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IMPROVING US AND EU IMMIGRATION SYSTEMS

Improving Policies in the Field of Asylum and Human Rights Protection in the US and EU

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European
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Robert Schuman Centre for Advanced Studies



**Improving EU and US Immigration Systems' Capacity for Responding to Global
Challenges: Learning from experiences**

**Research Report
Policy Brief
EU-US Immigration Systems 2011/13**

**Improving policies in the field of asylum and human rights protection
in the US and EU**

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**Improving EU and US Immigration Systems' Capacity for Responding to Global Challenges:
Learning from experiences**

The project is co-funded by the European Commission in the framework of the Pilot Projects on “Transatlantic Methods for Handling Global Challenges in the European Union and United States”. The project is directed at the Migration Policy Center (MPC – Robert Schuman Centre for Advanced Studies – European University Institute, Florence) by Philippe Fargues, director of the MPC, and Demetrios Papademetriou president of the Migration Policy Institute (MPI) the partner institution.

The rationale for this project is to identify the ways in which EU and US immigration systems can be substantially improved in order to address the major challenges policymakers face on both sides of the Atlantic, both in the context of the current economic crisis, and in the longer term.

Ultimately, it is expected that the project will contribute to a more evidence-based and thoughtful approach to immigration policy on both sides of the Atlantic, and improve policymakers’ understanding of the opportunities for and benefits of more effective Transatlantic cooperation on migration issues.

The project is mainly a comparative project focusing on 8 different challenges that policymakers face on both sides of the Atlantic: employment, social cohesion, development, demographic, security, economic growth and prosperity, and human rights.

For each of these challenges two different researches will be prepared: one dealing with the US, and the other concerning the EU. Besides these major challenges some specific case studies will be also tackled (for example, the analysis of specific migratory corridor, the integration process faced by specific community in the EU and in the US, the issue of crime among migrants etc.).

Against this background, the project will critically address policy responses to the economic crisis and to the longer-term challenges identified. Recommendations on what can and should be done to improve the policy response to short-, medium- and long term challenges will follow from the research. This will include an assessment of the impact of what has been done, and the likely impact of what can be done.

Results of the above activities are made available for public consultation through the websites of the project:

- <http://www.eui.eu/Projects/TransatlanticProject/Home.aspx/>
- <http://www.migrationpolicy.org/immigrationsystems/>

For more information:

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Abstract

Providing international protection to people fleeing persecution, torture and other inhuman and degrading treatment or punishment is recognised both in the US and EU as an important international obligation. Both the US and the EU have ratified international instruments which require states to provide international protection for an ever wider group of persons. At the same time, non-governmental organisations, academics and even international organisations have decried the reluctance of both the US and EU Member States to afford protection to specific individuals. This policy paper will provide some proposals how to bridge the divide between the US and EU commitments to provide protection and an apparent reluctance actually to accord that protection to individuals.¹.

¹ This policy brief relies heavily on the two excellent studies carried out in the context of this project on asylum policy in the US and EU: Donald M Kerwin 'The Faltering US Refugee Protection System: Legal and Policy Responses to Refugees, Asylum Seekers and Others in Need of Protection' MPI, Washington, May 2011; and Vincent Chetail and Céline Bauloz 'The European Union and the Challenges of Forced Migration: From Economic Crisis to Protection Crisis?' EUI, May 2011.

Introduction

Both the US and the EU Member States are bound by international commitments, contained in the UN Refugee Convention and its Protocol and the UN Convention against Torture among others, to provide international protection for people who have a well founded fear of persecution in their home countries or are at risk of torture. However, there are legitimate concerns over whether these commitments are being respected.

Four central issues arise in refugee and other forms of international protection in the US and the EU. These are:

- Access to the territory to seek asylum and protection;
- Adequate determination procedures with effective remedies;
- Durability of status;
- Protection elsewhere.

