

COERCION, PROHIBITION, AND GREAT EXPECTATIONS

The continuing failure of the Common European Asylum System

Maarten den Heijer, Jorrit Rijpma and Thomas Spijkerboer¹

This contribution explains the European asylum policy crisis from three structural weaknesses of the Common European Asylum System: its reliance on coercion within the EU; its unrealistic expectations of what borders can achieve; and the premise of prohibition of refugee movement in its external dimension. The article then critically reviews the proposals that the EU has submitted since the publication of the European migration agenda in May 2015.

INTRODUCTION

In Europe, the refugee crisis is first and foremost a policy crisis. Although as many as 1.5 million irregular migrants may have entered the EU in 2015, this represents a mere 0,3% of the 508 million inhabitants of the European Union. Yet, the EU was unable to respond effectively to the arrival of hundreds of thousands of people in Greece and Italy. By consequence, the system collapsed. The disorderly movements of refugees within the EU put Schengen in jeopardy and questioned both the ability and willingness of the Member States to meet their obligations towards refugees.

This article first sets out (part I) to explain the events in 2015 from fundamental flaws in the design of the common European asylum policy. We identify three paradigms in the common asylum policy that are not delivering. First, within the EU, the allocation of asylum seekers is premised on the false idea of a level playing field, which is maintained by a system of coercion, leading to constant stress and obstructive behavior on the part of both asylum seekers and the Member States. Second, at the external border, the focus on control and deterrence is misconceived as it overestimates, practically as well as legally, the ability of borders to bar irregular entry or prevent secondary movements. Third, beyond the external border, the series of prohibitive measures taken to prevent asylum seekers from arriving at the EU border has not stymied migration but incentivized migrant smuggling, potentially leading to more instead of less migration. The difficulties in designing effective policies are moreover exacerbated by the multi-layered nature of EU governance in the areas of asylum and border control, which pits national sovereignties against Union values.

¹ Assistant professor of international law at the Universiteit van Amsterdam; associate professor of European law at Leiden University, professor of migration law at the Vrije Universiteit Amsterdam. The authors are grateful to Banafsheh Mogadassi Mahalatti for her research assistance.

Next (part II), we critically review whether the proposals and actions undertaken by the EU since the publication of the European Agenda on Migration in May 2015 constitute a shift in these paradigms.² Is the EU fundamentally rethinking its policies? We conclude that, for the most part, the direction which European asylum law and policy is now taking, reproduces and in important ways intensifies the structural problems that caused the crisis.

PART I STRUCTURAL WEAKNESSES OF THE EUROPEAN ASYLUM POLICY

Coercion within the European Union

Secondary movement of asylum-seekers within the EU is related to real as well as to perceived differences in attractiveness of Member States. Apart from physical safety, important determinants in choosing a destination country are the presence of family and existing asylum communities, colonial and linguistic links, geographical proximity, as well as perceptions about the economic climate, the levels of xenophobia and the country's immigration policies.³ Studies further point out that destination choices are often made during the migration process and often depend on information and advice provided by human smugglers, as well as on social media.⁴

The EU is only to a limited extent able to address these disparities between Member States. The EU cannot directly influence some determinants, including those which in some studies are identified as the most dominant ones, namely existing asylum communities and the country's income level.⁵ Moreover, despite the reduction of secondary movements by harmonizing asylum laws being a central aim of the European asylum policy,⁶ the EU is a long way from having created a level playing field for asylum seekers. Recognition rates continue to differ widely,⁷ and the same is true for procedural standards, reception conditions and the content of protection.⁸

Multiple factors contribute to the EU's failure to create a level playing field. First, the EU rules on asylum do not comprise a set of fully harmonized standards. Even though the revision of the asylum directives in 2011-2013 aimed at further approximation (i.e. a uniform status and a common procedure), they still

² COM(2015) 240 final, Commission Communication: A European Agenda on Migration, 13 May 2015.

