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EU Asylum Policy: In Search of Solidarity and Access to Protection

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Abstract

The European asylum system is a relatively advanced regional protection framework, in both legislative and policy terms. However, that same system lacks a mechanism to distribute responsibility fairly among the Member States, as well as legal avenues by which persons in need of protection can access it. To the backdrop of the Syrian crisis and the rising toll of migrant deaths in the Mediterranean Sea, this brief analyses achievements and shortcoming in the area of solidarity and fair-sharing of responsibility between Member States, as well as the external dimension of EU's common asylum system. In view of the adoption by the European Commission of a "European Agenda on Migration", it offers tangible ideas for EU policy action that could meaningfully develop this policy and help address the humanitarian tragedy on the EU's borders.

Key words: European asylum Policy; Syrian crisis; Solidarity; Legal entry channels; Refugee resettlement; Humanitarian visas

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1. State of play

Growing numbers of the forcibly displaced

Numerous crises and conflicts worldwide have forced more people from their homes, in the last years and months, than at any time in the last two decades¹. The Syrian conflict has, for example, triggered the world's largest humanitarian crisis since World War II, leading 3.9 million refugees to flee and leaving an estimated 12.2 million persons in need of humanitarian assistance inside Syria². At the same time, significant numbers have had to flee other countries including Iraq, Afghanistan and Eritrea in order to seek asylum³.

The vast majority of those forcibly displaced outside their country of origin or residence remain in neighboring countries. The Syrian crisis is a telling example in this respect. Countries bordering Syria are coming close to saturation, particularly Lebanon, which hosts the largest *per capita* refugee population in the world with almost 1.2 million Syria refugees⁴. It has to be remembered that the Syrian refugee crisis comes just after the Iraqi refugee crisis of 2006-2009, which had displaced

around two million Iraqi citizens towards the very same countries: Syria, Jordan, Lebanon, Turkey and Egypt⁵.

It is against this backdrop that the relative rise in asylum applications to the EU28 and the EU's advancement in the creation of a common asylum system, as well as its role as a global protection actor should be assessed.

Is a Common European Asylum System in place?

The incremental development of a CEAS has been agreed since the Treaty of Amsterdam and the Tampere conclusions of 1999⁷. The first stage of development revolved around efforts at legal harmonization on the basis of shared minimum standards. However, a common asylum procedure and a uniform status valid throughout the EU were seen as the end objective. It became apparent that legal harmonization alone would not be enough to bring about this result. Therefore, the development of other elements, and most notably, practical cooperation and enhanced solidarity came up.

Statement by António Guterres, United Nations High Commissioner for Refugees, EU Stakeholders Conference: 'An open and safe Europe -- what next?', 29 January 2014.

European Commission, DG ECHO, Factsheet: Syria Crisis, April 2015. The factsheet contains facts and figures as of 7 Apr 2015.

³ See for example, UNHCR, Asylum Trends, First Half 2014: Levels and Trends in Industrialised Countries, October 2014.

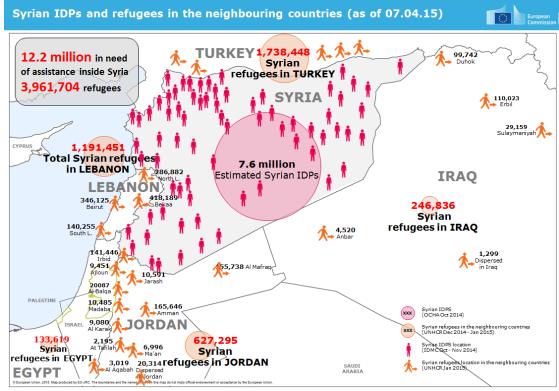
⁴ European Commission, DG ECHO Factsheet (fn 2).

P. Fargues, Europe Must Take on its Share of the Syrian Refugee Burden, But How?, MPC Policy Brief, February 2014, at 3.

The latest figures released by EUROSTAT reveal that the number of asylum seekers rose to 435,000 in 2013 and 626,000 in 2014; this was the highest number of asylum applicants within the EU since the peak in 1992. See EURO STAT, Asylum Statistics, March 2015, accessible at: http://ec.europa.eu/eurostat/statistics-explained/index.php/Asy lum_statistics

⁷ Tampere European Council, Presidency Conclusions, 15-16 October 1999.





