versus migration management. The challenge is to find a way that reconciles them and avoids conflict. If successful, it can offer important opportunities. But having to work within these opposing poles is not without risks. A focus on regional cooperation may undermine international standards; human security concerns may be pushed aside by state security concerns; and refugee protection may become subsumed under migration management, losing its specificity and eroding its human rights underpinning. It is therefore important that the development of such regional initiative be firmly grounded in international law and based on a vision on how these standards may creatively evolve in that particular regional environment.

## European Asylum Policy: Oscillating Between Shared and Individual Responsibility

*By André Nollkaemper*[*]

European states have adopted a shared responsibility toward asylum seekers that presents a double-edged sword. Together, they may act more efficiently than alone. But doing things together also leads to a diffusion of responsibility and has allowed individual states to duck their international obligations.

The European courts have recognized that individual obligations cannot be sacrificed in pursuit of a shared policy. However, a fundamental tension continues to exist between the ambition of sharing, on the one hand, and the individual responsibility for performance of international obligations, on the other.

Let me first briefly present the scale of the problem. In the last few years, Europe has hosted about 15% of the world's refugees. Absolute numbers have somewhat decreased. In 2012 just under 300,000 asylum applications were received within the member states of the EU, compared to a 2001–2002 peak of over 420,000 applications. Major countries of origin are Syria, Afghanistan, Iraq, Pakistan, and Somalia. Major recipient countries are Germany (almost 64,000), France (almost 55,000), and Sweden (44,000). But the differences are enormous. At the low end of the spectrum we find Portugal (300), and in particular Latvia (190) and Estonia (80).

In the past decades, European states have decided that they should tackle challenges posed by these refugee flows collectively. Put simply: how Greece, Italy, or Hungary handles an application for asylum is no longer a responsibility of each of these states alone. Rather, it is now a responsibility of European states collectively. By this I mean in part a collective responsibility of the 47 states that are parties to the European Convention on Human Rights (ECHR) and members of the Council of Europe, and that make up Europe at large. Within this group, a more far-reaching form of sharing is pursued by the European Union (EU) and its 27 member states.

By acting jointly rather than individually, European states make use of an option that international law allows. The preamble of the Refugee Convention recognizes the need for international cooperation in achieving a solution for the problem that granting of asylum may place unduly heavy burdens on certain countries. In 1994 the Executive Committee of UNHCR acknowledged the value of regional harmonization of national policies to ensure that persons who are in need of international protection receive it.

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Not any form of shared action helps to further the goals of the Refugee Convention, however. The litmus test for assessing shared policies has to be that refugees' rights are not to be compromised. It is only so long as all rights of persons defined as refugees are honored, that sharing responsibility to protect asylum seekers is permissible.

Conceptually, we can properly speak of a shared responsibility between two or more states in relation to the protection of the rights of refugees, when, proactively, each of these states assumes responsibility for the realization of these rights, and retrospectively, each of these actors assumes responsibility for its contribution to the infringement of such rights where they occur.

Assessed against this standard, the shared refugee policies of Europe are not without problems. To get to this conclusion, we should understand European asylum policy as a complex framework that embodies multiple ways in which European states share responsibilities. I distinguish four different strands: the human rights strand, the efficiency strand, the capabilities strand, and the solidarity strand. Each of these strands may help the realization of internationally protected rights. But they also reveal deep rifts in the European asylum policy, and may lead to a dilution of responsibility of individual states.

## Human Rights Sharing

The first strand that characterizes the cooperation of European states is the dominating role of human rights. European asylum policies are not only to be based on the Refugee Convention, but also and primarily on a human rights regime. This normative ambition has led to the European Convention on Human Rights, supervised by the European Court of Human Rights (ECtHR), and more recently to the largely overlapping EU Charter on Fundamental Rights, supervised by the Court of Justice of the European Union.

In principle this normative sphere supplements and strengthens the global refugee regime—there is much here that can serve as a model for other regions. There is a possible drawback in that the protection offered by the ECtHR has pushed the Refugee Convention somewhat to the background, as it was overwhelmingly focused on the prohibition of exposure to torture or to inhuman or degrading treatment. However, the broad understanding of the inhuman treatment by the ECtHR, and the emergence of the parallel regime of the EU Charter of Fundamental Rights with its right to asylum, have removed the sharp edges of the separation of the human rights and the refugee regime.

Clearly, under international law the obligations of European states are much wider than the right of non-refoulement. The performance of shared responsibilities has to be assessed against the full spectrum of obligations under international law, from which European states cannot contract out.

## Efficiency Sharing

The second, quite different strand of shared responsibility is dominated by a quest for efficiency. This strand is based on the idea that exercising protection responsibilities together can be more efficient than relying on individual action. The infamous Dublin regime embodies this idea. It allocates responsibility in relation to asylum claims, mainly to the state responsible for the asylum seeker's entry into EU territory. It deters asylum requests in multiple states.

Yet this regime can only be efficient if it is based on the principle of mutual trust. All states have to assume that all other states treat asylum seekers in conformity with international standards, and on that basis may be considered ''safe countries.''