³ E. Neumayer, 'Bogus Refugees? The Determinants of Asylum Migration to Western Europe', (2005) *International Studies Quarterly* 49, pp. 389-409; E. Neumayer 'Asylum Destination Choice: What Makes some European Countries more Attractive than Others?' (2004) *European Union Politics*, 5 (2), p. 155-180. K. Kuschminder, J. de Bresser & M. Siegel, 'Irreguliere Migratieroutes naar Europa en de Factoren die van Invloed zijn op de Bestemmingskeuze van Migranten', WODC, Universiteit van Maastricht, 2015.

⁴ J. Schapendonk, 'Turbulent Trajectories: African Migrants on Their Way to the European Union', (2012) *Societies*, 27-41.

⁵ See Neumayer, *supra* note 3; also T.J. Hatton, 'Seeking asylum in Europe', (2004) *Economic Policy*, 5-62.

⁶ Directive 2011/95/EU, recital 13; Directive 2013/32/EU, recital 13; Directive 2013/33/EU, recital 12.

⁷ When corrected for the varying demographic composition of the asylum population, recognition rates vary from 25% to almost 70%, A. Leerkes: 'How (un)restrictive are we? 'Adjusted' and 'expected' asylum recognition rates in Europe', WODC, Den Haag 2015. In 2014, recognition rates of Iraqi and Afghan applicants varied prominently and ranged from 13% to 94% for the first and from 20% to 95% for the latter group of applicants: EASO Annual Report on the Situation of Asylum in the EU (2014), p. 27.

⁸ *Ibid.* Also see EASO Annual Report on the Situation of Asylum in the European Union 2013.

contain the basic principle that Member States may introduce or retain more favourable provisions.⁹ In essence therefore, EU law only sets a threshold which national legislation must meet. This explains, for example, why Sweden could decide to immediately grant permanent residence to Syrian refugees, even though EU law merely requires the granting of residence for 3 years; and why in Sweden a refugee is allowed to work immediately upon applying for asylum, in Germany after three months, in the Netherlands after six months and in France after nine months.¹⁰ Second, refugee status (as well as subsidiary protection status) is legally constructed as treatment to be accorded on par with nationals in such fields as education, welfare and healthcare.¹¹ As long as these public services fall outside the remit of the EU, refugee status can simply not become uniform in the EU, despite proclamations to that effect in various EU policy documents. Third, the EU directives on asylum require implementation in national law and practice. This inevitably results in interference with national understandings and conceptions. Many differences between asylum procedures in the Member States can be explained from divergent procedural traditions, different understandings of the role of the judiciary and distinct administrative environments.¹²

Different levels of attractiveness of Member States are not necessarily problematic, as experiences in federal states such as the United States and Germany show. In Germany, a quota is calculated for each *Land* taking account of tax revenues and population size (*Königsteiner Schlüssel*).¹³ In the United States, the federal government works with nine private resettlement agencies. The agencies match the particular needs of each incoming refugee with the specific resources available in a local community, giving priority to the presence of family members and, if these are absent, try to find the best match between a community's resources and the refugee's needs.¹⁴ As in Germany, this tends to allocate refugees to regions and cities that are relatively wealthy and have low unemployment rates. In both these systems, socioeconomic factors, play a key if not decisive role.

Problematic is that Dublin is founded on an altogether different idea of allocation. Apart from the preferential position given to unaccompanied minors and asylum seekers with family members already residing in a Member state, Dublin disregards the preferences of asylum seekers and refugees, and builds on the (false) premise of a level playing field – that it does not matter where the asylum seeker ends up and that, therefore, he or she does not need to care. Obviously, the asylum seeker does care. This results in a system in which Member States try to coerce asylum seekers to subject themselves to an asylum procedure in a particular place, and concomitant forms of disobedient behaviour on the part of asylum seekers. The perverse incentives associated with Dublin have amply been demonstrated in a range of reports and studies, mentioning such behaviour as avoiding registration, lying about one's

⁹ Directive 2011/95/EU, Art. 3; Directive 2013/32/EU, Art. 5; Directive 2013/33/EU, Art. 4.

¹⁰ European Parliament Research Service, 'Work and Social Welfare for Asylum-seekers and Refugees: Selected EU Member States', Dec. 2015.