(Source: European Union, 2015)

It was gradually recognized that there were a number of advantages in joining forces in the asylum area. There was, of course, the rather 'inward-focused' motivation of establishing a common asylum system in order to limit secondary movements of protection seekers that had reached EU territory. But there were, also, more 'outward looking goals'. Notably, these were: coordinating action in order to have a strategic impact externally; collaborating with third countries in the management of migration flows; and, less prominently, boosting the possibilities of legal access to the EU for international protection seekers.

Examined macroscopically, the CEAS is an advanced regional protection framework, both legislatively and policy-wise, that has the potential to influence the international refugee protection regime. Member States have sought to devise concrete

mechanisms to allocate responsibility and they have elaborated detailed norms in areas that are not covered by the 1951 Refugee Convention, such as asylum procedures. They possess an institution, the Court of Justice of the EU, which is tasked with authoritatively interpreting the common norms, in an area where there is no 'international refugee Court'. They have managed to move from ad-hoc support and exchanges of good practice to the institutionalization of practical cooperation efforts, by creating an EU agency. Finally, they have begun to coordinate their actions externally in an effort to manage, as much as possible, migration flows and to build protection capacity in third countries.

Nevertheless, the EU's asylum system is riddled with problems that hold back its development. First of all, the responsibility-allocation mechanism that has been devised fails to share responsibility



equitably between the Member States; it also largely disregards the realities faced by protection seekers and their preferences. More broadly, no objective discussion of what is a fair share of responsibility has ever taken place. This creates disincentives: on the one hand, for Member States to respect the obligations they have undertaken legislatively and, on the other, for protection seekers to abide by the rules, which do not take into account their links to specific Member States. Beyond the legislative and policy framework, the differentiated level of economic development between Member States, the discrepancies in their social assistance systems and the varying levels of investment in their asylum processing and reception systems, have led to widely diverging recognition rates and reception conditions. This has undercut the objective of curbing secondary movements between Member States; on the contrary it has fuelled them.

Finally, the EU's external asylum dimension remains underdeveloped and is disproportionately focused on capacity building, while offering meagre opportunities for legal entry to protection seekers. On the contrary, the various measures the EU has taken as part of its external border control or visa policies have stifled access to protection and have led asylum seekers to risk their lives in order to reach EU territory. The impact of these policy choices is witnessed most vividly in the loss of life in the waters of the Mediterranean. Mediterranean crossings are not new; however, there an ever-increasing number of deaths in conjunction with a record number of migrant crossings⁸.

2. Why is reform still necessary?

A number of challenges remain unanswered by the *status quo*. Even the mention of the word (further) reform in this policy area is politically sensitive. Member States are recovering from negotiation fatigue after what turned out to be long-drawn out and controversial legislative negotiations. Nevertheless, our brief looks more closely at the issues of solidarity and fair-sharing of responsibility, as well as that of access to protection. We do so to substantiate why policy and legislative action at the EU level must be undertaken in order for the EU to live up to current and future protection challenges.

Solidarity and responsibility but still no fair-sharing

To date, it is not clear what the scope of obligations of Member States under the solidarity and fair sharing of responsibility principle is⁹. EU institutions in different policy declarations have avoided pronouncing themselves on this issue and have, instead, adopted the so-called 'tool-box' approach, listing different measures that operationalize solidarity¹⁰.

Most measures are of an operational/technical or financial nature. Examples of 'solidarity as operational support' are the engagement of the European Asylum Support Office (EASO) in assisting Member States that face particular pressures on their asylum systems. The agency is called to systematically identify, collect and analyze

⁸ See P. Fargues and S. Bonfanti, When the best option is a leaky boat: why migrants risk their lives crossing the Mediterranean and what Europe is doing about it, MPC Brief 2014/5 and P. Fargues and A. Di Bartholomeo, Drowned Europe, MPC Brief 2014/5

The wording concerning this principle was strengthened by the Lisbon Treaty; Article 80 TFEU now reads as follows: '[t]he policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle'.

