

## Refugees at Real Borders: Legal and Policy Issues

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*Zlat Milovanovic*

### Abstract

The influx of refugees to Europe brought 1.1 million people in 2015, and could easily be doubled in 2016, unless certain measures are taken rapidly. Despite the fact that 86% of all world refugees remain in the developing countries, the EU is in crisis. Our object here is to look into the International law applicable to refugees, as well as into EU law and policy, and to suggest measures for getting the world out of the crisis. The basic assumption is that the legal norms on refugees, their international protection, asylum and overcoming statelessness, are the essential and necessary elements of International law and that both regional and national norms should be aligned with the international ones. There are three parts to this study. First is an overview of the applicable International law of refugees, primarily based on human rights and humanitarian intervention. Second, European Union law and policies, completed as they are by the 28 national legal systems of member-states. Third, a review of the problems encountered so far in this area and proposals about what is to be done to overcome the crisis and restore normality. The latter include ceasefires and peace in Syria and Iraq, the acceptance of much-needed reforms, diplomacy at work by peaceful means – all in the interest of the international community and the people of the world. International law requires serious re-examination and codification, a task which has already been started but not as yet completed. Other measures are needed beyond International law proper, such as balancing the interests of individual nations with their international obligations, open borders, free trade and friendship among the world nations. Beyond Syria, Iraq, Afghanistan, and Eritrea, global peace is at stake. World peace is interconnected and interdependent with respect of human rights, they are the two pillars of the world order (Universal Declaration, 1948).

**Keywords:** Refugees, asylum, international law, EU policy, human rights, open borders, diplomacy.

“We recognize...: a need for the elimination of aggressive armaments, a need for the *breaking down the barriers* in a more closely knitted world ...” a need for restoring honor in the written and spoken word” (Roosevelt, 1940 / emphasis added). The vision of FDR was a more unified, open world with no barriers at borders, free trade across existing borders, democracy instead of dictatorship, and peaceful cooperation instead of war. For those values to prevail, a world war had to be fought.

In 2015, Europe experienced the first re-establishment of border walls, razor wire barriers and a military presence at its borders since the end of the Cold War. This was done in order to prevent or slow down the influx of some 1.1 million refugees, the largest such influx since Second World War, with the potential to double in 2016. Coming mainly from Syria, Iraq and Afghanistan, fleeing civil wars, genocide and other disasters, 942,400 applied for political asylum. (BBC News, 2015). Often with their families, they sought simple survival, crossing the Aegean Sea and the Mediterranean on boats. Many were helped or victimized by criminal operators. An estimated 3,500 drowned in the process. (BBC News, 2015).

While the UNHCR recognizes the crisis in Europe, it insists that there is a global crisis of refugees, given that 86% of all world refugees move through countries of the developing world. The UN agency counts a world total of 19.5 million refugees. Though UNHCR is helping refugees, its already insufficient resources are diminishing with the rise in numbers of refugees. The recently released Amnesty International Yearly Report for 2015/16, calls the situation of refugees catastrophic! Refugees are often denied the rights provided them in International Law. (Deutsche Welle, 2016).

The world’s institutional approach to refugees was born in Europe seven decades ago. The continent must relearn its lessons. (The Economist, 2015). Do we need a new, revised International Law of Refugees? Or can we leave it to the EU and other regional organizations, as well as individual states to take care of the issues at hand. How to best help refugees and asylum seekers? Statelessness is included in this study. “Migrants” are not, as they are regulated by a different section of International law.

## **International Law**

International law defines a refugee as a person who “As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear is unwilling to avail himself of the protection of that country; or who, not having a

nationality and being outside the country of his former habitual residence, as a result of such events, is unable or, owing to such fear is unwilling to return to it” (Convention relating to the status of refugees, 1951). Excluded from refugee status are “Persons who are suspected of having committed crimes against the international order, or serious non-political crimes or acts contrary to the purposes and principles of the United Nations “ (Weston, Falk, D’Amato, 1990).