¹¹ See Arts. 22, 23 and 24 of the 1951 Refugee Convention and Arts. 27, 29 and 30 of Directive 2011/95/EU.

¹² I. Staffans, *Evidence in European Asylum Procedures*, Leiden/Boston: Martinus Nijhoff (2012).

¹³ D. Thym, 'Ein "Königsteiner Schlüssel" für die EU-Flüchtlingspolitik', *Verfassungsblog* 11 Oct. 2013, retrieved from <http://verfassungsblog.de/koenigsteiner-schluesel-fuer-eu-fluechtlingspolitik/>.

¹⁴ United States Department of State, Factsheet Refugee Resettlement in the United States, 21 Oct. 2015, retrieved from <http://www.state.gov/r/pa/pl/249076.htm>.

travel route, or cutting off one's fingertips.¹⁵ That the Dublin system is under constant stress is highlighted by several more recent studies pointing out its lack of effectiveness.¹⁶ In 2013, for example, of the total of 76,358 requests for transfers, 56,466 were accepted by the receiving Member States but only 15,938 (20%) were actually carried out.¹⁷ Yet, the tendency is to find solutions in the stricter and more coercive application of the Dublin rules, including securing fingerprints by force and systematic detention of asylum seekers who are subject to transfer decisions.¹⁸

Two further features distinguish the U.S. and German systems from that of the EU. First, the object of distribution are recognised refugees instead of asylum seekers. Because refugee status determination is a federal responsibility in Germany and the US, there are no issues relating to diverging reception conditions, procedural standards or eligibility criteria.¹⁹ Centralized status determination bypasses many incentives for Member States and asylum seekers to frustrate the Dublin system. Second, although allocated to a particular state that may bear special responsibilities towards the refugee, including responsibility for giving effect to the rights associated with refugee status,²⁰ in Germany and the United States refugees are free to accept employment anywhere in the country and to settle elsewhere. This contributes to economic dynamism and reduces chances that refugees end up in situations of unemployment and long-term dependence. A further important effect is that the initial allocation to a particular state is less consequential, as the refugee may choose to settle elsewhere later in time. Under EU rules, by contrast, a conditional right to accept work in another Member State is granted only after five years of legal residence.²¹ Under EU law, refugees are trapped in one particular Member State

¹⁵ AWO et al., 'Allocation of refugees in the European Union: for an equitable, solidarity-based system of sharing responsibility', March 2013, retrieved from http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/STARTSEITE/Memorandum_Dublin_engl.pdf; Migreurop, 'European borders – Controls, detention and deportation, 2009/2010 Report', 2010, retrieved from http://www.migreurop.org/IMG/pdf/rapport-migreurop-2010-en_-_2-121110.pdf.

¹⁶ ICF International, 'Interim Evaluation report Dublin III Regulation', 4 Dec. 2015; E. Guild et al, 'New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection', Study for the LIBE Committee, 2014; E Guild, C Costello, M Garlick and V Moreno-Lax, *Enhancing the CEAS and Alternatives to Dublin*, (Brussels: European Parliament, 2015): [http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU\(2015\)519234_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf);

Adviescommissie voor Vreemdelingenzaken, 'Delen in verantwoordelijkheid. Voorstel voor een solidair Europees asielsysteem', Den Haag, Dec. 2015.

¹⁷ S. Fratzke (Migration Policy Institute), 'Not Adding Up. The Fading Promise of Europe's Dublin System', March 2015, p. 11, retrieved from <http://www.migrationpolicy.org/research/not-adding-fading-promise-europes-dublin-system>.

¹⁸ For example, the Commission on 27 May 2015 issued proposals in a Working Document which places particularly strong emphasis on the importance of fingerprinting all those who arrive: Commission Staff Working Document on Implementation of the Eurodac Regulation as regards the obligation to take fingerprints, SWD(2015) 150 final, 27 May 2015.

¹⁹ In the United States, however, considerable discrepancies in asylum adjudication remain: J. Ramji-Nogales, A. Schoenholtz and P. Schrag, 'Refugee Roulette: Disparities in Asylum Adjudication', (2007) *Stanford Law Review*, Vol. 60, pp. 295-411.