See European Commission, Communication on Enhanced Intra-EU Solidarity in the Field of Asylum: An EU Agenda for Better Responsibility-Sharing and More Mutual Trust, COM(2011) 835 final; European Parliament, Resolution of 11 September 2012 on Enhanced Intra-EU Solidarity in the Field of Asylum, (2012/2032(INI)); Council of the European Union, Council Conclusions on a Common Framework for Genuine and Practical Solidarity Towards Member States Facing Particular Pressures on their Asylum Systems, Including Through Mixed Migration Flows, Brussels, 3151st Justice and Home Affairs Council Meeting, March 2012.



information regarding various aspects of national asylum systems under particular pressure: the agency fulfills this through the 'early warning and preparedness system' it has set up¹¹. It also supports actions on the ground, including the deployment of seconded national experts in the form of 'asylum support teams'¹².

The agency carries within it great potential and certainly aims at fulfilling existing needs. EASO's potential is however currently limited by a number of factors. First, budgetary constraints; the agency is expected to undertake its activities with a budget of around EUR 15,7 million, at a time when FRONTEX has a draft budget of around EUR 114 million for the same year¹³. The deployment of national personnel for support missions is also dependent on the will of the Member States' national administrations to make them available and agree on their deployment.

Moreover, the agency is restrained by its own mandate. Some examples are the limitations regarding its role in joint or common processing. According to its Regulation it has 'no powers in relation to the taking of decisions by Member States' asylum authorities on individual applications for international protection'¹⁴. Likewise its technical documents and guidelines should not purport 'to give instructions to Member States about the grant or refusal of applications for international protection'¹⁵.

Financially, solidarity is expressed through the Asylum, Migration and Integration Fund the following (Regulation EU Np 516/2014). The

amounts are distributed taking into account certain indicators; however, they are calculated on the basis of absolute rather than relative figures and, therefore, fail to take into account the perceived 'burden' of each Member State in running an asylum system. In addition, the Fund is conceived in such a way that the current amount of EU funding only covers a small percentage of the costs actually incurred by each Member State in this area.

Physical solidarity, meaning the intra-EU transfer of asylum seekers or protected persons between EU Member States has been extremely limited to date. It has been applied on a small scale through *adhoc* and voluntary initiatives that were undertaken exclusively in Malta. 227 individuals, mainly protection beneficiaries but also asylum seekers, were relocated from Malta in 2011 and 356 places were pledged for the second phase of the project in 2012¹⁶. Intra-EU relocation initiatives have been limited to such an extent that they can be viewed as political tokens rather than as fully-fledged operations.

The EU's efforts in the field of solidarity are undercut by the fact that there has never been an objective assessment of what would be an equitable share of responsibility for each Member State. Therefore, any claim by a Member States that it is 'overburdened' cannot be objectively substantiated, and raises the suspicion among the others, who are also called on to carry part of the protection responsibility. This has led EU institutions to highlight that 'it is fundamental to increase trust to strengthen solidarity' It has been observed that full compliance with asylum

See Regulation (EU) No.439/2010 [EASO Regulation], Article 9 and EASO, EASO Work programme 2015, at 26.

¹² See EASO Regulation, Articles 10 and Chapter 3.

See FRONTEX, Frontex Program of Work 2015, 2014.

¹⁴ See EASO Regulation, Article 2(6).

¹⁵ See EASO Regulation, Article 12(2).

¹⁶ EASO, EASO Fact Finding Report on Intra-EU Relocation Activities from Malta, 2012, at p.4.

¹⁷ COM(2011)835, (fn 10), at 2.



obligations may not be realistic or meaningful as a precondition for solidarity¹⁸. Indeed, the necessity for solidarity measures normally arises from the inability of a particular Member State to fulfil obligations envisaged by CEAS instruments. Through an objective assessment of the protection capacity of each Member State, 'inability to comply' with one's obligations would clearly be distinguished from 'unwillingness to comply'. This would, thus, address the current tensions between Member States in terms of distributing responsibilities.

