Introduction and background

Thirty years ago we knew that there was a demographic and economic crisis on the horizon. We knew, because the ILO told us. We knew just how many young people would be entering the work force in the developing world; we knew how many jobs would be required; we knew that regular migration to the developed world could provide only a small percentage of solutions, at best; and we knew, too, that conflict, turmoil, upheaval and displacement would likely still be with us.

And what did we do? Essentially, we did nothing. We put our heads in the sand, crossed our fingers, and hoped that the inevitable would never happen. Well, it did, as the inevitable generally does. And the price is being paid today, in lives lost in flight and in transit from situations we saw coming, and in the floundering ineffectiveness of regional and national policies.

Of course, emigration and immigration touch the self-interest of States, and self-interest can and does lead to inaction. For long, the prevailing view was that these matters fell pre-eminently within the reserved domain of domestic jurisdiction, and that they were therefore subject to the absolute and uncontrolled discretion, or sovereign power of the State, and therefore unsuited to international regulation.

There was good historical authority for this view, but the picture was always rather more complex. Even in the nineteenth century, the treatment of the foreigner, once admitted, was indeed seen by many States as engaging international law, and as justifying the exercise of diplomatic protection in defence of an international minimum, if somewhat uncertain, standard. And the practice of States in relation to the protection of the rights and interests of their citizens in other countries played a major part in the development of what we now call the rules of State responsibility.

Today, there is a new reality. The General Assembly calls it a multidimensional reality. It is the product of a certain dynamic in relations between States, generated in part by globalization, and in part by inescapable facts, for example, that migration cannot be ‘managed’ unilaterally, let alone turned off.
At the same time, the persistent illusion of an absolute, exclusionary competence remains a matter of concern, because it tends to frame and direct national legislation and policies in ways that are inimical to international co-operation and, not infrequently, contemptuous of human rights.

Although we can quibble about the exact start date, ‘irregular migration’ is largely a product of the late twentieth century, reflecting the desire of certain States to impose (their) order on that particular human activity which is the movement of people across borders. ‘Irregular migration’ is thus a State construct which, currently at least, is little represented in international law. The irregular migrant, like the migrant, is not defined by international law, other than by reference to his or her common humanity. Nor does international law prescribe what States shall do (as opposed to what they may not do), confronting this product of their own idiosyncratic view of the migrant on the move.

There is a gap, then, or the perception of a gap, in the regulatory framework. Or perhaps the problem is not a gap, so much as an opportunity – like today – to bring together and to synthesize what we already have learned and what we are learning with regard to migrants and refugees in transit, in detention, in search of protection, in limbo, in distress at sea, in need of disembarkation in a place of safety, in need of resettlement.

Constraints

In the overall picture of inter-State relations and their interaction with ‘events’, certain things are constant. There is now and always has been a strong humanitarian dimension in responses to the movement of people, and not only in the case of refugees and those in search of protection.

More particularly, there is also a solid legal framework governing the actions of States in and outside their territory, which is not displaced by the fact that control of migration – the core decisions about entry, residence and removal – falls within the sovereign competence of the State.

International law is always there, as it were, even though some States are may seek to displace it, to build the notion of ‘irregular’ status into some sort of foundational reason or excuse for denying to one particular class, the rights to which we are all entitled in virtue of our common humanity.

When the 1951 Convention relating to the Status of Refugees was drafted, States began with a couple of simple principles – that those leaving their country for reasons of persecution were ‘entitled to special protection on account of their position’. The European Court of Human Rights has taken a similar approach; in Medvedyev, it emphasised that, ‘the end does not justify the use of no matter what means . . .’, and again, in M.S.S., it remarked
that, ‘States’ legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum seekers of... protection...’.

It is the refugee’s international status which entitles him or her to protection, and that is and ought to be the point of departure. It does not mean that the refugee is privileged, for the refugee’s circumstances are not like those of everyone else, but in a space of difference regulated by international law.