²⁰ In Joined Cases C-443/14 and C-444/14, *Alo and Osso*, the CJEU found that the imposition of a residence condition on international protection beneficiaries for receiving social benefits, with the objective of facilitating their integration, did not necessarily run counter to their right of free of movement guaranteed in Art. 33 Directive 2011/95/EU.

²¹ Art. 14 Directive 2003/109/EC as amended by Directive 2011/51/EU.

(except for the right to move freely for up to three months within the Schengen area in a six-month period²²), which may well be neither to their liking nor to that of the Member State.

The design of the Common European Asylum System not only leads to avoidance behaviour of asylum seekers, it also encourages disobedient and competitive behaviour on the part of Member States. The Dublin system, together with the method of harmonisation, whereby each Member State remains within certain limits competent to devise its own asylum policy, may tempt Member States into providing lower levels of protection, for fear of being inundated by asylum shoppers – the so-called race to the bottom.²³ Avoidance behaviour of Member States is reinforced by the sentiment that the system is fundamentally unfair. The default position of the current system is that each Member State has to fend for itself, no matter how many asylum seekers are coming in. The Dublin Regulation simply assigns Greece responsibility for the hundreds of thousands of asylum seekers who entered the country irregularly from Turkey. It is striking that at present, the chief avenue by which relief is provided to countries as Greece and Italy, is by simply suspending the Common European Asylum System. Italy and Greece organize their own relief by not registering asylum seekers and stimulating their secondary migration.²⁴ The other Member States provide relief to Greece by not applying Dublin in respect of that country. It was only natural that with the peak of asylum seekers travelling onwards from Greece in 2015, the next countries along the route - Hungary, Slovenia, Austria – neglected their duties as well.

Statistics predating the current influx already indicated that Dublin leads to considerable disparities among Member States. In 2012, Member States receiving a disproportionate share of asylum applications relative to their size or population were wealthy Member States such as Belgium and Sweden, but also a selection of border states in the south and east (Malta, Cyprus, Greece, Bulgaria, Hungary).²⁵ Other countries at the external border, however, such as Spain, Portugal, Poland and the Baltic States, are free riders and receive only very little asylum applicants. On the basis of this data, it would seem that Dublin results in distribution largely on the basis of geographic location of the Member States, and on the asylum seeker's choice to lodge an application in a particular Member State. If the Dublin system would be applied in all cases, there would be an even larger distributive effect towards Member States at popular points of entry into the EU. Some reports have estimated that in 2014, for example, only half of the persons entering Italy and asking for asylum somewhere in the EU, were registered in Italy as asylum seeker.²⁶ The criteria for distributing asylum seekers laid down in the Dublin Regulation fall short of fair-sharing, as there is no attempt to make allowances for any state which is particularly burdened, nor is there any attempt to take into account capacities of Member States to offer protection. Instead, past²⁷ and current efforts of correcting uneven burdens are based on voluntary

²² Art. 21(1) Schengen Implementing Convention.

²³ Described by Noll as 'the common market of deflection': G. Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection*, The Hague, Martinus Nijhoff (2000).

²⁴ See Guild et al, *supra* note 16.

²⁵ Eurostat, Asylum applicants and first instance decisions on asylum applications: 2012 - Issue number 5/2013.

²⁶ See Guild et al, *supra* note 16, p. 55 with further references.

²⁷ See esp. the EU relocation scheme for Malta: EASO fact finding report on intra-EU relocation from Malta, July 2012.

and ad hoc arrangements – normal practice in the international community at large, but described as ‘unacceptable within a European Union committed to close integration between Member States.’²⁸

EU law does provide for some mechanisms of relief: the early warning mechanism in the Dublin Regulation, the Temporary Protection Directive and the power of the Council to adopt provisional measures for the benefit of the one or more Member States confronted with an emergency situation as laid down in Art. 78 TFEU.²⁹ But the present crisis illustrates the lack of effectiveness of these mechanisms. Although all three mechanisms make the EU competent as crisis manager, they do not prescribe how burdens should be shared between the Member States. The early warning mechanism rather vaguely refers to ‘guidance on any solidarity measures’ and the Temporary Protection Directive assumes that Member States will receive displaced persons ‘in a spirit of Community solidarity’.³⁰ A key reason why this directive was not set in motion is that that very spirit has dissipated.

