in 2014 and the public health crisis the latest Covid-19 pandemic triggered. To address the burden-sharing challenge, the UNHCR drafted the *Global Compact on Refugees* (GCR). The European Union (EU) was a major driving force behind the adoption of the GCR and followed the GCR's burden-sharing objective in more concrete terms than any other state by proposing a New Pact on Migration and Asylum (the New Pact). The GCR and the New Pact stipulate norms (e.g., "international solidarity"), governance mechanisms (e.g., "multi-stakeholder perspective"), and discourses (e.g., "human and humane"). State-level governance structures have a decisive effect on policy outcomes; the association of different actors in a policy process places them in a situation of interdependence so that no single actor can fully enforce its own will. Yet, especially regarding asylum seekers, the GCR and the New Pact do not operationalize the types of state-level institutional frameworks, stakeholders' roles and responsibilities, and discourses needed to achieve the burden-sharing objective. PROTECT endeavours to fill in this policy gap by identifying the best norms, governance mechanisms, and discourses applicable in diverse national contexts.

2. Evidence and Analysis

International instruments aimed to coordinate protection between countries lack enforcement capacity and, thus, delegate implementation to the signatory/member states. The GCR and the New Pact are no exception. The GCR introduces an international solidarity norm and a multi-stakeholder perspective to collaboration among international organizations, states, non-state organizations, and private sector actors. These are expected to play a voluntary role in governance of refugee protection. While prescribing common goals and launching new global institutions to facilitate responsibility-sharing (e.g., the Global Refugee Forum, Asylum Support Platforms), GCR leaves the design of international collaboration

mostly to stakeholders' own choice. Similarly, the Common European Asylum System (CEAS) and the New Pact provide a protection framework along with a supranational coordination mechanism and a single asylum procedure. The New Pact specifies that a border procedure, a normal procedure, and an appeal procedure should be in place in all member states, though it leaves the design of the institutional framework around these functions for the EU member states to decide individually, which leads to a diversity in governance mechanisms.

How governance in asylum procedures is organized; which stakeholders participate in asylum decision-making, human-rights monitoring by NGOs, and legal help and translation; and how independent asylum institutions are from state-structures have a great impact on asylum recognition rates. States' ways of sharing power with other stakeholders in asylum decision-making affect asylum recognition rates. In the Czech Republic, for instance, decisions on asylum are taken by the central government while this is delegated to a specialised independent agency in France. Belgium includes the UNHCR in asylum decision-making as an observer whereas Italy includes the UNHCR as a fully-fledged part of the decision-making process. Denmark gives veto right to the Danish Refugee Council in inadmissibility decisions. Further, whether the appeal instance is regular courts as in Italy, or a specialized tribunal as in Ireland, or an independent appeals board as in the UK, or a ministry as in Norway before 2000 makes a big difference. These examples indicate a huge variation among the EU member states. In the period before 2000, the participation of multiple stakeholders in asylum procedures in EU countries led to higher asylum recognition rates. Thus, *institutionalized participation of multiple stakeholders in the governance of asylum may be a key quality element in international protection.*

During the 1990s, single asylum procedures where all legal grounds – Convention status, constitutional asylum, subsidiary protection, humanitarian protection, temporary status – are examined in one run tended to decrease the recognition rates for the Convention refugee status. At that time, single asylum procedure was used by Finland, Iceland, the Netherlands, Norway, Sweden, Switzerland, and the UK. Fully separate asylum procedures were used by Belgium, France, Ireland, and Italy. In a separate procedure, asylum seekers have to submit a separate application for each legal ground, which also led to low recognition rates. On the other hand, partly single asylum procedures gave the best Convention-recognition rates. A partly single procedure comprises examination of asylum applications in one run on the grounds of Convention status, temporary protection, and general immigration rules, and automatically transferring all rejected applications for examination on non-refoulement, subsidiary, and humanitarian grounds. This asylum procedure was widely used by Austria, Denmark, Germany, Greece, Portugal, and Spain during the 1990s. Further, Convention status grants more rights to its holder than nationally defined protection statuses. The length of residence permits is a case in point: from 5 years for refugee status in most countries (EU's legal minimum being 3 years), it decreases to 1 year in other cases – e.g., the Italian humanitarian status prior to the refugee crisis. Likewise, right to family reunification tends to be more restrictive for alternative protection statuses than for refugees – e.g., Austria and Germany. Thus, *single asylum procedures, despite being time and cost effective, likely bear unintended adverse consequences on the protection of those in need. As of today, single asylum procedure is advised by the UNHCR, and it is the norm in CEAS and the New Pact.*