External Dimension or Europe's closed doors

To date, two types of initiatives concerning the system's external dimension have been operationalized: Regional Protection Programs (RPPs) and resettlement or humanitarian admission programs. EASO's mandate also contains a component for supporting Member States in their actions in the external dimension. This includes, for example, refugee resettlement, as well as a limited mandate to make exchanges with competent authorities of third states in technical matters and the implementation of regional protection programs. The relevant issue of legal entry channels to the EU has been discussed often at policy level, but no jointly coordinated operations have taken place. Member States have individually operated, for limited periods of time, variants of what might be called 'protected entry procedures'19, or legal entry channels for protection seekers to the EU. With the growing numbers of life loss in the Mediterranean, unofficial policy discussions on legal entry channels have been intensifying.

Despite the underdevelopment of its external dimension, it is better understood that Europe cannot build a truly comprehensive asylum system in isolation. Policy-wise this led, first of all, to the inclusion, in 2011, of international protection in EU's 'Global Approach to Migration and Mobility'²⁰. Moreover, the Asylum, Migration and Integration Fund now includes financing for Regional Protection Programs as part of Union actions²¹, whereas they were previously funded by external aid instruments. The 'Ypres Guidelines' also mentioned that, as part of the development of the EU asylum policy, a focus should be placed on enhancing Regional Protection Programmes and to increasing contributions to global resettlement efforts. This position depended, in part, on the protracted crisis in Syria²².

Regional Protection Programs consist of a 'tool box' that would be mainly protection-oriented, however, cooperation on legal migration, actions on migration management and return were also to be included in the range of measures financed by the EU²³. RPPs have taken the form of projects implemented primarily by UNHCR, together with local NGOs; in practice at country level all these projects have been part of broader UNHCR operations with funding

¹⁸ M. Garlick, MPI Policy Brief: Strengthening refugee protection and meeting challenges: The European Union's Next Steps on Asylum, 2014, at 5.

There is no EU definition for this term of art. A study undertaken for the European Commission, defines protected entry procedures as '[a]n overarching concept for arrangements allowing a non-national to approach the potential host State outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final'; see G. Noll, J. Fagerlund and F. Liebaut, Study for the European Commission: On the Feasibility of Processing Asylum Claims Outside the EU against the Background of the Common European Asylum System and The Goal of a Common Asylum Procedure (European Commission 2002) at 20.

²⁰ See COM(2011) 743 final.

See AMIF Regulation, Article 20. According to the same article, Union actions are 'transnational actions or actions of particular interest to the Union' that are initiated by the Commission.

See European Council Conclusions – 26/27 June 2014, doc. no. EUCO 79/14.

²³ Ibid, at 18-19.

²⁴ ECRE, Regional Protection Programmes: an effective policy tool?, January 2015, at 8.



from the EC and from different countries²⁴.

The first two pilot RPPs have been implemented since 2007 in the Great Lakes area of Africa (Tanzania) and the Western NIS (Ukraine, Moldova, Belarus). Their evaluation in 2009 concluded that they were a successful mechanism to provide more protection for refugees close to regions of origin. However, the evaluators went on to say, their impact was limited due to limited flexibility, funding, visibility and coordination with other EU humanitarian and development policies, and insufficient engagement of third countries²⁵. Gradually, the programs gained more prominence and were introduced into further regions. In 2010, as well as the first two programs, the Commission introduced the following: the implementation of an RPP in the Horn of Africa Region (Kenya, Djibouti, and Yemen) started in September 2011²⁶, and an RPP in Northeastern Africa (covering Egypt, Libya and Tunisia but essentially operational in Egypt and Tunisia) started in December 2011²⁷.

Finally, in response to the Syrian crisis, the EU launched a Regional Development and Protection Programme for refugees and host communities in Lebanon, Jordan and Iraq²⁸, which has been operational since July 2014. This is funded partly by the EC and by MS and is implemented by governments, UN agencies and civil society²⁹. The innovative element of the latter is that it targets

not only Syrian refugees, but also vulnerable host communities enhancing their economic opportunities and livelihood capacity.

Regarding resettlement, more concrete policy actions started in 2009 when the European Commission launched a Communication on the establishment of a joint EU resettlement program³⁰. The main guiding principles envisaged were: voluntary participation of Member States; adaptability through the adoption of annual priorities; enlargement of the scope of resettlement activity in the EU and of the number of Member States involved in the process; as well as the participation of all relevant actors such as UNHCR and civil society³¹. On this basis, after difficult negotiations, Member States amended the European Funds in 2012 in order to operationalize the program.