In US law, this definition of refugees expanded to include any person: “in such special circumstances as the President after appropriate consultation...may specify, any person who is within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a social group or political opinion” (Immigration and Nationality Act, 1952 and Refugee Act, 1980).

Both definitions refer to a person’s fear of persecution. That is a subjective criterion. The fear has to be “well-founded” – which is an objective criterion. The grounds for persecution are listed: Combined, they amount to a war situation, as violations of human rights on a large scale occur in wars. The right to life itself is threatened by war. The fear of war is present in most normal human beings and would not have to be specifically proven. The African Convention on Refugees of 1969 includes war of aggression, occupation and foreign domination as grounds for fear additional to ones contained in the Refugees Convention. Reports of half a million dead (and no number of wounded) given in Syria, have been circulating in the media. We regularly see reports on and photographs of the refugees, but not on the war itself. The number of people killed, is in itself a cause of fear, as is the use of chemical weapons in Iraq, the use of prohibited cluster munitions, genocide – threatened or practiced... Shouldn’t everybody be afraid?

The Convention of 1951, containing the definition, consolidated previous agreements and conventions, including also The Statute of the Office of the UN High Commissioner for Refugees, of 1950. It applies now to events, both before and after 1 January 1951, not only in Europe, as originally agreed upon, but also in other geographical areas (Protocol, 1967). The UNHCR provides international protection and assistance to any person corresponding to the definition of refugee, although this task is now shared by the receiving state which has to approve each refugee for asylum or a temporary stay on its territory. “The events” which have not been defined, refer, among other things, to wars, revolutions, military interventions, and the exchange of territories.

Refugees normally receive international assistance for a certain period, and may have the right to work in some but not all countries. They may have the right to free medical care, education for their children, and the free profession of their religion. They have the obligation to respect the laws and customs of the receiving state, respect its institutions and always act in good faith. Their political activity may be limited within the requirements of the receiving state's public order or security.

The rights of refugees may be of three types: a) equal to those of nationals; b) equal to those of foreigners with most favored nation's status; or, c) equal to aliens generally (Baroness Elles, 1980). The end of refugee status occurs with voluntary repatriation to one's state, with the full assimilation of the refugee within the system of the receiving state or naturalization in the receiving state. There is no obligation of any state to approve the application of any would be refugee or group of refugees. Every state can make this decision freely. Refugees, however, cannot be returned to the country where their lives or freedom would be in danger. A refugee who has been rejected by a state, should be allowed a temporary stay (a temporary refuge in that state), until he finds a third country which will accept him, or until he has had a chance to appeal the decision to a higher authority, excluding when there is a danger to national security. The rule of "non-refoulement" (Art. 33 of the Convention on the Status of Refugees) prohibits border control agents from turning boats carrying refugees around out to sea or expelling asylum seekers who entered their territory. Such a case happened in 1984 when the Tanzanian authorities closed their border to 50,000 Rwandans fleeing genocide (Goodwin-Gill, MacAdams, 2007).

Among the sources of the International Law on refugees today, the Universal Declaration of Human Rights occupies a particularly high place. The Declaration of 1948 recognizes the "inherent dignity and the equal and inalienable rights" of all members of the human family, as the foundation of freedom, justice and peace in the world. We refer in particular to articles 13-15, that is to the right to leave any country, to seek and enjoy asylum, to have a nationality and not be deprived of it. These norms are clearly proclaimed, yet they are not systematically applied.

For instance, Art. 13 (2), in order to be meaningful, should be completed by the norm of the obligation of states to receive a refugee. If one can leave his country, and if all states decide to close their borders, the right may become meaningless. At least a number of nations should always be open to receive refugees, and there should be a right to transit through the states which are closed. Also, a would-be refugee whose asylum application is not granted, should have a third country as a choice. The incidents that have occurred at the borders of Greece, Macedonia, Serbia, Hungary, Croatia, Slovenia and Austria since mid-2015, are a case in point. If those countries

adopt (by common agreement) a daily limit of 550 to the transit of refugees they will discriminate against those who come in addition to that number, creating masses of refugees at the Greek-Macedonian border. (UN News Center, Statement of UNHCR, 2/26/2016). Practical problems force practical solutions even those that are not in the interest of refugees. If the refugees go by train, bus or other forms of public transportation, they are now charged the cost of that transfer. Some who cannot pay go on foot (or have often gone on foot). In Denmark and Switzerland, the would-be refugees are asked to deposit their money, jewelry or other valuable objects, as a guarantee that they will be taking care of their obligations. (Personal souvenirs are excluded).