And this is a useful starting point precisely because of the legal exceptions to sovereign discretion which it demands. It is the protected status of the refugee in international law which requires anxious scrutiny of any measure which appears to deny or limit rights, or of claims to disregard or not to hear requests for protection.

I would go further, however, and argue that there are equally limits to the right of the State to act ‘differentially’ when operating at its borders, or beyond them, and when treating non-citizens on the move as ‘others’ to whom something less than equal treatment is said to be due.

Here, I would call in aid, first, the principle of non-discrimination which, originally limited to distinctions drawn on the basis of race alone, has much a wider scope today. The general principle of equality now imposes on those who wish to treat individuals differently the duty of showing valid reasons for such differential treatment.

It is not enough that the individual is a migrant, a non-citizen, an alien. Nor is it enough, when it comes to human rights protection, to invoke the individual’s irregular or undocumented status. This factor may count in determining what to do next, within the limits of the law, but it cannot be sufficient justification for ill-treatment, arbitrary and indeterminate detention, denial of wages earned, and so forth; nor does international law support such restrictions or limited conceptions of rights. The question is, whether the bases advanced for distinction are relevant, and thereafter whether the measures adopted are reasonable and proportional.

Next, I would consider the special situation of the migrant, and turn to the pioneering work begun in the old Commission on Human Rights, and continued in that of the three Special Rapporteurs since 1999. The Commission singled out the problem of vulnerability (not in the sense of weakness, so much as in exposure to smuggling, trafficking and exploitation), and the lack of any effective protecting authority as key elements affecting those who move between States, while it also confirmed the existence of a relevant body of international law with which better compliance was required.

In her first report, the Special Rapporteur, Gabriela Rodriguez Pizarro, noted that there is no ‘commonly accepted generic or general legal concept of the migrant in international law’. Moreover, it was increasingly difficult, if not impossible, to distinguish clearly between those, ‘who leave their countries because of political persecution, conflicts, economic problems, environmental degradation or a combination of these reasons and those
who do so in search of conditions of survival or well-being that do not exist in their places of origin.’

For the purposes of her human rights mandate, she therefore proposed to consider as migrants those who have moved or been moved, irrespective of their status, but with due regard to their particular needs and vulnerabilities; in this context, irregular or undocumented migrants required special attention.

In the years that followed, the Special Rapporteurs have succeeded in sensitising the international community to the protection needs of those who migrate. In 2012, the UN General Assembly took note of a full spectrum of relevant issues, including the prevention of violence against migrants, especially women migrant workers, non-discrimination, freedom of movement, the need for due diligence in the prevention of crime, for co-operation in combating trafficking, for the compliance of nationals laws with international obligations, and for a holistic approach to migration management.

In his August 2013 report to the General Assembly, the current Special Rapporteur on the Human Rights of Migrants, François Crépeau, noted that the major problem is inadequate implementation at the national level, while the Secretary-General’s report emphasised the intrinsic quality of human rights to all human beings, ‘regardless of their instrumental value as units of labour or agents of development’.

Following the Second High-level Dialogue on Migration and Development, held in New York in October 2013, the General Assembly adopted a Declaration, which can be read as something of a rights agenda, calling for proactive policies and programmes on the part of States, while recognizing also their particular competence. None of this changes the law, of course, but insofar as resolutions adopted in the General Assembly can be evidence of the views of States, they can also provide examples of a growing consensus on the need for a newer, more realistic approach.

A gap nonetheless remains between acceptance of a human rights based approach and the reality for today’s migrants, and it will need to be bridged by way of effective implementation of the applicable law. Here again, European jurisprudence has helped to clarify the legal framework within which national and regional measures must be organised and operationalised.