A further free rider element is that it is possible to be part of Schengen, but not to partake in the Common European Asylum System. Denmark, for example, has opted out of all EU asylum instruments except the Dublin regulation. It actually made use of this opt out in its decision to halve social security benefits to refugees so as to make itself less attractive for asylum seekers. This is arguably in violation of the Refugee Convention but not in violation of EU law.³¹ Similarly, Denmark is not taking part in the Council Decisions to relocate 160,000 asylum seekers who arrived in Greece and Italy. On the other hand, Denmark fully enjoys the benefits of the Schengen free travel area and has a ratio of incoming and outgoing requests for Dublin transfers of 1:3.³² In these various ways, EU law fosters disobedience and free rider behaviour on the part of Member States. Moreover, Dublin seems to have created a sense of historic entitlement on the part of some Member States to not have to share in the burden at all.³³ Ironically, now that the traditional reluctance of quite a few North-Western Member States to revise Dublin seems to be waning, a new coalition of other Member States has formed who embrace its non-redistributive effects.

In sum, the European asylum system seeks to coerce both asylum seekers and crucial Member States to act in ways they have no interest in and understandably consider unfair. Why should an Afghan refugee accept being assigned to a Member State which is likely to reject her asylum claim while another one would in all probability accept it? Why should Greece and Italy spend considerable resources on registering migrants, with the mere effect that they get saddled with them on the basis of Dublin? Why should Germany and Sweden bear the brunt of the failure of the European asylum system, while most

²⁸ H. Gray, ‘Surveying the Foundations: Article 80 TFEU and the Common European Asylum System’, *Liverpool Law Review* (2013), 175-193 at 176.

²⁹ Art. 33 Reg. 604/2013; Directive 2001/55/EC; Art. 78(3) TFEU.

³⁰ Art. 33(4) Reg. 604/2013; Art. 25 Directive 2001/55/EC.

³¹ UNHCR Regional Representation for Northern Europe, ‘UNHCR Observations on the proposed amendments to the Danish Social Security legislation’, Stockholm, August 2015.

³² Eurostat, *supra* note 25.

³³ E.g. a Joint Statement on migration of an extraordinary summit of the Prime Ministers of the Visegrád Group Countries, Prague, 15 February 2016, http://www.vlada.cz/assets/media-centrum/aktualne/2016_02_15_v4_deklarace_en_1.pdf, last accessed March 2, 2016.

other Member States behave as unresponsive bystanders? In the *Frankfurter Allgemeine*,³⁴ Kay Hailbronner described EU asylum law as “Schönwetterrecht” (good weather law) – created at a time in which refugees were a marginal issue in the EU. Because EU asylum law is not consonant with the interests of key players (asylum seekers and Member States), it could only work if it would contain means to coerce them to comply. The problem is not that there are no judicial enforcement mechanisms, but that there is often no interest in activating them. Rather than launching procedures in Greece for not being granted proper relief, asylum-seekers travel to another Member State. And although the European Commission is responsible for ensuring the proper transposition of EU law and correct application of EU rules by the Member States, it has only on rare occasions launched infringement procedures in the area of asylum law.³⁵

Great expectations at the borders of the European Union

The common European asylum system is intimately linked with a common policy for the external borders. Both were considered a *conditio sine qua non* for the lifting of checks at the internal borders.³⁶ Ideally a European system for the management of the external borders supports and facilitates a common European migration and asylum policy. However, the flaws described above clearly resonate within the EU’s border policy, which suffers from similar free-rider behaviour.