What is the maximum number of refugees who can be admitted, even for transit only? Back in 1945-51, Europe dealt with 40 million refugees, including some fleeing territorial transfers between states. Luckily, Europe is not in that situation now, but the law should provide some workable solutions.

These issues are related to the larger ones: When will peace be re-established in Syria and Iraq? Once peace is restored, the Syrians and the Iraqis will be able to go back to their countries, rebuild them with the help of the international community and reorganize their governments.

Art. 14 deals with asylum and with nationality. The right to asylum is proclaimed but it is not guaranteed, except through the sovereign decision of each state. Yet, asylum does exist, and is a provision in many national legislations. For instance, U.S. law provides for territorial asylum and diplomatic asylum, upon the decision of the Attorney General. (Immigration and Nationality Act, as amended, 1952). In the Republic of Macedonia, asylum is provided for by Art. 29 of its Constitution, for foreigners and stateless persons persecuted in their countries for democratic political convictions and activity. Finally, the right to a nationality is fully within the sovereign rights of each state. There is an international Convention Relating to the Status of Stateless Persons, of 28 September 1954. The states parties agreed (in a separate convention) to reduce statelessness, which arises for two main reasons: for political reasons where a state decides that a person would not be its citizen, or in the case of the conflict of laws (domestic v. foreign). It is always up to the state administration to decide, based on national law. A national of a state can also renounce his nationality. The states of the Western Hemisphere have an advantage here, as their laws are based on the *ius soli* principle. A child born in the US, even to a stateless person or a refugee, acquires US nationality by birth. Some adjustments in that direction have been made in some continental law countries. The human rights international instruments,

especially the two Covenants, and other international norms are a further guarantee of the rights of individuals.

The Convention on the Rights of the Child of 20 November 1989, by now ratified by 196 states, confirms the right of a child to seek refugee status, or have such status and be entitled to a corresponding protection and humanitarian assistance... and to the rights contained in this Convention (Art. 22). Also, Art. 30 confirms minority rights to children's own culture, religion and language.

The first safe country principle is worth mentioning here as well. Most states have their own criteria for determining who may be granted refugee status. That determination may be made by UNHCR representatives in the reception states or states which provide a temporary refuge. The determination should be made in the first "safe country" after crossing the border of one's own state. Those Syrians who have been accepted as refugees in Turkey, should not apply for refugee status in Greece, as Turkey is a safe country when fleeing Syria. A would-be refugee applying in Greece could be returned to Turkey for the determination of his status. If that principle was fully implemented, refugees from Syria could never reach Germany except by boat or by plane. In the UK, according to the Asylum and Immigration Act of 2004, those who entered the country can be sent back to the first safe country they reached. An amendment to the Constitution of Germany, adopted in 1992, makes it obligatory for the federal government to return the refugees to the first country within the EU they entered. The present situation in Europe shows that this is impossible to manage.

### **The European Union and Refugees**

The EU law on refugees is based on International law with some modifications introduced by the Dublin Convention of 15 June 1990, which entered into force on 1 September 1997. The Dublin system includes the EU Qualification Directive and the EURODAC (i.e. the fingerprints database regulation), both being called Dublin II. The Dublin Regulation No. 604/2013 (also known as Dublin III) determines which EU state is responsible for and will make a decision on refugee applications. The objective of this system is to prevent an applicant from submitting applications in several different states at the same time. Some refugees have submitted several applications along their route (the Balkan route), without being informed of the potential problems in EU countries.