In M.S.S., in Hirsi, and in N.S., for example, knowledge was a key factor which effectively determined what had to be done, or not done, if a violation of the European Convention and/or the Charter of Fundamental Rights was to be avoided. Article 3 of the European Convention appears at first to impose a regime of strict liability which is contingent on certain factual findings, rather than one of absolute liability, in the sense of that liability which follows, simply and straightforwardly, from the State’s engagement in a particularly dangerous or perilous activity with harmful results.
In a strict liability regime, once the facts and the risk of prohibited treatment have been determined or proven to the requisite degree, there are no exceptions; but substantial evidential hurdles may need to be overcome, as the case law confirms.

The door to absolute liability, however, may not be closed. The import of the judgment in Hirsi, and perhaps also that in Al-Saadoon, is that State operations in presumptively perilous or hazardous situations impose a special duty of care, a form of absolute liability in which the obligation not to harm (in this context, not to violate a human right) is effectively translated into a positive obligation to protect.

This has major implications for the formulation and implementation of programmes to ‘manage migration’, including by way of interception and return. The framework of international law and obligation, appropriately contextualised, implies more than the passive avoidance of direct harm, and demands an active protection role – one in which responsible States are obliged to ensure that those over whom they do or may be expected to exercise jurisdiction and control are effectively protected as a consequence.

Protecting the human rights of all migrants, refugees and asylum seekers, is still very much a work in progress, though, and Europe must face up to the task.

Europe: Challenges

Challenges produce ideas, some positive, others negative; some viable, others unrealistic; some progressive, others destructive; some backward-looking, others forward-looking.

Some call for the borders to be closed, everywhere. As François Crépeau has pointed out, however, ‘sealing’ national borders is not a realistic or viable option. It is premised on the use of levels of force and control which are both unattainable and unacceptable in a community founded on the rule of law. Moreover, the very idea flies in the face of experience – the discredited practices of ‘deterrence’ through detention, or of ‘deterrence’ through enforced destitution; and it flatly ignores reality – the very real push factors, such as conflict or extreme poverty; and the very real pull factors reflected in the cheap labour needs of key sectors of the European economy, including agriculture, construction and the care industry.

Still, there is no shortage of other suggestions. The European Commission has just announced plans for a new ‘European Agenda on Migration’ which, we will be pleased to know, will include ‘fighting irregular migration and human trafficking more robustly...’ (why the language of war?); ‘securing Europe’s external borders...’ (do we know where they are?); ‘a strong common asylum system...’ (where ‘common’ is perhaps the problem, the enemy within...); and ‘a new European policy on legal migration...’ (at last...).

UNHCR has proposals, too, some of them drawing on practices developed and refined during the Indo-China refugee crisis, such as compensating or otherwise mitigating the direct
costs incurred by merchant ships rescuing those in distress at sea; and making a working reality out of disembarkation in a place of safety.

UNHCR also argues for proactive use – full implementation – of Dublin options (on the long-term future of which I have many doubts); suggests support for Greece and Italy through a pilot relocation programme for Syrian refugees using whatever ‘instruments’ are available in the EU law and policy library; and is making positive noises about involvement with States in bringing international protection processing closer to where the needs now are.

In similar vein, the EU Fundamental Rights Agency last month published a comprehensive overview of ‘legal entry channels’ to the EU for those in need of international protection, with the aim of making the (Charter) right to asylum a reality, and of making legal entry options a viable alternative to the risks of irregular entry.

From another perspective, the Office of the United Nations High Commissioner for Human Rights has recently drafted and issued a set of ‘Recommended Principles and Guidelines on Human Rights at International Borders’. As it notes:

‘International borders are not zones of exclusion or exception for human rights obligations. States are entitled to exercise jurisdiction at their international borders, but they must do so in light of their human rights obligations...’

The High Commissioner emphasizes the primacy of human rights, and the overarching principles of non-discrimination, and of assistance and protection from harm.

No less important is the Fundamental Rights Agency’s 2014 critique of the criminalisation of migrants in an irregular situation, and of those who may assist or engage with them.