Each of these issues raises different considerations but impacts on the others. For example, whether someone is a spontaneous asylum seeker arriving clandestinely at the border (a common EU scenario) or a refugee selected for resettlement (a common US scenario) actually reaching EU or US territory can be fraught with difficulties. For the refugee seeking to reach the EU, mechanisms to screen out irregular migrants make territorial access difficult. For the refugee chosen for resettlement in the US, security checks may result in the individual languishing for years in unsafe countries. Where adequate determination procedures are effectively inaccessible, this means that unsustainable decisions by authorities go unchallenged. International protection, without security of residence or favourable reception conditions, can lead to difficulties both for the individuals and the receiving society. For example, persons in receipt of international protection are not encouraged to invest in the state as their status is too precarious. Finally, the lack of a positive approach to receiving refugees has led, both in the US and the EU to a troubling race to allocate responsibility for asylum seekers to other countries. Concepts such as safe third countries,² safe countries of origin and international agreements with third countries which have the effect of making those other countries responsible for the reception of people and determination of protection claims have proliferated over the past ten years.

I will address each of the issues from the perspectives of the US and the EU respectively examining and proposing mechanisms whereby improvements in each area might be achieved.

Access to the territory to seek asylum and protection

In the US system of refugee protection, there is a very strong and long standing emphasis on resettlement. Under this system, refugee status is determined through procedures which are carried out overseas (in refugee camps in third countries and elsewhere) then the people who are selected are invited to come to the US. This system commands support among US policy makers and the public, although refugee admissions dropped sharply after 2001 and are still well below historically high levels. One problem has been delayed resettlement. Refugees who have been selected for resettlement cannot actually travel to the US until a security clearance procedure is completed. Since the heightened interest in controlling political violence after September 2001, these procedures have become more onerous and lengthy. The non-governmental and academic communities have argued that people in need of protection are excluded on the basis of an overly broad definition of security

² A third country is one other than the host country or the country of persecution.

risk: individuals must not have provided material support for terrorist activity (broadly defined) or political violence in their country of origin.³

In the EU resettlement programmes are limited and rarely result in more than a few thousand people being allowed into the EU.⁴ The area of resettlement is exclusively controlled by the Member States of the EU and for the moment no EU harmonization legislation is envisaged which would result in a common basis for resettlement. Notwithstanding the criticisms which have been made in respect to the US resettlement programme, it still enjoys broad support among policymakers and the US public. In the EU context, pro-refugee discourse is all too often missing in the debate which tends to focus exclusively on combating irregular migration.

Spontaneous asylum claims in the US are made by people who manage to reach US territory. What the US authorities call interdiction programmes where possible asylum seekers are discouraged and/or prevented from arriving in the US through the activities of coast guards, border guards etc. reveal some antagonism on the part of the authorities to such spontaneous arrivals. In the EU, a substantial proportion of measures adopted in the framework of the EU's measures to combat irregular migration have the same effect as US interdiction programmes. The EU's measures on fining carriers for bringing people to the EU without the necessary documents is an example which has received much attention.⁵ This is because refugees are so frequently unable to obtain travel and other necessary documents when they flee their countries. The EU's external border agency, FRONTEX, carries out coordination of border activities in the Mediterranean and Atlantic which have the effect of preventing boat people from getting from North and West African coasts to EU territory.⁶ It continues to do so.⁷ However, questions are frequently raised whether people who are on those boats are actually seeking international protection and whether they are able to access it.⁸

Adequate determination procedures with effective remedies

Asylum determination procedures need to be robust and fair if they are to succeed in ensuring protection for those who need it. When resettlement forms a key component of refugee protection, the procedures take place while the individuals are outside the country. This undoubtedly diminishes the capacity of officials to carry out interviews. In the US, one consequence is heightened security concerns and the conduct of more intensive security checks on people under consideration for resettlement. This leads not only to delays but also to question marks about the efficiency of the security checks and the viability of the procedures for challenging a security hit.⁹

In the EU, asylum procedures have been the subject of legislation establishing minimum standards.¹⁰ However, the adequacy of those minimum standards has been questioned.¹¹ The way in which Member

³ Maryellen Fullerton 'Terrorism, Torture, and Refugee Protection in the United States' *Refugee Survey Quarterly* (2010) 29(4): 4-30.

⁴ According to UNHCR in 2009, the largest number of people resettled in the EU was to Germany (2,064) the second largest to Sweden (1,880) and thereafter few other Member States provided resettlement for more than a hundred refugees. In 2009, the US resettled 62,011 refugees. UNCHR *Projected Global Resettlement Needs 2011* Geneva 2011.