According to the European Council of Refugees (ECRE) and UNHCR, this system fails to provide fair, efficient and effective protection of refugees. Those transferred to the first safe state have not always had fair access to an independent examination of

their claims. Some of the would-be refugees were arrested, separated from their families, and denied the right to examination or the right to appeal the decisions of the administrators. The Dublin system impedes the personal welfare of refugees and its implementation has been suspended in Norway and Finland. Dublin II has been suspended at the EU level.

In 2015, the German government lead by Angela Merkel decided on a new policy of so-called “welcome culture” (*willkommens Kultur*). Germany opted for the choice of moral conscience, compassion for the refugees, and a humanitarian approach. This decision was very well received by the refugees. The majority of them decided to go to Germany! Sweden also followed a similar policy. Some politicians (extremists of the right) and legal scholars opposed that decision. It is clear there is a limit to the number of refugees that can be accepted. Nobody can tell at which point the crisis will become impossible to manage, but there are fears that the Schengen agreement will be lost, along with the Euro itself and the growth of the EU economy. On 3 March 2016, Donald Tusk, the President of the European Council warned the refugees not to come to Europe. To those “seeking to flee poverty and unrest, Europe is no longer an answer”. Do not come to Europe, do not believe the smugglers, do not risk your lives and your money – were his words in Athens (McAuley & Adam, 2016). UNHCR confirmed, that in March there were some 30,000 refugees stranded at the Greek-Macedonian border, a figure destined to rise in subsequent weeks.

Should the EU reallocate the number of refugees among all member states? The UK and Denmark are not under any obligation to accept such a reallocation. Other states are opposed, especially those of the Visegrad group and others who find their quotas too high. The EU decision on the reallocation of refugees of 22 September 2015, on the basis of the Art. 78 (3) of the Treaty on the Functioning of the EU (TFEU), dealt with an emergency situation- “a sudden inflow of nationals of third countries” (European Commission Fact Sheet, 2015). The EU is working on an agreement with Turkey, which would agree to accept refugees returning there while sending the same number of refugees who are already in Turkey to the EU. In addition, Turkey will be paid a sum of money to help offset the expenses incurred by the presence of these refugees. Turkey has also promised visa-free travel to the EU for its citizens, the opening of new chapters in negotiations on Turkey’s EU membership, and some administrative support, the same as for other non-member states that receive transiting refugees. Some countries are objecting to accepting Muslims as refugees at the time of terrorist attacks and other conflictual situations. Some countries have historical differences with Turkey. Hungary complained that there was not a single mosque in their country, there were no instructors in Arabic, and there were very few

translators. There are countries with a lack of financial capacity to accept more refugees. Even in the US there is growing opposition to accepting any Muslim refugees, unlike in the past where every religion used to be welcome.

The EU recognizes human rights – a key element of the refugee debate-- on two tracks: within the Council of Europe and on its own. The first basic document is the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, of November 4 1950, ratified by 47 nations, including all 28 member-states of the EU. The second, is the EU Charter of Fundamental Rights, first proclaimed in 2000 and in force since 1 December 2009. Both are consistent with the Universal Declaration of Human Rights and binding on the EU and its member states. The individual right to asylum, for instance, is and should be understood as an absolute right (The EU Common European Asylum System) unlike the right to migration for economic reasons. A war of any kind produces refugees who are to be recognized as such, and fall under the protection of the UN and the international community. The EU and other regional organizations are part of the international community and they have their obligations in that capacity. The EU and the Council of Europe both deal with refugee - related issues, and both the Council of Europe Court of Human Rights and the European Court of Justice have jurisdiction in cases of refugees and member states. The Council of Europe has its own Commissioner for Refugees, Nils Muiznieks.