While preventing ‘illegal immigration’ is one feature of the ‘common immigration policy’ now in course of development (Article 79, Treaty on the Functioning of the European Union), the ardour with which certain sections of certain governments embrace sanctions and criminalisation suggests a major rights and rule of law deficit – a blatant disregard of those values on which the EU is based, and of those principles at the heart of any representative democracy.

The propaganda directed at the irregular migrant and the asylum seeker is, not unintentionally, a driver of discrimination. To label as a criminal the ‘other’, allegedly guilty each day of a continuing offence, is intended to open the way to further measures of control. And the effects of such labelling are well understood, resulting in social hostility, suspicion among the wider community, and fear of assisting those in need, even in distress at sea. For those targeted, it means fear of reporting crime, or discrimination, or abuse, fear of seeking medical assistance, fear of exploitation.
We seem to have come a long way, and down the wrong road, from historically sound principles of humanitarian assistance; small wonder then, but prescient, that the drafters of the 1951 Convention thought it best to make it an *obligation* not to penalise the refugee for entering illegally...

Whether we are thinking about sealing borders or of the many current ‘lesser’ policies and practices favoured by governments today, what we see time and again is how they fail entirely to understand what it is that drives people knowingly and rationally to risk their own and their families’ lives.

Such ignorance is perhaps best illustrated by the United Kingdom’s refusal to support rescue operations in the Mediterranean, on the ground that it will merely encourage others to make the journey. How little they know, those now complicit in the loss of life.

Only when knowledge and understanding of the despair of others, of their need to survive, and of their persistent optimism, only when these factors are integrated into serious, long-term policy-thinking will we begin to see programmes with a chance of making a positive impact – of providing, pro-actively, not reactively, humanitarian alternatives to the present crisis on the doorstep of Europe.

Europe: From the General to the Particular

So what exactly is wrong with the European approach, other than the lack of political will? Let’s start with *Dublin*, as symptomatic of the whole.

Dublin did one good thing, in principle, at least: Within the EU, it broke the vicious circle of responsibility denial which had been fostered by States on spurious first country of asylum arguments, and in consequence it has helped to strengthen the right to seek asylum, by entrenching the rule that the asylum seeker is *entitled* to a decision. Whether it also reduced ‘forum shopping’, as some might argue, is another matter to which I will come back.

Dublin did not, of course, provide for the effective *sharing* of responsibility among European States, in the fulfilment of protection obligations held in common; but it was never intended to do so.

Nor did Dublin obviously help to streamline asylum procedures, or speed up access to protection. On the contrary, the resulting region-wide bureaucratisation appears overall to have slowed down the asylum and protection process, to have disrupted family unity, to have proven inadequate in face of the rights of the child, and to have had little or no impact on secondary movements.

Like the Common European Asylum System in its present form, Dublin reflects certain assumptions that have proven unrealisable – that asylum seekers would receive equal treatment and consideration wherever they applied, and that there would be equivalence
among Member States in procedures, reception and integration. We have come to learn otherwise...

Dublin and the Common European Asylum System are also premised on something else – on disregard of individual interests, in an almost dehumanizing approach to the asylum seeker as object, not subject, as therefore disentitled from any right to express a preference, let alone choose his or her destination; as someone, something, therefore, to be ‘taken back’ or ‘taken in charge’.

Again, we see that divorce between the policy-maker and the legislator, on the one hand, and what happens out there in the real world, on the other – the world of the EU in which secondary movements and asylum shopping are matters of rational choice, just like the decision to flee one’s country, itself a process which engages elements of risk assessment, personal networks, language ability, culture, employment opportunities, not to mention an assessment of the chances of acceptance.

Knowing what we know – about reception conditions, about decision-making, about disparities in recognition rates – can we be surprised that the failures of ‘harmonisation’ are themselves the drivers of onward movement?

Why should we expect to build a common European asylum system on such shaky foundations as twenty-eight more or less national procedures? Why, having formulated a general catalogue of agreed principles and criteria – at a certain level of generality, to be sure – and having translated them across multiple languages, should we expect independent and more or less experienced national courts and tribunals to arrive at uniform and consistent interpretations?