This effort was consolidated under the Asylum, Migration and Integration Fund which seeks to enhance refugee resettlement in the following manner: providing targeted assistance in the form of financial incentives (lump sums) for each resettled person and additional financial assistance when individuals under the common Union resettlement priorities are resettled³². Despite the fact that more Member States have been activated since the launch of the program, the overall numbers of resettled refugees remain modest.

European Commission, First Annual Report on Immigration and Asylum (2009), COM(2010)214 final, 6 May 2010, at 6.

European Commission, Annual Report on Immigration and Asylum (2010), COM(2011) 291 final, 24 May 2011, at 6.

European Commission, Third Annual Report on Immigration and Asylum (2011), COM(2012)250 final, 30 May 2012, at 16.

See European Commission, New EU regional development and protection programme for refugees and host communities in Lebanon, Jordan and Iraq, December 2013.

See 20 June 2014, Brussels – Questions and Answers: the European Commission helps refugees, http://eu-un.europa.eu/articles/en/article_15168_en.htm

European Commission, Communication on the establishment of a Joint EU Resettlement Program, COM(2009) 447 final, 2 September 2009.

³¹ Ibid, at 5.

³² See AMIF Regulation, Recitals 41-43 and Articles 3(2) and 7.



Resettled persons³³ -annual data

2008	2009	2010	2011	2012	2013	2014
4,885	7,400	5,060	4,090	4,930	4,840	6,380

(Source: EUROSTAT)

Other legal channels of entry to the EU for protection seekers remain extremely underdeveloped. Nevertheless, the Syrian crisis has seen the emergence of some national initiatives. It must be noted that the majority of those concern a limited number of persons. The most prominent legal channel of entry is humanitarian admission³⁴. Most notably, since 2013 Germany has pledged 20,000 places for Syrian refugees³⁵. Germany has also implemented a program to admit privately sponsored Syrians to live with their relatives. This initiative is incumbent on the presence of family members in Germany who can commit to covering the transport and living costs for their relatives for the duration of their stay; it involves an additional 10,000 persons³⁶.

France has provided close to 1,400 asylum visas for Syrians, which enable them to travel to France for the purpose of applying for asylum³⁷. Finally, Ireland initiated extended family reunification for people affected by the Syrian conflict to join close relatives who are lawfully residing in Ireland³⁸. This led to 111 persons entering Ireland. The small scale of these operations means that the majority of protection seekers are left with no choice but to risk their lives in order to access protection.

3. Ideas for EU policy action

Assessing responsibility fairly in order to enhance solidarity and mutual trust

It is becoming increasingly evident that the vicious circle of 'mutual mistrust' between Member States can only be broken if responsibility is assessed fairly. To that end, Member States must agree on a system of evaluation of their individual share of responsibility on the basis of objective indicators. Given the investment of Member States in the EU's external borders in both rescuing lives and safeguarding the common EU borders³⁹, such a mechanism should factor this in when seeking to establish the national share of responsibility. This commonly agreed evaluation of responsibility would objectify the assessment of calls for solidarity. It would, also, reveal to what extent Member States are underperforming and it would mean more investment in building up their systems in terms of both human and financial resources.

The following individuals are included in the EUROSTAT statistics as resettled refugees: 'persons who have been granted an authorisation to reside in a Member State within the framework of a national or Community resettlement scheme'; see: http://ec.europa.eu/eurostat/tgm/table.do?tab=table&init=1&language=en&pcode=tps00195&plugin=1.22 See European Council Conclusions – 26/27 June 2014, doc. no. EUCO 79/14.

According to AMIF 'other humanitarian admission programmes' means an ad hoc process whereby a Member State admits a number of third-country nationals to stay on its territory for a temporary period of time in order to protect them from urgent humanitarian crises due to events such as political developments or conflicts; see AMIF Regulation, Article 2(b).

See UNHCR, Resettlement and Other Forms of Admission for Syrian Refugees, 14 April 2015.

