

# POLICY BRIEF

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# MIGRATION

## OVERVIEW

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Day by day, there are reports of refugees trying to enter the EU. They are fleeing in the hope of having a better life and escaping war and prosecution. In 2015, the refugee crisis was an escalation which drew the 27 member states of the EU into tension. As of 2022, particularly those countries at the EU's external borders are charged with the responsibility of the admission and care of incoming refugees. Although discussions always seem to be cast as an inner-European problem, the real drama in the refugee policy takes place at the external borders of the EU - we refer here mainly to the Polish and Greek situation.

Poland and Greece are not only failing to comply with their human rights obligations, but they are also not providing migrants with basic humanitarian help - a gap, which is filled by the local NGOs, who are later prosecuted for facilitating human trafficking. Unfortunately, the EU seems to see asylum seekers as a danger, so this "problem" is frequently outsourced to third countries, such as the EU-Turkey agreement of 2016. However, the so-called problem is not resolved, but simply relocated, hence countries such as Turkey can put the EU under increasing pressure. A similar dispute arose in the summer of 2021, when the Belarusian regime transfer migrants to the EU as a response to the imposed sanctions in the wake of President Lukashenko's falsified election resulted.

### KEY POINTS:

- NGOs and civil society responsible and handling migration issues
- The main problem – the reaction of the relevant countries' authorities and their noncompliance with the international human rights obligations
- UN and Europe are breaking their own Values

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We propose four recommendations to try to mitigate the problems Europe faces in terms of migration: First, all **member states should provide access to fair asylum procedures** respecting their human rights law obligations and avoid relying on the permissive domestic laws, which often undermine human rights standards. We suggest that all member states stick to the value of solidarity within the EU. Therefore, **the Dublin regulation must be renewed** to include the solidarity perspective and to ensure the fair distribution of asylum-seekers among the EU dealing with the unbearable burden on countries at the EU's external borders. We are calling for a **narrative shift from refugees being framed as a security threat for the EU to them being an opportunity** for the community to deprive these third countries of a tool to blackmail the EU for the benefits they demand. The EU should work to better **appreciate the contributions being made by non-governmental and humanitarian aid organizations** in assisting refugees rather than prosecute them.

## ENDING “OUT OF SIGHT OUT OF MIND” EU POLICY REGARDING MIGRATION

**Introduction:** The development of the field of European migration and asylum policy can generally be divided into three phases: The *first phase* stretched from 1957 to 1990, when the member states of the **European Economic Community (EEC) coordinated migration and asylum policy** in terms of the EEC's internal security, which eventually led to the decision of the Schengen Agreement in 1985 and thus to a common external border. The *second phase* of the development of this policy field started with the **Dublin Convention** in 1990. The Schengen Agreement thus required a new form of cooperation among member states to define who was ultimately responsible for migrants and asylum-seekers. Thereby, the Dublin Convention focused on the responsibilities of EU members and established the logic of the country of first entry, which assigns responsibility to those member states where asylum-seekers first enter the Schengen area. The 1992 Maastricht Treaty attempted to create an institutional framework for this policy field and the European Commission grew increasingly involved in the field of migration. The *third phase* commenced in 1999 with the Treaty of Amsterdam, which had envisaged the communitarization of migration policy and the related establishment of a **Common European Asylum System (CEAS)**. It also created common minimum standards of the asylum procedure, as well as a uniform definition of asylum-seekers, protection guidelines, and refugee status. In the 2009 finalization of the **Lisbon Treaty**, one of the largest agreements was signed at the European level. Besides the creation of a common system with uniform status and procedures for asylum-seekers, the standards for reception conditions and the Dublin Convention, i.e., the responsibilities of individual member states, were adopted as legally binding. With the **Stockholm Program** of 2010-2014, which was launched within the Lisbon Treaty, the solidarity of the individual member states was demanded of those member states that are under greater pressure from migration flows, although not as legally binding. The **Border and Coast Guard Agency, Frontex**, which was founded in 2004 to support “the EU countries and the associated Schengen states in the management of their external borders,” is also considered an EU instrument to “harmonize border controls in the EU. [It] facilitates cooperation between border authorities in different EU countries by providing technical assistance and expertise” (European Union 2022). Criticism is repeatedly voiced that with the creation of Frontex as a legal instrument for the protection of the Schengen area, the EU has created a regime of isolation that prevents the right to asylum. Ever since the so-called refugee crisis in 2015, it has been clear that the EU's asylum and migration policy has failed. Unfortunately, however, it seems that the EU now also has a blind spot in this field, so that time and again autocratic regimes can flaunt the EU's vulnerability.