Some funding for the refugees has been provided by the EU, some by the states. NGOs and private citizens have provided some food and shelter at a few places along the Balkan route. Criminal organizations are taking a cut in the process for example issuing real or false ID papers, providing sea transportation, and supplying information on the conditions of the road to take. A trip from Istanbul to Germany may often cost up to \$ 2,400 per person (*Foreign Policy*, January-February 2016). In 2015, Syria was the first country of origin of all refugees, with some 4.3 million refugees outside the country, and an additional 7.6 million internally displaced persons. Turkey was the top host of refugees, with 2.7 million refugees (as of February 2016). The small country, Lebanon, with a population of 5.8 million, has accepted 1 million refugees, who do not have the right to work legally.

The growing opposition to refugees, from parts of the population and the new xenophobic political parties of the right in Europe, calls for more attention and action. As of 1 December 2015, the European Commission had appointed two Coordinators on combatting antisemitism and anti-Muslim hatred, Ms. Katarina von Schnurbein and Mr. David Friggieri respectively. Both have worked on earlier programs in favor of a culture of tolerance.

## What Is to Be Done?

That question is often asked but not often enough. The “cessation of hostilities” in Syria, started on 27 February 2016, has brought temporary relief to parts of the country, not including the Al Nusra and ISIS - held territories. Will it hold? Probably not, as the war against ISIS will have to continue. One of the proclaimed goals of ISIS is to expel all non-Muslims, Christians and Jews from the Middle East. This is a threat to the UN and to humanity at large. Fighting the Sunnis alone, or just the Shia to expel them from their homelands, is not any less of a crime under International Law. Enslaving free people like the Yazidis cannot be acceptable to modern civilization, including the Islamic one! The international community will have to act, not as individual countries alone but as the community of nations.

The task of diplomacy is to work for peace *by peaceful means as defined in the U.N. Charter* (U.N. Charter, 1945/ emphasis added). “All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered [Art. 2 (3)]. International problems should be addressed rapidly, without delay. The Kurdish problem should have been solved some 90 years ago (Treaty of Sèvres), or within the Syrian federation in 1922, or within Iraq!

Refugees have been arriving in Europe since time immemorial. And more will be coming unless some legal order is created. There are some 5,000 ethno-linguistic groups in the world; many of them are likely to be interested in creating their own states. J.J. Rousseau, in his recently reconstituted text on interstate relations, according to Blaise Bachofen, did not consider the world as an endless territory subject to colonization. The distant conquests would end up, with humankind feeling that it was running out of space on earth, resulting in human societies getting crushed against each other (Bachofen, 2015). Such societies are likely to be getting aggressive against each other.

Peaceful means for resolving conflicts demand compromise. Compromise does not mean that one side gets 100% of its desired outcomes. A compromise has to be close to the middle, involving gains and losses for both sides. In solving the refugee crisis and future refugee crises, there are measures, both legal and political which should be considered and adopted. The *de lege ferenda* in legal terms, *political reforms* in the realm of international relations. Here are the recommendations:

1. The international community needs to re-examine and codify the Law on refugees. This is a long overdue action (the 1977 attempt having been suspended). There

should be a complete and clear international legislation dealing with all parts of refugee protection and assistance. The EU, the Council of Europe and other regional organizations should take part in the process to achieve this.

2. The right to refugee status and asylum, should be guaranteed by all states, to complement the “right to leave any country”. According to Jan Eliasson, the UN Deputy Secretary for Humanitarian Affairs: “Those forced to flee should never be denied safe haven or rescue” (Eliasson, 2015).

3. In the present or any similar crisis: a) Increase the financial aid to refugees in the source country of refugees and in the neighboring states; b) Review the asylum claims in those first out-of-country safe states, before the refugees continue their journey by sea or by train or on foot for hundreds of miles. The claims should be reviewed and if necessary, appealed to a higher authority. c) Demand that the refugees wait for the determination of their status in the first safe country they reach after leaving their country; d) Allow would-be refugees to work in those, first countries under a temporary residence status and allow their children to attend schools. (The Economist, 6 February 2016). The Government of Turkey has proposed building a safe city on Syrian territory close to the Turkish border, to be defended by Turkish and allied forces. Safe havens could even be built by the Syrian government or their opposition, inside Syrian territory, like in an ancient Hawaiian example (*punhonua* in Honaunau). An additional principle: Never use the military against the refugees!

