EUROPEAN INTEGRATION 04.03.2022 | J. Olaf Kleist

The return of 'Cold War' refugee policy

It's good that the EU has opened its border for Ukrainians. Yet it only welcomes politically desirable refugees — and not everyone seeking protection

Estimates of how many Ukrainians will seek protection in the EU from war at home run between three and nine million. Since the conflict intensified a week ago, several hundred thousand displaced people have been admitted. Lines stretch for kilometres at border crossings and arrivals are likely to exceed the number of refugees in 2015, when more than three million asylum seekers were registered in the EU in the following three years. The reception of refugees appears to be far less controversial now, especially in Eastern European countries, which are demonstrating a political and societal readiness to help like that in Germany six years ago.

The war in Ukraine has brought the EU closer together in many policy areas, causing paradigm shifts that appeared unthinkable just a little while ago – refugee policy included. But despite the current general openness to refugees, the EU appears to be putting one more nail in the coffin of universal international refugee law.

Face with the high need for protection, the EU's so-called 'Temporary Protection Directive' is being applied for the first time, granting refugees from Ukraine protection status without conducting an asylum procedure. In addition to the long-standing selective-restricted access to EU refugee protection, such '*prima facie*' recognition threatens to further undermine a refugee policy based on the rule of law.

The return of ideological refugee policy

Most recently, those seeking protection at the external borders of the EU were greeted by closed doors, push-backs, and deterrence – not only but with particular brutality at the border between Belarus and Poland. But now Poland, Hungary, and Slovenia – the very countries that had long rejected refugees – are greeting arrivals from Ukraine with open arms. Given the war and distress in Ukraine, this is important.

That said, their relatively open borders do not mark any major change in European refugee policy. Instead, the current receptiveness is accelerating a recent development of increasingly politicising refugee protection. Non-whites – African and Asian students and Afghan refugees living in Ukraine – are reportedly being turned back at border crossings. This is no surprise given these previously unwelcoming states' rejection of non-European and non-Christian refugees.

The latest developments in European refugee policy coincide with the politicisation of refugee protection.

In fact, we are observing a return to the ideological refugee policy of the Cold War. *Allied* refugees – back then, opponents of Communist countries along with some South Vietnamese; today, Afghan local staff and displaced Ukrainians – are the preferred and supposedly real political refugees. In the late 1970s, West Germany restricted asylum – a *universal* right – specifically for non-Europeans, and introduced politically discriminatory access. Only after the Cold War ended, the shunned refugees became the focus of a depoliticised, *humanitarian* right to protection – in the far away Global South.

In the EU, the right to asylum is de facto abolished

In the early 2000s, the comprehensive and human-rights-based Common European Asylum System (CEAS) guaranteed individuals the right to asylum in the EU, which represents a huge accomplishment of European integration. But members states found it a domestic and administrative burden, and increasingly undermined it by comprehensive, externalised, and violent border protection: without access, the asylum system is spared, but the right to asylum is also *de facto* abolished.

Subsequently, EU refugee policy addressed protection by ensuring individuals' access through 'safe and legal access routes' such as resettlement and humanitarian admission programmes. But that does not guarantee the legal right to asylum: Receiving countries can dictate their preferences about which refugees will be accepted and protected and which not.

Why issue another directive if refugees

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already have the right to protection in the EU?

seeking protection: It is only open for politically desirable refugees. Most of the people fleeing Asia, Africa, and the Arab world, as well as those from Eastern and South-eastern Europe, come up against Fortress Europe.

Why a new EU directive now?

Given the great number of people from Ukraine seeking sanctuary, it seems justified and appropriate for the EU to activate the 'Temporary Protection Directive' of 2001. Following the European Commission's proposal, the European Council has designated a specific group of people to be protected from deportation and granted other rights, including basic security, healthcare, and the rights to work and go to school – without any complicated procedures. Under discussion is granting three years initially – that could be extended until revoked by the European Council. Beneficiaries would also be entitled to simultaneously apply for asylum.

The directive was adopted in response to people fleeing former Yugoslavia who, as civil war refugees, had no right to asylum and as a consequence had no legal status and were merely 'tolerated'. However, the directive has never been used by EU member states, not even in 2015. One reason is because it has no mechanism for distributing refugees between EU member states. It is more likely, however, that the directive has never been applied because the gap in protection for those fleeing war and human rights violations was closed in 2004.

In the so-called 'Qualification Directive' adopted at thetime, which sets criteria for asylum seekers to be granted protection, subsidiary protection was introduced for those who are not individually persecuted as described in the Geneva Refugee Convention, but still need temporary protection from generalised violence. Thus, even without a 'Temporary Protection Directive', there is an individual legal entitlement to temporary protection in the EU.

The EU is avoiding a foreseeable crisis because of the lack of proper infrastructure to ensure legal asylum procedures, not because of the number of arrivals.

Why issue another directive if refugees already have the right to protection in the EU? For one thing, it saves people lengthy and costly asylum procedures – which also comes with fewer rights and mass accommodation. More importantly, though, the principle Eastern European host countries have no functioning asylum procedures or institutions, which is especially critical in light of the many people seeking

protection.

The EU is thus avoiding a foreseeable crisis because of the lack of proper infrastructure to ensure legal asylum procedures, not because of the number of arrivals. However, the EU is *also* promoting its policy of granting protection based on political and ideological interests rather than individual needs and guaranteed rights.

The EU's political interest

The people fleeing war in Ukraine are due to be protected in any case. However, the criteria about exactly who qualifies who does not are still being debated. While the directive applies to all those fleeing the war in Ukraine, it does not apply to refugees from other wars, such as in Syria, Yemen, or Ethiopia. In general, the application of the directive shows that the right to asylum in the EU is increasingly only granted when it is in the EU's political interest, rather than because of each individual's legal entitlement.

Given the circumstances, the EU's directive is probably the right instrument to provide fast and unbureaucratic help for the many people fleeing Ukraine. However, the situation should be used to develop the infrastructure for legal procedures in functioning asylum systems that are currently lacking. Refugees must be given the opportunity to apply for asylum even under the new directive and have the chance to stay – independent of EU decision-making.

Financial and logistical support for the Eastern European EU member states admitting refugees should be accompanied by the requirement that they create asylum systems with the new European Union Agency for Asylum (EUAA). *That* would secure refugee protection immediately and longer term. Political protection of refugees must not be made at the expense of the law. The right to asylum must be legally guaranteed and not just part of a self-serving refugee policy. This is particularly important when the democratic EU is seeking to distance itself from an authoritarian and arbitrary regime. Now is the time to protect basic rights and the rule of law *especially for refugees* – no matter how hard that may be.



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