**Problem:** National Human Rights Institutions, international organizations, and civil society organizations regularly report cases of **human rights violations at the land and sea borders of the European Union**. According to these reports, retaliatory measures often include excessive use of force by the authorities of EU Member States and EU agencies, as well as the degrading and inhuman treatment of migrants and their arbitrary detention. Since 2015, the handling of refugee and migration movements has been high on the agenda of the EU and its member states. Urgently needed reforms of the CEAS and European migration policies are proving difficult because many **EU member states rely exclusively on restrictions for domestic political expediency**. The external dimensions of EU migration policies are becoming increasingly important in light of the difficulties of achieving internal change. Seeking asylum is a fundamental human right, safeguarded by both EU and international refugee law, including the 1951 Refugee Convention to which Poland is a signatory. **Poland's border policy violates the non-refoulement principle and the prohibition of collective expulsion under international human rights law** (namely, under Article 3 and Article 4 Protocol No. 4 to the ECHR). If a state does not offer genuine and effective means for asylum-seekers to lodge their applications, that state violates their duty to assess each case individually under Art. 3 and Art. 4 Prot. 4 ECHR. Migrants and refugees trying to reach Europe are taking enormous risks, including abuse at the hands of smugglers, freezing temperatures in winter, and negotiating unknown and dangerous terrain such as forests and fast-flowing rivers. This is an often-terrifying situation where robbery, injuries, and even death are the price being paid. 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**. This means that the human rights of all persons at international borders must be respected in the pursuit of border control, law enforcement, and other state objectives, regardless of which authorities perform border governance measures and where such measures take place.

In principle, the responsibility for controlling external borders lies with EU member states which, in performing this function, also act in the common interest of all member states and the Union. The experiences of the ongoing refugee crisis in Europe highlight the **failures of the current model of having the EU and its member states share responsibility for asylum policies**. Nevertheless, states have greater flexibility in their actions due to the advisory nature of the European provisions. What is the consequence: whilst states have the right to control their borders and ensure security, this cannot come at the expense of human rights. In this sense, there should be incentives for all EU member states to advance toward truly European asylum policies.

The **EU still requires a mechanism to allocate processing responsibility between member states**, preferably in accordance with the precepts of solidarity and fair sharing of responsibility under Article 80 TFEU. The legislative document that, through its effects, adversely affects the concept of solidarity is the **Dublin III Regulation**, which aims to determine the member state responsible for examining asylum applications. Have the discussions of the candidate countries' involvement in the Dublin system contributed to the awareness on the potential prospective solidarity obligations in the field of asylum and migration? Not necessarily. Namely, the Dublin III Regulation contains a **solidarity paradox** – regardless of the regulation's declaratory reliance on solidarity, it has anti-solidarity effects.

In 2021, Polish police detained a bus full of activists of the German Seebrücke Deutschland movement and the LeaveNoOneBehind association, who were planning to provide humanitarian aid to migrants. Law enforcement officers stopped the bus in Poland, a few kilometers from the Belarusian border. Among the items were winter shoes and blankets. The participants of Seebrücke Deutschland and LeaveNoOneBehind, according to the Polish side, wanted to take the refugees to German territory. The German Interior Ministry warned of possible “criminal consequences” due to such actions. It is one of the examples of the fact that non-governmental organizations face serious roadblocks. People are stuck in a forest border region in need of medical and humanitarian assistance, where they face sub-zero temperatures. In the aforementioned instance, there were numerous first-hand reports of violence, ranging from theft and destruction of people's belongings to intimidation, deliberate violence, and physical attacks on both sides of the border. Doctors witnessed injuries that corroborate these reports. People are attacked and beaten by border guards, and yet government officials continue to allow the practice of moving people between borders, knowing that such ill-treatment persists. The teams of NGOs tried to work in Belarus, Lithuania, and Poland in response to the crisis, but were unable to access the border areas of any of the three countries, despite repeated requests to the relevant authorities.

**Since humanitarian organizations, non-governmental organizations and volunteer groups are blocked from accessing the border zone** in Poland, residents of the restricted areas are largely forced to provide assistance to people on the move. According to the MFS Coordinator Frauke Ossig, not only the organizations were banned from entering the restricted area, but also that “some of the volunteers were vilified and intimidated, and their property was destroyed in an attempt to prevent them from providing support.” While in recent years there has been an **increase in cases of charges against activists for human trafficking and espionage**, especially on the Greek islands, it can be observed that the **work of NGOs and civil society is increasingly restricted**. This is a problem mainly because work in the field of migration is mostly carried out by NGOs and civil society organizations and the responsibility of the official authorities is being handed over.