Why should we expect the essential factual judgements, which are at the heart of protection decisions, also to be consistent, absent agreed common and authoritative sources, absent an agreed philosophy and practice of risk and credibility assessment?

So what next? A European Migration and Protection Agency...

There can be no Common European Asylum System that is not a European one, in which protection decisions are taken by a European institution, appealable to a European court, and in which the decisions are valid region-wide – a European refugee or protected status to be enjoyed across a Europe without internal borders.

And we have the resources – experienced judges and interlocutors across so many jurisdictions – who can be brought within and under the roof of European protection, in an institution built from the ground up, but with top-down competence and authority.

Why cling to outmoded national procedures? Let’s think outside the box, and tap into the resources reflected in the rest of Europe’s engagement with those in need of protection; let us ensure that civil society and the knowledge and understanding which non-governmental
organisations have of the refugee and migrant experience are fully factored into a new European refugee and migrant institution, and let us ensure ongoing accountability through FRA oversight and judicial control.

After all, there is a certain logic in the idea of the European Union. As I have argued before, a regional group of States organized without internal frontiers suggests certain outcomes when it comes to refugee protection. All Member States are party to the 1951 Convention and 1967 Protocol relating to the Status of Refugees, and all are bound by the same obligations and the same legal understanding of the refugee. Given that they have all agreed to treat refugees in the same way, to recognize the same rights and to accord the same benefits, national refugee status determination systems are redundant. The EU demands – I am shortening the argument – a simple European response, in which Europe’s refugees enjoy a European asylum and European protection, and the rights and benefits accorded by European law. Meanwhile, good policy, if not strictly logic, argues equally for a common, obligation-based approach, not just to refugee status determination, but also to resettlement, rescue at sea, and protection at large.

If the EU can sign treaties, then in theory it could replace individual Member States as party to the regime of protection organized under the 1951 Convention/1967 Protocol; or if it does not replace them, it could exercise their competences by way of delegation.

The terms of those treaties in fact mean that they are presently open to ratification only by States, but there is no legal reason why an EU institution should not be set up, competent to determine refugee status and enabled to fulfil, collectively as it were, the individual obligations of the Member States.

What would be the objectives and the basic organising principles of such a European Migration and Protection Agency? That would justify a separate workshop, and some further thinking also about how its mandate might also encompass the migrant, as well as the refugee.

But in short, it would be protection agency, with a mandate ideally encompassing refugees, asylum seekers and migrants (the last-mentioned being limited perhaps to those in an irregular situation or whose status is unresolved following disembarkation after interception or rescue at sea).

The Agency’s primary protection responsibility with regard to those within its mandate, would be to ensure, directly and by way of oversight and supervision, that the international obligations accepted by and/or binding on Member States and the EU are implemented and fulfilled in good faith.

Specifically, and without prejudice to other applicable rules, the Agency would ensure that the principle of non-refoulement was upheld, and that no one was returned to any State or territory in which he or she would be at risk of persecution, of torture, of inhuman or
degrading treatment, of a serious violation of fundamental human rights, or of indiscriminate violence arising from armed conflict.

In overseeing the arrival, reception, and treatment of those under its mandate within the EU, the Agency would ensure that the principles of non-discrimination and equality were upheld; that no one was subject to inhuman or degrading treatment; that no one was subject to arbitrary, indefinite or unnecessary detention; that the best interests of the child were a primary consideration in every decision affecting a child, both in the years of childhood and in anticipation of adult life; and that the family was protected and family unity upheld.

In determining whether anyone within its mandate was entitled to international protection as a refugee or otherwise in accordance with relevant and applicable human rights principles, the Agency would ensure prompt access to its decision-making procedure in a location close to where the individual was accommodated; that the applicant was informed of the procedure in a language which he or she understood; and that he or she was provided with legal advice and representation in making a claim for protection.