Member States have remained individually responsible for the management of their part of the external borders. It has become common place to state that the external border is as strong as its weakest link. But what is more important is that some Member States, due to the length of their borders or their geographical location, have carried a disproportionate share of this responsibility. In the case of Greece, it has also been the weakest shoulders that have had to carry this burden. European ‘solidarity’ has been limited to financial support, as well as operational support from Member States under the coordination of Frontex.³⁷ There have thus been few incentives for Member States to reinforce controls of their part of the external borders as this will not only trigger their responsibility for asylum-seekers under the Dublin-system, but also for the return of irregular migrants under the Return Directive.³⁸

The incapacity or unwillingness to deal with flows or refugees and irregular migrants may trigger the reinstatement of internal border controls that have been witnessed in recent times. Already in 2011, the

³⁴ K. Hailbronner, ‘Asyl in Europa - wenn, wie, wann, wo?’, *Frankfurter Allgemeine* 10 December 2015.

³⁵ See infringement scoreboards published by the European Commission: http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/infringements/index_en.htm#maincontentSec4 and http://ec.europa.eu/dgs/home-affairs/what-is-new/eu-law-and-monitoring/infringements_by_policy_asylum_en.htm

³⁶ Case C-378/97, *Wijsenbeek*, para. 42.

³⁷ Regulation (EU) No 515/2014 of the European Parliament and of the Council of 16 April 2014 establishing, as part of the Internal Security Fund, the instrument for financial support for external borders and visa ... O.J. 2014, L 150/143; Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, O.J. 2004, L 349/1.

³⁸ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, O.J. 1998, L 348/98.

influx of Tunisians in Italy in the wake of the Arab spring resulted in a diplomatic clash between Italy and France, ultimately resulting in the introduction of Article 26 in the Schengen Borders Code, allowing for the reinstatement of checks at the internal border in case of a serious deficiency in border controls jeopardizing the functioning of the Schengen area.³⁹

The focus on border controls, be it at the internal or external borders, is however fundamentally flawed for three reasons.

First, it overestimates the capacity of borders to bar irregular entry or prevent secondary movements. Even when internal border controls in Europe were still fully in place, member states were at times confronted with large inflows (like during the wars on the territories of former Yugoslavia), and secondary movements were a problem already before the Schengen agreements were negotiated.⁴⁰ Of course, a militarization of the external border, as in totalitarian regimes, which can be observed to some extent at the Spanish enclaves of Ceuta and Melilla, may reduce the number of irregular entries at the militarized stretch of the border. However, it comes at enormous costs, both in terms of the disruption of the flow of border traffic, as well the cost for setting up and maintaining such border infrastructure, even if supported with state-of-the-art surveillance and intelligence.⁴¹ There is no such thing as an impermeable border, and a border which gets close (like the one between the Koreas) is not only inhuman and questionable from a human rights perspective; it also strangles the economy. For example, reports indicate that the Hungarian border fence leads to displacement of migration to other Member States, and is even failing to keep people out of Hungary itself.⁴² Sealing off all of the 42 673 km of sea borders and 7 721 km of land borders is simply not a realistic prospect.

A second flaw of the present focus on external border control is that tightened border controls will worsen the humanitarian crises at the external borders. Border controls do not address the root causes of migratory and refugee flows. They will make access to Europe more difficult and result in the emergence of new routes, which are the harder, longer and more dangerous ones. As the past twenty-five years have shown, this will increase the reliance of people trying to reach Europe on human smugglers, and it will increase the number of border deaths.⁴³ To the extent that tightened borders do succeed in keeping people out, as a result many will remain in limbo: unable to return to their country of origin and stuck in countries in the EU's neighbourhood which themselves are not in the position to

³⁹ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), O.J. 2006, L 105/1.

⁴⁰ See Peers, 'The Refugee Crisis: What should the EU do next?', *EU Law Analysis blog*, 8 September 2015, available at: <<http://eulawanalysis.blogspot.nl/2015/09/the-refugee-crisis-what-should-eu-do.html>>, with reference to A. Hurwitz, last accessed 4 March 2016.

⁴¹ See e.g. the recent report of the Bertelsmann Stiftung: https://www.bertelsmann-stiftung.de/fileadmin/files/BSt/Publikationen/GrauePublikationen/NW_Departure_from_Schengen.pdf, last accessed 4 March 2016.