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It is widely documented that this presumption is untenable. Driven by divergent geographies, cultural sensitivities, and economic capabilities, there continue to be wide variations in the performance of international obligations. The recognition rate in first-instance asylum decisions varies widely, ranging from 2% in Greece, 11% in France, 25% in Germany, and 45% in the Netherlands, to 87% in Malta. There also are major differences in reception facilities, length and quality of detention, and so on. In light of these differences, mutual recognition is not really a mechanism to share responsibility for the protection of asylum seekers, but rather allows states to evade their responsibility.

The European courts have progressively recognized this problem and have rebalanced the interests of efficiency and rights protection. In *T. v. UK*, the ECtHR considered that an agreement between the EU member states did not absolve the contracting states of their obligations under the ECHR.

In the leading 2011 case, *M.S.S. v. Belgium and Greece*, the ECtHR's Grand Chamber came close to rejecting mutual trust altogether when it found violations on the part of Greece for subjecting an asylum seeker to a deficient asylum procedure and humiliating detention conditions. Crucially, it found Belgium responsible for sending the asylum seeker to Greece in the first place. Belgium should not have ''assumed,'' but should have actively ''verified,'' that Greece would comply with its obligations.

As the ECtHR is a court external to the EU, of even more importance was the subsequent 2011 judgment of the European Court of Justice (ECJ) in *NS/ME*. In a landmark decision, the ECJ recognized that an EU state (again Greece) or a third country is only safe if it has ratified the Refugee Convention and the ECHR, and it observes these provisions in practice.

While this case law to some extent rescues the principle of individual responsibility from a notion of European sharing that may dilute responsibility, the ECJ could not throw overboard the principle of mutual trust altogether. Because it was committed to the interest of effective implementation of EU law, it reconciled the principles of effectiveness and individual rights. It held that not *any* infringement of European or international law would suffice to rebut the presumption of compliance with international standards. Only *systemic* flaws in the asylum procedure and reception conditions that result in inhuman or degrading treatment as prohibited by Article 4 of the Charter would give rise to a prohibition of transfer. There is no basis for such a balancing in international law. Here we see the effect of a shoehorning of asylum policy from the normative angle of inhuman or degrading treatment, that serves to accommodate competing legal regimes. For norms that do not meet the high threshold, individual states may still duck individual obligations.

The legal impact of norms outside this narrow zenith of European normativity remains to be determined in later case law. But a recent judgment of the Court on the principle of mutual trust as it operates in the context of the European arrest warrant does not offer great hopes, as the Court expressly subjected individual rights to the mutual trust and effective performance of EU law.

## Capabilities Sharing

A similar tension exists as regards the third strand of shared responsibility, the capabilities strand. This is based on the recognition that the external borders of the European space

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are better protected together. The European Agency for the Management of Operational Cooperation at the External Borders (or Frontex) has now launched over 50 maritime interception operations at the southern borders of Europe.

Here, too, there is a problem with the mutual trust assumption in those cases where Frontex hands over asylum seekers to an individual EU state. More problematic is the practice of sending back asylum seekers to the state of origin, without knowing whether that state complies with international standards.

In addition there is the fundamental problem that when states act through or in cooperation with Frontex, it may be difficult to identify who is responsible for what. Who is responsible—the EU itself, the states that are actively engaged in a particular operation, each state that has set it up, or all of these together?

The case law that I just mentioned to some extent has clarified the continuing individual responsibilities of states participating in Frontex. The more recent rules governing Frontex also recognize more expressly the effect of international obligations. Of importance is also the judgment of the ECtHR in *Hirsi v. Italy,* where the European Court clarified the obligations of states intercepting migrants at sea.

Yet recently the European Union Agency for Fundamental Rights published a report that documents extensively human rights concerns that arise in the implementation of this shared border policy, and it seems that major gaps in the responsibility regime remain.

## Solidarity Sharing

This brings me to the fourth strand of European sharing, the solidarity strand. This strand seek to tackle the problem that some states receive disproportionately large number of asylum seekers, or otherwise are in need of assistance, and should not carry this ''burden'' on their own. For instance, Mediterranean countries have asked for a greater sharing of burdens in response to large-scale arrivals of asylum seekers in their part of Europe.

This type of sharing is closest to what the drafters of the Refugee Convention and the Executive Committee had in mind when they envisioned international cooperation. It can mitigate weaknesses of the second and third strand, and bring effective performance of obligations under the global regime closer.

This is the least developed of all four strands. It remains to be seen how much more solidarity is left after the various financial rescue packages.

## Conclusion

The shared response of European states for handling asylum seekers and refugees may at times be effective and help promote global regimes. But it has problematic dimensions by diluting the individual responsibility of each individual European state in the performance of its international obligations. From the perspective of international law, the bottom line is that while international law relies on the EU and other regional arrangements to implement the global refugee regime effectively, it does not allow individual states to back out of their individual obligations by engaging in regional arrangements.