⁵ P. Minderhoud and S. Scholten, 'Regulating Immigration Control: Carrier Sanctions in the Netherlands', *European Journal on Migration and Law*, vol. 2 (2008), pp. 123-147

⁶ Human Rights Watch *Pushed Back, Pushed Around* 21 September 2010 <http://www.hrw.org/en/node/85582/section/1> visited 11 May 2011.

⁷ FRONTEX *Hermes 2011 is Running* 22 February 2011 http://www.frontex.europa.eu/newsroom/news_releases/art96.html visited 11 May 2011.

⁸ Human Rights Watch *Pushed Back, Pushed Around* 21 September 2010.

⁹ Kerwin op cit.

¹⁰ Directive 2005/85 on minimum standards on procedures in Member States for granting and withdrawing refugee status OJ 2005 L 326/13.

States have implemented the EU legislation has also raised concerns.¹² Even with a set of minimum standards on procedures, unacceptably high differences appear in protection rates in different EU Member States for nationals of the same countries. For example, of the Afghanis who sought asylum in EU Member States in 2009, 66 percent receive some sort of protection in Austria, but only 37 percent did in France. Eighty-seven percent received protection in Italy but only 33 percent in the Netherlands.¹³ It is not evident that common procedures are resulting in equivalent outcomes.

Access to legal advice and representation makes an important difference to outcomes for refugees. As the Kerwin study shows, for those refugees who must make their applications and defend them before the authorities in the US, success rates are substantially higher where they have legal representation.¹⁴ Similar results also occur in the EU. However, in the US, there is no government-funded legal representation. In the EU, there is pressure to exclude or limit public funding of legal advice and representation in many areas, not least those related to foreigners. This has a negative impact on the ability of people to obtain recognition as refugees or otherwise to secure international protection.

Durability of status

The time line of international protection bears attention. While the main international instrument which establishes refugee protection was first opened for signature in 1951, since then in 1984 the UN Convention against Torture was opened for signature which includes, at Article 3, an obligation not to return a person to a place where he or she is at risk of torture. Subsequently, the EU has created a new ground for international protection (protection from indiscriminate violence)¹⁵ and included a right to asylum in its Charter of Fundamental Rights.¹⁶ What is striking is that the accumulation of international protection obligations over time both in the US and the EU has not appeared to result in any increase in numbers or percentages of asylum seekers who receive protection.¹⁷

There is another effect, however, of the widening of the grounds of international protection. This is a proliferation of statuses which people who need international protection may be granted. While the Refugee Convention of 1951 and its 1967 Protocol are mainly concerned about the rights which attach to refugee status (rather than the procedures by which it may be recognised)¹⁸ the Convention against Torture and other instruments are concerned exclusively with the non-refoulement aspect of the individual's status – the prohibition on him or her being returned to the country where the persecution or torture would take place. In practice what has happened is that both in the US and the EU the status of persons who are not recognised as refugees but are considered to enjoy protection from return are given less and less durable residence statuses with fewer and fewer rights. In the US there is the status of 'withholding removal'¹⁹ which provides protection against expulsion of potential torture victims but which does not lead to permanent residence nor does it allow the individual to leave the US even for temporary visits elsewhere. In the EU the status of 'beneficiary of subsidiary protection' was created by

¹¹ UNHCR *Improving Asylum Procedures Comparative Analysis and Recommendations for Law and Practice* March 2010.

¹² *Ibid.*

¹³ UNHCR *Global Trends 2009* Annex 12.

¹⁴ Kerwin *op cit* P 24.

¹⁵ Article 15(c) Qualification Directive 2004/83.

¹⁶ Article 18 EU Charter of Fundamental Rights and Freedoms OJ 2010 C 83/389.

¹⁷ See UNHCR *Statistical Year Books 2001 – 2009* <http://www.unhcr.org/pages/4a02afce6.html> visited 11 May 2011.

¹⁸ James C. Hathaway, *The Rights of Refugees under International Law*, Cambridge University Press, Cambridge, 2005

¹⁹ "Withholding of Deportation/Removal" at §§ 243(h) and 241 (b)(3) of the Immigration and Nationality Act.

the Qualification Directive²⁰ but the rights which attach to the status are inferior to those of refugees in key areas such as access to employment, family reunification and social benefits. This creates a two tier protection scheme where the more privileged are recognised as refugees and obtain the possibility of a durable status and family reunification while the others are merely protected from expulsion.