4. Unlike the Western hemisphere or Africa, Europe does not have a single regional organization but several. European organizations should all work together in the areas of human rights and refugees. There is no reason why all European states together would not be active in solving the problems of and accepting refugees from wars in the European neighborhood. Syria could have been a European nation, had it remained a part of Turkey. The Council of Europe’s European Convention and its Protocol 4, prohibits: “collective expulsion of foreigners” or “forced removal of refugees.” (The EU-Turkey agreement of 18 March 2016 should not be considered as legally valid).

5. Leaders engaged in terrorism in their own or in foreign territories, whether they lead states or rebels, are to be opposed by the military contingents or police forces of all states, apprehended and tried in international criminal courts. In more difficult cases, those forces fighting terrorism can be placed under UN command.

6. The United Nations should proclaim a general prohibition on removing governments elected or in power, or supplying weapons to the rebels by foreign governments. Organizing such changes or participation in the “regime change” of a

foreign government should be proclaimed “acts of aggression”. Even non-democratic governments have the right to exist. Denying human rights to one’s own population by undemocratic governments should be fought within the system of International Law, in other words by prosecuting the violators of human rights on international level.

7. The United Nations should restore the Trusteeship Council, which could be put in charge of the “failed states”, especially those not respecting International Law. States unable to manage their own governmental functions can be made trusteeship territories temporarily, until again prepared for full independence. Such a measure could appear to be excessive, but why should the peaceful nations allow piracy, terrorism, trafficking in persons and other trans-border crimes, the existence of war lords and similar?

8. The members of the United Nations should work on plans to create open borders worldwide, “How useless, we said to ourselves, are frontiers when any plane can fly over them with ease, how provincial and artificial are customs duties, guards and border patrols, how incongruous in the spirit of the times which visibly seeks unity and world brotherhood”, wrote Steven Zweig in 1913! (Zweig, 1943) If there is a need for ID cards, all nations could use the same model, as is done within the Schengen group.

9. In cases of natural disasters, or changes of state territories caused by nature, international solidarity should allow for physical transfer of states into new areas. If, as Kant claimed, the world belongs to all people of the earth, nations should be providing for “international hospitality” (Kant, 1787 as cited in Milovanovic & Dodovski, 2015).

10. Civil wars will eventually become unnecessary. What would be important to do, is proclaim them unlawful. Something that is neither easy, nor impossible. The UN should act to stop every case of war, whether international, regional or internal.

11. All peoples have right to self-determination (Two Covenants, 1966, Art. 1 in each one). There is NO definition of the “PEOPLES”! There is no PROCEDURE on how to implement such a right. Both elements are needed to avoid future confusion or conflicts. Groups claiming the right to self-determination should freely and legally be able to petition some international institution, such as the Security Council, the International Court of Justice, a regional organization or some other authority which is to be designated.

12. In a case of war, diplomatic action should be an international priority. The UN members or all the nations together should not wait for years before establishing a cease fire. Wars can be prevented too. Lives and property are to be saved. The crises in Iraq and Syria have lasted at least 5 years at the time of writing (15 March 2016). The number of diplomats, consuls, advisors, mediators, negotiators who should be addressing the present crisis is too small or inadequate by comparison to the needs at hand.

The UN “2030 Agenda on Sustainable Development” (2015), calls on all countries “to implement planned and well-managed migration policies”. In November 2015, UN Secretary General Ban Ki Moon announced a roadmap to address the issues of migrants and refugees. The General Assembly decided to convene a high level meeting of world leaders on large movements of migrants and refugees. The Secretary General has appointed a Special Advisor to prepare this meeting, Ms. Karen Abu Zayd, a US diplomat (“Sustainable development Goals”, 2015)

Our main conclusion is that, as long as there is no political solution to the crisis in Syria and Iraq, there cannot be a workable solution to the refugee crisis. A continued refugee crisis also, in the words of Filippo Grandi, means a continued crisis of European solidarity! By extension, this means a crisis of world solidarity too!

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