

## **Opening address at the Conference of the European Chapter IARMJ**

*Stefan Maier, Head of Political and Legal Support Unit, Representation for EU Affairs*

### **“REFUGEE AND MIGRATION LAW JUDGES - LOYAL TO WHOM OR LOYAL TO WHAT?”**

**11 September 2022**

Brdo Congress Centre (Predoslje), Slovenia

Your Honours,

Ladies and Gentlemen,

Let me thank you for inviting me to this important discussion at a time of multiple crises, with the war in Ukraine entering its sixth month, and as the Commission’s proposed Pact on Migration and Asylum continues to be discussed amongst EU Member States (MS).

Firstly, allow me to reiterate: the right to seek asylum is a fundamental human right. It must be preserved, especially in extraordinary situations or times of emergency. The EU is a Union based on the rule of law, but we have too often seen divisive and politicized positions and practices that seek to evade asylum obligations. Mixed movements of refugees and migrants pose challenges to asylum systems. However, these situations never justify responses that run counter to international law and negate asylum obligations.<sup>1</sup>

My contribution will briefly highlight four pressing challenges EU MS have been recently confronted with and highlight some possible solutions in line with the fundamental values of the Union.

#### **1. Ukraine – emergence of ‘two tier’ asylum system and non-discrimination provisions and principles, effective access to rights for all refugees.**

Turning first to Ukraine. Since the onset of the Russian invasion, one-third of Ukrainians have been forced from their homes. This is one of the largest human displacement crises in the world today. As of end August 2022, around 7 million refugees from Ukraine are estimated to be across Europe, of whom almost 4 million have registered for Temporary Protection or similar national protection schemes in Europe.<sup>2</sup>

The decision by the EU to offer Temporary Protection to refugees fleeing Ukraine is welcome. It provides immediate protection in the EU for Ukrainians, third country nationals and stateless people with refugee or permanent residence status in Ukraine. At the same time, it guarantees a swift access to rights and services.

We have been deeply concerned by rising xenophobia and discrimination against refugees and asylum-seekers in recent years, so we welcome the tremendous reception and solidarity exhibited towards refugees over the past six months.

We commend MS and the EU for their solidarity, and hope this might inspire some reflections as well as a shift from the toxic narratives and policies we have sadly too often seen in various contexts.

From UNHCR’s perspective, as the custodian of the Refugee Convention, we continue to advocate for access to asylum for all people in need of international protection. In this regard, we are concerned by reports of discrimination and a ‘two tier’ asylum system that prioritises

---

<sup>1</sup> Gonzalo Vargas Llosa, ‘UNHCR issues recommendations to the 2022 French and Czech Presidencies of the Council of the EU’, 10 January 2022, <https://www.unhcr.org/news/press/2022/1/61dc1f074/unhcr-issues-recommendations-2022-french-czech-presidencies-council-eu.html>

<sup>2</sup> UNHCR, ‘Operational Data Portal – Ukraine Refugee Situation’, <https://data.unhcr.org/en/situations/ukraine>

some groups over others. The respect for refugee rights must never be arbitrary or discretionary, and we encourage Member States to find a fair, sustainable system to manage the arrival of people seeking international protection – no matter where they come from.

## **2. Pushbacks and Monitoring mechanisms – rule of law and human rights violations at the borders**

I will now turn to a key concern on Europe's shores and borders.

The death toll of people seeking safety and opportunity in Europe has seen a steep rise. Last year, some 3,231 were recorded as dead or missing at sea in the Mediterranean and the northwest Atlantic.<sup>3</sup>

The Ukraine emergency has shown that Europe can welcome refugees in a humane and sustainable manner. This is why, by contrast, I would next like to focus on continued concerns over systematic pushbacks at some of the EU's external borders.

*Non-refoulement* is a cardinal protection principle, which is central to the realization of the right to seek asylum. It is a well-established obligation in international and European human rights law and constitutes a norm of customary international law.<sup>4</sup>

The prohibition of *refoulement* applies to any form of forcible removal, including deportation, expulsion, informal transfers, pushback practices and non-admission at the border. UNHCR underlines that States must admit asylum-seekers to their territory at least on a temporary basis as the right to seek asylum and the principle of *non-refoulement* would otherwise be rendered meaningless.<sup>5</sup>

The principle of *non-refoulement* applies wherever a state exercises jurisdiction, including in the context of Search and Rescue (SAR) operations. As underlined by the ECtHR in the landmark *Hirsi* judgment, States must not summarily turn back rescued persons to a country of departure, where doing so would deny them a fair opportunity to seek asylum or subject them to a risk of serious harm.