The Agency would establish procedural rules governing the determination of claims to protection which ensured the standards of due process and good administration required by EU law, including the Charter of Fundamental Rights. In particular, the rules would provide for the claimant to appear personally before the decision-maker, and to be provided with representation, and with interpretation where necessary. The decision would be provided in writing and would be reasoned with regard to the facts and the law; the claimant would be advised of the decision in a language which he or she understood and of the opportunities for appeal.

The Agency would ensure that its staff were drawn from across the Member States and that they had appropriate levels of knowledge and experience of refugee determination, human rights protection, and country conditions.

The Agency would establish Appeals Boards located proximate to the place or places of first instance decision-making. The members of the Appeals Boards would be independent of first-instance decision-makers, drawn from across the Member States, and have appropriate levels of knowledge and experience in refugee and human rights law. An appeal would be available on any point of law or fact, and would be conducted as a de novo hearing at which the appellant could be present and represented.

The Appeals Board would give written reasons for its decisions. The claimant would be entitled to appeal/apply for review of the Appeals Board’s decision to the European Court of Protection, which would be established independently of the Agency and with its own jurisdiction.

Decisions recognizing entitlement to refugee status, to complementary status, or to status on humanitarian grounds, whether made by the Agency, the Appeals Board, or the European Court of Protection, would be valid and effective throughout the Union.
In principle, status beneficiaries would be entitled to reside in the territory of the Member State where their status was determined. From the date of determination and/or the date of issue of the first residence permit, status beneficiaries would be entitled to the same treatment with regard to freedom of movement as EU citizens, bearing in mind, however, that a pilot project may have limited territorial scope.

While maintaining its paramount responsibility to provide protection and subject to appropriate oversight and accountability, the Agency would receive information from the police and security services of Member States on matters which may have an impact on entitlement to protection, including questions of ‘exclusion’ as set out in Article 1F of the 1951 Convention relating to the Status of Refugees or the exceptions to the principle of non-refoulement in Article 33(2).

The Agency would be guided by the principles of transparency and accountability; it would be subject to oversight and audit by the Fundamental Rights Agency.

The Agency would have the right to be consulted, for example, preparatory to the initiation of interdiction or interception operations, and before any agreement was concluded with third States dealing with readmission; in every case, its views would have to be taken into account in good faith.

Together with the European Asylum Support Office, the Agency would promote solidarity and practical co-operation among Member States with a view to ensuring that the responsibilities of protection were shared equitably, and that the views and interests of those within its mandate were acknowledged and taken into account individually and in the context of policy-making.

This is just a beginning, and there is lots of room for debate about how best to develop protection institutions consistent with the organizing values and principles of the European Union and with the Charter of Fundamental Rights. For example, and in particular, what should be the relationship between Agency decision-making and appeals bodies and national courts having jurisdiction over public acts? Should the first appeal or review lie to a national court or tribunal, and only then to the European Court of Protection? Should the European Asylum Support Office be functionally integrated into the new Agency?

Moreover, the EU regional dimension, which is the point of departure, cannot remain inward looking. Action is needed beyond the region, beyond the sea, as is engagement with countries directly involved, in one way or another, with the movement of people between States. Whatever is proposed in this context, the overarching principles of protection must remain the same – and given its mandate, the Agency would need to be a partner in the process.

There will be objectors, of course. On present form, certain countries cannot be relied on to abide by the rule of law or to favour a principled approach to the situation of refugees, asylum seekers and ‘irregular’ migrants. Given the likely difficulty of reaching agreement
among all Member States, this project might best begin as a pilot limited to those States in fact committed to a rights-based, co-operative approach.

These, then, are just a few of the challenges for us today, and tomorrow; and among them there is that of bringing policy-makers, legislators and administrators to the recognition and fulfilment of their duties to the migrant and the refugee, and to do something new and effective.
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