⁴² BBC News, 'Europe migrant crisis: Razor wire fence failing in Hungary', <http://www.bbc.com/news/world-europe-35624118>, last accessed 4 March 2016.

⁴³ I.a. T. Last and T. Spijkerboer: Tracking Deaths in the Mediterranean, in Tara Brian and Frank Laczko (eds): *Fatal Journeys. Tracking Lives Lost During Migration*, International Organization for Migration, Geneva, 2014, p. 85-106.

provide for a minimum of assistance. This is the situation on the Balkans right now.⁴⁴ Even if these people are not in direct need of international protection, it does not mean that they are devoid of rights.

A third flaw of the approach to borders is legal in nature. Not only practically, but also legally border controls as a solution to curb refugee flows are not feasible. Although international refugee law does not allow for a right to be granted asylum, there is a binding obligation of non-*refoulement*, i.e. not to return a person (either directly or indirectly) to a country where there is a risk of persecution. This obligation applies also at the border and on the high seas,⁴⁵ and applies within the EU as a general principle as well as under Article 4 of the Charter of Fundamental Rights. EU secondary legislation provides for a right to asylum or subsidiary protection once the conditions of the qualification directive have been fulfilled.⁴⁶ The procedures directive clearly states that an asylum request can also be made at the border and the Schengen Borders Code provides in numerous provisions that its application shall be without prejudice to these rights.⁴⁷ Member States can apply the concept of a European safe third country in order to declare an asylum request inadmissible. However, this concept cannot be used for the immediate return of refugees at the border. Its application is bound to strict conditions and safeguards, including individual assessment and judicial control.⁴⁸ In a consistent line of cases, the European Court of Human Rights has also made it clear that the return of third country nationals requires an individual assessment of the personal circumstances of the person involved and that mere identification does not suffice if it is to respect the prohibition of collective expulsions in Article 4 of Protocol 4 to the ECHR.⁴⁹ Currently Member States put all their cards on qualifying Turkey as a European safe third country,⁵⁰ but such a policy can only succeed if proper asylum procedures and judicial control are organised in Greece.

Prohibition outside the territory of the European Union

The external dimension of European refugee policy is based on prohibition. The guiding principle is that refugees and asylum seekers are not allowed to travel. This was implemented initially by harmonizing European visa policies. Until 1990, each member state had its own visa policy, based on historical ties, trade relations and international politics. This meant that citizens of most countries in the world could

⁴⁴ references

⁴⁵ European Court of Human Rights (Grand Chamber) 23 February 2012, *Hirsi Jamaa v Italy*, 27765/09.

⁴⁶ Article 13 (“shall grant”), Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), O.J. 2011, L 337/9.

⁴⁷ Article 3(1) (“scope”), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection, O.J. 2013, L 180/60.

⁴⁸ Articles 38 and 39, Procedures Directive.

⁴⁹ European Court of Human Rights: (Grand Chamber) 23 February 2012, *Hirsi Jamaa v Italy*, 27765/09; (Grand Chamber) 3 July 2014, *Georgia v Russia (I)*, 13255/07; (Chamber) 21 October 2014, *Sharifi and Others v. Italy and Greece*, 16643/09; (Grand Chamber) 1 September 2015, *Khlaifia and Others v. Italy*, 16483/12.

⁵⁰ Whether it would be lawful to qualify Turkey as a safe third country is questionable, see E. Roman, T. Baird and T. Radcliffe: Why Turkey is not a “Safe Country”, Statewatch February 2016, and the sources quoted there; O. Ulusoy: Turkey as a Safe Third Country? Available at <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/03/turkey-safe-third>, last accessed 29 march 2016.

reach at least one Member State without a visa. In the framework of the 1990 Schengen Implementing Agreement, these policies were gradually harmonized. Since 2001, Regulation 539/2001 enumerates the third countries whose nationals must have a short-term visa when crossing external borders, and those whose nationals are exempt from the visa requirement. Nationals from all refugee producing countries are subject to a visa requirement, and therefore cannot legally enter the EU.⁵¹ Simultaneously, the technical quality of documents was improved drastically, with the consequence that it became much more difficult to travel on forged documents. The Schengen Implementing Agreement also harmonized the externalization and privatization of the visa requirement by means of carrier sanctions.⁵² This has resulted in a considerable decrease of the number of people applying for asylum at European airports.