UNHCR considers it important to recall that *non-refoulement* cannot be derogated from even in times of emergency. Neither the 1951 Convention nor EU asylum law provide a legal basis for the suspension of the reception of asylum applications.<sup>6</sup>

In this context, UNHCR supports the establishment of Independent National Monitoring Mechanisms (INMM) in all EU MS, as proposed in the Pact. Progress in fulfilling the European Border and Coast Guard Agency's mandate in hiring Fundamental Rights Monitors is particularly welcome and follow-up of reported human rights violations and adoption of remedial actions is encouraged in view of preventing their re-occurrence.

## **3. Instrumentalisation**

With these numerous challenges, the EU Institutions have made multiple proposals on how to manage these exceptional times.

For example, in the framework of the new Pact, last December, the European Commission (EC) introduced a Proposal for a Regulation on Situations of Instrumentalisation in the Field

---

<sup>3</sup> UNHCR, 'UNHCR data visualization on Mediterranean crossings charts rising death toll and tragedy at sea', 10 June 2022, <https://www.unhcr.org/neu/81177-unhcr-data-visualization-on-mediterranean-crossings-charts-rising-death-toll-and-tragedy-at-sea.html>

<sup>4</sup> UNHCR, Submission in the case of SAA and Others v Greece before the European Court of Human Rights, 2022, paras 3.2.1

<sup>5</sup> *Ibid.*, paras 3.2.2

<sup>6</sup> Background: While the ECHR allows derogations from certain rights in exceptional circumstances, it explicitly precludes derogations from Article 3 ECHR (Prohibition from Torture).

of Migration and Asylum following the situation on the Belarusian border last summer. The Council of the EU, led by the Czech Council Presidency until December 2022, has reopened the file for discussion among EU MS.

The proposal defines ‘instrumentalisation of migrants’ as the use of migratory flows by a third country as a tool for political purposes to destabilise the EU and its MS. The aim of this proposal is to provide a clear framework, offering operational rules that allow for the adaptation of common procedures in order to effectively react to such complex situations.

UNHCR welcomes the EC’s statement that these rules aim to cater for such circumstances ‘*without undermining the right to asylum or the principle of non-refoulement while also ensuring the protection of fundamental rights of people instrumentalised*’.

In this respect, as recently reminded by the CJEU in the *M.A.* case, it must be restated that the right to seek asylum should not depend on the mode of arrival to the territory of EU MS and that the EU Charter applies whenever States implement EU law, including in times of emergency.

#### **4. Externalisation dimension**

Finally, turning to the global perspective.

Global displacement has reached a new, unsettling record. By the end of 2021, those displaced by war, violence, persecution, and human rights abuses stood at 89.3 million, well over double the figure of 10 years ago.<sup>7</sup> We should not forget other serious displacement situations which remain unresolved in the face of great humanitarian needs, including Afghanistan, Venezuela, and many others.

In this context, UNHCR urges EU MS to share responsibility for refugees and asylum seekers, in the spirit of the Global Compact on Refugees, rather than shifting it to countries outside the EU with less capacity.

We are very concerned by the considerations of some governments to transfer asylum-seekers to other countries outside Europe for the purpose of processing their applications for international protection.

The forcible transfer of asylum-seekers does not comply with the requirements of Article 31 of the Refugee Convention. This article prohibits the penalisation of asylum-seekers or refugees on account of their irregular entry or presence. We deem these externalisation efforts to be inconsistent with the 1951 Convention, which affirms that arrangements between States to provide refugee protection must enhance responsibility sharing and be consistent with the widest possible exercise of the fundamental rights and freedoms of asylum-seekers and refugees.

These initiatives inevitably fail to provide protection for those most in need of it and increase the risk of refugees resorting to more dangerous journeys. These proposals also gravely undermine the global international refugee system that has saved millions of lives in recent decades and sends a very dangerous signal to those countries hosting the vast majority of the world’s refugees.

Your Honours,

Ladies and Gentlemen,

Thank you for your time and I hope that this introduction has provided food for thought, and UNHCR thanks the important work you do as Judges in upholding international refugee law and protecting people most in need.

---

<sup>7</sup> UNHCR, ‘Global Trends Report 2021’, June 2022, <https://www.unhcr.org/news/press/2022/6/62a9d2b04/unhcr-global-displacement-hits-record-capping-decade-long-rising-trend.html>