A governance principle to increase the quality of asylum decisions is decision-making bodies' independence from the state apparatus. Since the 1950s, immigration and asylum offices have been organized in ways that gave them different degrees of independence from the state apparatus. The historical development has mainly been towards centralization after the Committee of Ministers of the Council of Europe recommended in 1981 that decisions on asylum applications should be made by a central authority. However, there are important exceptions from this trend. By significantly increasing the number of asylum offices and administrative courts since 1978, which, respectively, have first instance decision and appeal competences, Germany embarked on a clear decentralization process. Similarly, Italy has since 2002 been decentralizing its first instance asylum decision-making by spreading its asylum offices throughout the country as well as creating a decentralized appeals structure. The Italian courts' handling of appeal cases during mass refugee inflows since 2014 shows even courts may turn out to be government-dependent. There is no comprehensive assessment of how centralized and decentralized ways of organizing asylum and immigration offices affect the quality of international protection. *One should expect autonomous decentralized asylum offices to accommodate the protection needs of refugees better than centralized institutional structures since they are less exposed to arbitrary political signals from the central authorities.*

What happens in times of crises?

The policy implications above concern "normal times". When confronted with extraordinary situations such as *mass migrant inflows* and *public health crises*, normal policy measures may need to be reinforced with additional measures. These require resilient legal norms, governance mechanisms, and discourses that serve the twin purposes of giving a humane and fair treatment to refugees and, at the same time, ensuring the host countries' stability.

Norms and governance of international protection during mass migrant-inflows

During mass refugee-inflows, there are two major challenges. The first is establishing resilient legal norms to handle populist demands to abolish states' legal obligation to protect refugees. This can be done by linking the Refugee Convention with other human rights instruments. There are already good practices of this in the EU member states. Other human rights instruments are partly incorporated in EU member states' asylum procedures as "subsidiary protection". On the other hand, the humanitarian status that existed before 2000, for example in Norway, is gradually disappearing. Today, the Czech Republic, Finland, Hungary, Italy, and Norway have a limited version of humanitarian status linked to the principle of non-refoulement whereas Italy and Sweden have used national versions of humanitarian status to protect climate refugees. The GCR and the New Pact may be a new opportunity to establish a more resilient normative basis for international protection. In legal terms, an important innovation of the GCR is the link it aspires to create between refugee rights and the UN human rights instruments that came into force after 1951. These instruments include the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, the 1984 Convention Against Torture, the 1990 UN Convention on the Rights of the Child, and the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children. Connecting other human rights instruments with international protection by law by

making them legal grounds in partially single refugee status determination procedures, may make it more difficult to overlook the human rights of asylum seekers and migrants during mass refugee-inflows. *In this respect, how the Convention can be linked with pre-existing human rights instruments through GCR and the New Pact without diluting the Convention status is a key concern for the future.*

The second main challenge during mass inflows is effective handling of refugee arrivals. The GCR proposes some measures: increasing asylum capacity, safe returns and readmissions where possible, and international burden-sharing. In response to GCR's call for international solidarity and the malfunctioning of the Dublin Convention, the New Pact proposed an innovative responsibility-sharing mechanism, whereby all member states are obliged to contribute to the EU's refugee protection efforts, but they can choose between accepting asylum seekers who have applied to other EU member states (relocation) and financing and organizing returns and readmissions. The Dublin Convention puts the responsibility for processing asylum applications, and the subsequent protection of those who are granted asylum, on the shoulders of the country of first arrival. This system resulted in an overburdening of the EU's border countries, leading to poor conditions for the refugees in the border zones of France, Greece, Italy, and Spain. The EU's proposed relocation policy may ease the burden of the EU's border states while also providing better living conditions for asylum seekers and safeguarding their human rights. On the other hand, it is less clear at this stage how this internal burden-sharing mechanism within the EU will contribute to the GCR's more general, international responsibility-sharing objective beyond the EU. As suggested in the New Pact, the EU-Turkey agreement of March 2016 may be a prototype policy-model for achieving a broader international burden-sharing. EU and Turkey agreed in March 2016 that, for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU, taking into account the UN Vulnerability Criteria. Although this agreement did not function optimally because of other political challenges and despite it is based on resettlement of recognized refugees rather than relocation of asylum seekers, it should be interpreted as a novel yet imperfect extension of the relocation policy to EU's neighbourhood. *For the relocation system to function as a genuine international burden-sharing mechanism, as the Turkey-agreement shows, the relocation policy proposal of the EU needs to be extended to the EU neighbourhood and exported to other regions as well.*