**“Saving lives is not a crime!”** The current policy of restricting access to aid organizations and volunteer groups may lead to even more migrants and refugees. This policy is another example of how the EU deliberately creates unsafe conditions for people seeking asylum at its borders. The trial of two dozen humanitarian workers was postponed in Greece, and the defendants were prosecuted for their work with refugees on the island of Lesbos. Sean Binder, a German citizen who grew up in Ireland and is a rescue diver, is among the accused and was present in court.

Sarah Martini, a Syrian swimmer who was hailed as a hero for rescuing refugees in danger at sea, is another defendant. They each face up to eight years in prison for espionage and disclosure of state secrets and 25 years in prison on charges including smuggling and money laundering. Along with other Irish politicians, Grace O'Sullivan, an Irish MEP, called on Greek and EU authorities to drop the charges. “We support those who save lives,” she said. The influx of migrants and asylum-seekers is often used by third countries (for instance, Belarus and Turkey) as a tool to extract benefits for themselves. At the end of February 2020, migrants began to gather at the Greek-Turkish border after Turkish President Erdogan announced that he would no longer “block” refugees and migrants “access to the border” and opened the border with Greece. Belarusian President Lukashenko facilitated the flow of migrants and asylum-seekers in retaliation to the EU sanctions imposed for the grave human rights violations of the Belarusian authorities.

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The emerging shift in focus in the EU’s refugee policy also contains **risks for refugee protection at the global level**. The design of the global refugee system, which is based on international law and protected by the UNHCR, depends not only on the contents of the Geneva Convention on Refugees but also on state practice. European states used to be important role models in this regard, which served as a basis for their credibility in promoting refugee protection in other countries. If that status is lost, the implications will reach beyond Europe. Potentially, they could even trigger onward migration of refugees from their country of first reception into the EU.

**Recommendations:** We have three recommendations that could mitigate the problems mentioned before.

1. **All member states should provide access to fair asylum procedures in accordance with their human rights and international law obligations.** Poland should not use a state of emergency excuse for not complying with the obligation to accept asylum applications at the EU external border. In this sense, we suggest an external investigation at the Belarus-Polish border to potentially hold Polish authorities accountable. In the case of Greece, all reported practices of illegal collective expulsion should also be examined by an external investigation. Instead of acting according to the existing legal obligations, the frames and measures that were established by the EU, for example the EU-Turkey Agreement 2016, are worsening the situation rather than solving it sustainably. If the access to the asylum procedure is guaranteed, refugees also have the opportunity for safe passage into the EU, thus the issue of actual human rights traffickers and risky ways to cross the EU external border are resolved.
2. We suggest that all **member states stick to the value of solidarity within the EU.** For all member states it is expected that they share the burden in solidarity and mutual assistance. There are tensions between EU member states on how to deal with the migration issue, especially after the 2015 failure of EU migration policy. The legally-binding framework inaugurated by the Dublin regulation only contributes to these tensions. Therefore, the Dublin framework must be renewed in order to include the solidarity perspective to ensure the fair distribution of asylum-seekers around the EU dealing with the unbearable burden on the countries at the EU external borders.
3. We suggest **the discourse be shifted from the narrative of border protection and potential security risks to a novel chance to tackle the demographic development and an opportunity to fill the gaps in the EU labor market.**
4. The EU should **value the work of activists and NGOs in this policy field.** Especially in the current refugee crisis with refugees from Ukraine, we have seen in countries like Germany that they are networked nationwide and can help the state here. The criminalization of aid should be valued much more as necessary humanitarian aid.

Countries such as Turkey who create the conditions to facilitate the migration flow later bargain the benefits for resolving the problem, they themselves created. These practices have already been reported several times by different international organizations like the UNHCR. A possible instrument for dealing with this issue in third countries is economic sanctions – but in the case of Belarus, sanctions were one of the reasons why the regime pushed asylum-seekers to the EU external border. A shift in the narrative from the refugees being a security threat for the EU to them being an opportunity for the EU will deprive these third countries of a tool to blackmail the EU to get the benefits they request.

Under EU law, border surveillance activities must be implemented in full compliance with fundamental rights. It is possible to manage borders and address security concerns, while implementing fair, humane, and efficient policies towards asylum-seekers that are in line with States' obligations under international human rights and refugee law including the 1951 Convention as well as European law. What is happening at European borders is legally and morally unacceptable and must stop. Protecting human life, human rights, and dignity must remain our shared priority. Progress on preventing human rights violations at borders as well as the establishment of truly independent national monitoring mechanisms to ensure reporting and independent investigation of incidents are urgently needed. States ought to implement their international legal obligations in good faith and respect to protect human rights in the governance of their borders.

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