Protection elsewhere

According to UNHCR, in 2009 Pakistan hosted the largest total numbers of refugees in the world (1,740,400) followed by Iran (1,070,500) and Syria (1,054,000).²¹ In 2009, the US hosted 275,500 refugees and Europe just over 1.5 million.²² Yet there is substantial political pressure both in the US and in the EU to shift responsibility for receiving asylum seekers and processing their protection claims to other countries. This trend has been substantially developed in the EU where the Common European Asylum System is based on the principle that asylum seekers will be allocated both for reception and determination purposes either to a Member State or where possible a state outside the EU if the individual arrived in the EU through that third state.

The EU has entered into readmission agreements with 12 countries²³ since 2004, including Pakistan,²⁴ which permit the summary return to the other country party to the agreement not only their own nationals but also third country nationals who arrived in the EU via that state. These agreements have been substantially criticised because of a perceived failure to take proper account of the protection needs of persons returned under them.²⁵ The US entered such an agreement with Canada in 2002.²⁶ Readmission agreements follow the logic of deterring access to the territory in the name of combating fraud and controlling immigration but take it one step further – even those who have managed to reach the territory of the state may find themselves expelled to a third country through which they may have passed on route from their country of persecution. While the US-Canada Agreement is between countries with a similar level of development and capacity to host refugee populations, the EU agreements are with countries where there is a striking imbalance of wealth and capacity in favour of the EU. That there should be such an agreement with Pakistan which in theory at least also covers people who seek international protection is problematic.

What Policy initiatives would reduce the negative externalities?

In each of the four areas discussed above, there are straight forward policy options available both to the EU and the US which would go some way towards alleviating the problems identified. These are as follows:

²⁰ Article 15 Qualification Directive 2004/83 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted OJ 2004 L 304/12.

²¹ UNHCR <http://www.unhcr.org/4c11f0be9.html> visited 13 May 2011.

²² Ibid.

²³ In order of signature: Hong Kong, Macao, Sri Lanka, Albania, Russia, Ukraine, Serbia, Montenegro, Bosnia, Macedonia, Moldova and Pakistan.

²⁴ OJ 2010 L 287/50 entry into force: 1 December 2010.

²⁵ Daphne Bouteillet-Paquet 'Passing the Buck: A Critical Analysis of the Readmission Policy Implemented by the European Union and Its Member States' European Journal of Migration and Law, Volume 5, Number 3, 2003, pp. 359-377(19).

²⁶ Kerwin op cit p 26.

Access to the territory:

- US: improve its refugee screening and protection policies for those interdicted at sea, and provide access by non-governmental organizations to the screening of non-citizens who lack sufficient documents at US borders and ports-of-entry;
- EU: establish effective and generous resettlement programmes applicable to all Member States; this could help to change the discourse about beneficiaries of international protection;
- EU: place responsibility on FRONTEX to ensure that the EU Borders Code (with specific attention to the exceptions for refugees and those in need of international protection) is correctly applied by the Member States' border guards.

Adequate Procedures and Remedies

- US: ensure transparency in refugee processing and resettlement procedures and speed up security checks for those seeking resettlement;
- EU: improve EU standards of determination (Directive 2005/85) with specific attention to outcomes;
- US and EU: facilitate legal assistance and representation for all those who claim international protection, but who cannot otherwise afford it.

Durability of Status

- US and EU: harmonise protection statuses of all persons in need of international protection to the standard required by the Refugee Convention. Access to permanent residence, to work, to education and to facilitated family reunification should be the top priorities.

Protection elsewhere

- EU: refrain from applying any readmission agreements to expel or refuse admission to persons seeking international protection;
- US: put in place a monitoring and review programme regarding the US-Canada Safe Third Country Agreement, and allow any person claiming international protection to justify the suspension of the Agreement's application to his or her case on the basis of humanitarian considerations.

There is much scope for improvement in asylum and human rights protection in both the US and the EU. There are some fairly simple policy options available which would substantially improve the situation from the perspective of delivering protection without creating problems elsewhere in the immigration systems of either the US or the EU.