See the website of the Germany Ministry of the Interior for more details: http://www.bmi.bund.de/D

See the website of the Germany Ministry of the Interior for more details: http://www.bmi.bund.de/DE/Themen/Migration-Integration/Asyl-Fluechtlingsschutz/Humanitaere-aufnahmeprogramme/humanitaere-aufnahmeprogramme_node. html



Enhancing solidarity tools

The brief analysed the stumbling blocks to EASO's capacities to support CEAS. Its financing and resources should become commensurate to the level of ambition and expectations placed upon the agency. At the same time its mandate should be strengthened so that it will become legally possible to organise joint or common processing of asylum applications, as well as allowing seconded experts to become more operational on the ground.

European funding distributed through AMIF should be strengthened so as to cover a greater part of national expenses than it actually does. Moreover, the indicators on the basis of which funding is distributed should be refined as they are currently limited to absolute figures.

Intra-EU relocation of asylum seekers and protected persons should be operationalized to a greater degree, not least in view of the objective assessment of responsibility that needs to take place. In a pilot phase this could concern specific caseloads, such as refugees from Syria or those arriving in the EU by sea. In the future, relocation could be a component of broader schemes of overall responsibility-sharing, such as the policy idea to instate tradable refugee-admission quotas, coupled with a matching mechanism linking countries' and migrants' preferences⁴⁰.

Finally, the activation of the EU Temporary Protection Directive (Directive 2001/55/EC) should be seriously considered at the EU level, in view of the increasing numbers of asylum seekers in the EU, not least as a result of the conflict in Syria. This instrument, adopted in the aftermath of the Kosovo crisis, has never been applied. However, it incorporates provisions on solidarity and the balancing of efforts⁴¹. These include co-operation on the intra-EU transferral of residence of persons enjoying temporary protection, on the basis of the request by a particular Member State and subject to the consent of the persons concerned.

by UNHCR, Resettlement and other forms of admission for Syrian refugees (fn 35).

FRA, Legal entry channels to the EU for persons in need of international protection: a toolbox, 2015, at 9.

³⁹ The costs of running operation 'Mare Nostrum' for the Italian government were estimated at 9 million Euros per month.

See H. Rapoport and J. Fernández-Huertas Moraga, Tradable Refugee-admission Quotas: a Policy Proposal to Reform the EU Asylum Policy, MPC Working Paper Series, RSCAS 2014/101, 2014.

⁴¹ See Articles 24-26, Temporary Protection Directive.



Allowing access to protection

It would be helpful if the Commission issued a set of guidelines comprehensively compiling what different ways of legal access exist in different instruments; some are contained in the EU visa policy or border policy. Therein, the Commission would explain how those should be interpreted in a protection-sensitive manner, highlighting examples of existing State practice.

In what concerns refugee resettlement, the numbers of resettled refugees should be lifted. In order to boost numbers, apart from state sponsored refugees, Member States could also explore private sponsorship schemes, both by family members and relatives, but also by private individuals, churches or associations: these schemes are already used in the US and Canada.

The issuance of so-called humanitarian visas, i.e. visas with limited territorial validity, valid usually only in the Member State that issued them, must also be expanded to allow legal entry for protection seekers to the EU. Rules around this type of visa are already included in the Visa Code but could be refined in the ongoing negotiations for the amendment of this instrument. Moreover, Member States could make more frequent use of the possibility of relaxing family reunification rules for specific caseloads, such as people in need of international protection from Syria.

Establishing meaningful partnerships with third States

The goal of EU action should be twofold. First, attention and resources should be devoted to enhancing the protection capacity as well as economic development of the countries that host large numbers of refugees. The overall financing of regional protection programs should be boosted and they should include a well-developed and resourced local development component. This would help alleviate pressures on national resources and avoid destabilisation of local societies and competition with refugee communities for access to basic services and a dignified level of subsistence.

Second, there should be a greater sharing of protection responsibility in human terms. This aim could partly be achieved by boosting refugee resettlement to the EU. In what concerns the Syrian crisis specifically, Member States should work with UNHCR and a number of countries such as the US, Canada and Australia, in order to agree on a global level protection scheme. This scheme would mean organising the orderly transfer to their territory of large numbers of refugees who have found temporarily protection in the neighbouring countries, whose capacities are now reaching the point of exhaustion.

Such initiatives should not be developed unilaterally, but in full cooperation with the countries in the region who have need a say in the establishment of priorities and the use of resources.



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