Mass refugee inflows also comprise aspects that need immediate responses at border zones. No matter how efficiently the relocation, return, and readmission policies are implemented, there will always be accumulations of asylum seekers and migrants at border zones during mass inflows. The severity of the conditions under which refugees have to live usually leads to involvement of a mix of intergovernmental organizations (IOM and UNHCR), regional organizations (EU), state institutions, local authorities, and non-state organizations. We have learned from experiences in Lesvos, Lampedusa, Calais, Ceuta, and Mellila that when a state is absent, unable, or unwilling to properly handle mass refugee arrivals, other stakeholders try to fill in this gap. The same refugee-entry sites, especially Lesvos, have also taught us that the state and local authorities are irreplaceable, and their absence leads to chaos and despair in refugee protection work. This concerns especially shortcomings in responding to the needs of vulnerable groups. On the other hand, almost all border cases indicate that the protection capacities of the stakeholders in a border zone are not utilized in full thanks to

the lack of efficient coordination and cooperation mechanisms. There is little comparative knowledge of which coordination methods, collaboration patterns, network structures, and division of labour between different types of stakeholders provide an effective protection at the border zones. The UNHCR, the EU and its border states, local authorities at border zones, and NGOs have rich action and collaboration repertoires that should be uncovered and appraised. This implies a need for on-site explorations of institutional arrangements for generating effective collaboration mechanisms and stakeholder networks needed at the border-zone level. The most serious scenario in this respect concerns, as mentioned, filling the protection gap that arises when a state is unable to handle, or coordinate the handling of, mass arrivals and the needs of vulnerable refugees in this context. *In such cases, it may be a solution to install agile supranational coordination agencies at refugee-intense border zones to organize and synchronize collaboration between stakeholders in well-functioning networks.*

International protection during public health crises: the case of the Covid-19 pandemic

Three major policy challenges arose in connection with the latest public health crisis. The first one was: the mobility restrictions that were imposed in order to stop the global spread of the coronavirus blocked asylum seekers' access to safe territory. In May and June 2020, around 170 of 195 countries either partly or entirely closed their borders. These travel restrictions also included the closure of many parts of public administrations, access to ports for rescue vessels in Italy, and serious disruption to all means of travel. For migrants and asylum seekers arriving or recent arrivals to the EU, these measures had unintended and severe consequences. The closure of ports meant no access to EU territory. Shutting registration centres and application processing units meant that asylum seekers on the territory could not make their claims – a necessary prerequisite to receiving reception conditions. It also meant migrants could not pursue their applications and, in some cases, they became irregular as they were unable to renew their residence document. The knock-on effect was destitution and irregularity in this sector of the population. *This has been only partly, and only recently, overcome by gradually exempting asylum seekers from travel restrictions.*

The second challenge concerns Covid-19 vaccine passports that are being introduced in the wake of the pandemic. Requiring Covid-vaccine passports for travellers will bring citizens' mobility patterns back to the normal but it may add another hurdle to refugees' access to safety. Efforts to provide a vaccine passport or any other kind of official document in home country poses a life threat for people who are persecuted by the authorities. Even if such passports may be obtained, it may add further delays to an already prolonged asylum decision process. According to the UNHCR and the World Bank, *a key to solution is including all migrants and asylum seekers in national vaccination programmes independent of their migration status, which implies their inclusion in vaccine passport arrangements too.*

The third challenge concerns the basic rights of migrants and asylum seekers whose immigration status has not yet been determined. The exclusion of part of the population, in particular from access to health services because of their irregular status, put the whole EU population at greater risk. Accordingly, the problem was not only the rights of migrants and asylum seekers but also a public health challenge. Yet, Portugal chose a different path which both met the requirements of the public health emergency and ensured that migrants and

asylum seekers were beneficiaries of all the relevant rights in EU, European and international fundamental rights law.

When the pandemic started to spread across the EU, like many other Member States, Portugal had a substantial backlog of migration and asylum-related applications. Instead of simply closing registration centres and de facto turning reception centres into detention centres, Portugal chose another route: temporary regularization. Any migrant or asylum seeker who had a pending application on 20 March 2020 was automatically granted a status which included equal treatment with Portuguese nationals as regards work, education, access to health services and social services, including housing and social benefits. Although this status was temporary (and was extended in November 2021), it meant that no migrant or asylum seeker was placed in a position of destitution as a result of discrimination in access to health care, work or social benefits because of measures taken to address the pandemic (and delay in the administration's prompt determination of their applications).

Most critical in the context of the pandemic was access to healthcare. This was provided on the basis of non-discrimination to all persons irrespective of immigration status. As stated by the Minister of Internal Affairs, Mr. Eduardo Cabrita, "In a State of Emergency, the priority is the defence of collective health and safety. It is in these moments that it becomes even more important to guarantee the rights of the most fragile, as is the case of migrants. Ensuring migrant citizens' access to health, social security and job, and housing stability is a duty of a solidary society in times of crisis".

The Portuguese case shows that the differential treatment of migrants, asylum seekers, and citizens in the context of a pandemic is not a universal necessity. Portugal also demonstrated that discrimination on the basis of immigration status in the treatment of a pandemic is not an obvious choice from a public health perspective. Before adopting measures which exclude and discriminate against people present on the territory on the basis of their immigration status, Member State authorities must justify why such measures are necessary, what the consequences of such measures will be, in human rights terms, for those affected but also in public health and safety terms for the whole of the population. Any justification in favour of such discrimination should be made public and not hidden on the basis of emergency measures taken against a pandemic. It is incumbent on the EU to set a high fundamental rights standard across the Member States in addressing the pandemic. *The equal treatment of everyone on the territory, irrespective of immigration status, can be chosen as a more effective and efficient approach to pandemic control measures.*

3. Policy Implications and Recommendations

On 17 September 2020, that is, four days before unveiling the EU's New Pact on Migration and Asylum, EU Justice and Home Affairs Commissioner Ylva Johansson said: "I would not say it's [the Moria fire] the result of EU policy, it's the result of lack of European policy, of a common European migration and asylum policy". Though, the diversity of states' asylum determination systems and collaboration methods in refugee-intense border zones may be an impediment or facilitator for the implementation of GCR, CEAS, and the New Pact, if passed as law in the future. PROTECT is trying to minimize the adverse effects of some governance mechanisms and particularistic norms and discourses on the right to international protection. The most

important policy implication is that UNHCR, EU, and other interstate unions, like the African Union, may need to advise their member states about their national legal norms and governance systems for international protection. *Contingent on our final research results*, we may recommend the UNHCR and the EU to encourage their member states to:

- include in their asylum procedure the human rights instruments that came into force after the 1951 Refugee Convention
- organize their asylum procedures in separate bodies that are independent from state structures
- include multiple stakeholders institutionally in their asylum decision bodies and asylum procedures
- introduce partially single asylum procedures (where each application is first examined on the grounds of the Convention status, temporary protection, and general immigration rules, and if not granted, it is automatically transferred to examination on non-refoulement, subsidiary, and humanitarian grounds)
- expand EU's innovative "relocation" tool to neighbour countries to achieve more international solidarity beyond EU borders and export it to other regions
- separate the norms, governance, and discourses of international protection more clearly from migration policy objectives to avoid dilution of international protection in migration policies
- introduce discourses that clearly distinguish between refugees and migrants in order to increase society's acceptance of refugees
- introduce duly authorized agile on-site supranational coordination agencies at refugee-intense border zones to organize well-functioning collaborative networks of stakeholders
- make basic rights, including health rights, independent of migratory status by law, including the times of refugee influxes, pandemics, and economic and political crises
 - keep legal pathways to safe territories open at all times
 - equal treatment of everyone on the territory, irrespective of immigration status, can be chosen as a more effective and efficient approach to pandemic control measures
 - include all migrants and asylum seekers in national vaccination programmes independent of their migration status
 - exempt arriving asylum seekers from the requirement of vaccine pass and include all migrants and asylum seekers in national vaccine passport arrangements

PROTECT's policy focus excludes the internally displaced people (IDP). This is a significantly large group of people in need of protection but do not come under the definition of refugee in the 1951 Refugee Convention. For an effective international protection system, the protection of this group of people should be assessed separately.

4. Project Identity

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ACKNOWLEDGMENT OF FUNDING



This project has received funding from the European Union's Horizon 2020 research and innovation programme under grant agreement No. 870761