The successful enforcement of the harmonized visa policies by airlines closed off one route to Europe. Asylum seekers and refugees were still able to travel to countries neighbouring the European Union, and to try to enter European territory from there. In the context of the Schengen process, European states began harmonizing their safe third country policies, which had their roots in German and Dutch asylum policy in the late 1970s.⁵³ The central notion was that, if asylum seekers are returned to third countries for their claim to protection to be assessed, they will figure out that it is fruitless to come to Europe and will stop coming. This notion of automatic return without individual assessment was at the core of the 1993 German constitutional reform.⁵⁴ A harmonized version of the safe third country concept is laid down in Article 35, 38 and 39 Directive 2013/32. Even apart from the legal obstacles (such as the possibility for the individual to rebut the safety of the country concerned in the individual case, see above), during the past 40 years application of the safe third country principle on a scale of any significance has been prevented by the third countries' obstruction or outright refusal to readmit asylum seekers and refugees. An exception is the cooperation between Spain and the North- and West-African countries from where boat people approached Spanish territories, which seems to have led to a radical drop in the number of people trying to reach Spain by boat (and the subsequent increase of boat people trying to reach Italy).⁵⁵

⁵¹ S. Mau et al: The Global Mobility Divide. How Visa Policies Have Evolved over Time, *Journal of Ethnic and Migration Studies* 41 (2015), 1192-1213.

⁵² Article 26 obliges the signatory states to oblige carriers (such as airlines) to ensure that passengers are in possession of the required documents (including visas), and to impose fines for carriers who fail to do so. Article 4 Directive 2001/51 provides that the minimum fine will not be less than €3.000 and the maximum not less than €5.000 per passenger. See more extensively Tilman Rodenhäuser: Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control, *International Journal of Refugee Law* 26 (2014), 223-247.

⁵³ R. Marx: *Asylrecht. Band 2: Rechtsprechungssammlung mit Erläuterungen*, Nomos, Baden-Baden 1991, p. 163-1200; K. Zwaan: *Veilig derde land. De exceptie van het veilig derde land in het Nederlandse asielrecht* (dissertation Katholieke Universiteit Nijmegen), 2003, p. 87-108 and 199-215; J. C. Hathaway: *The Rights of Refugees under International law*, Cambridge University Press, Cambridge 2005, p. 293-296, 323-333; G.S. Goodwin-Gill and J. McAdam: *The Refugee in International Law*, third edition, Oxford University Press Oxford 2007, p. 391-407.

⁵⁴ See i.a. K. Hailbronner: *Asylum Law Reform in the German Constitution*, *American University International Law Review* 9(1994), p. 159-179; R. Marx and K. Lupp: *The German Constitutional Court's Decision of 14 May 1996 on the Concept of 'Safe Third Countries' - A Basis for Burden-Sharing in Europe*, *International Journal of Refugee Law* 9(1996), 419-439.

⁵⁵ D. Godenau: *An Institutional Approach to Bordering in Islands: The Canary Islands on the African-European Migration Routes*, *Island Studies Journal* 7(2012), p. 3-18; D. Godenau: *Irregular Maritime Migration in the Canary*

Apart from trying to return asylum seekers and refugees to third countries, European states have also sought to cooperate with neighbouring countries in order to prevent departure from there to Europe, and to prevent the entry into these countries of people who might subsequently try to travel onwards to Europe. Until 2011, Italy sought to cooperate with Libya, with a measure of success varying according to the negotiation tactics used by the Libyan government.⁵⁶ Since the outbreak of the armed conflict in Syria, Algeria, Egypt,⁵⁷ Libya, Morocco and Tunisia have introduced visa requirements for Syrians,⁵⁸ most likely under pressure from the EU. This made it harder for Syrians to access the well-functioning route from the Libyan coast to Italy, and may have resulted in a shift of Syrian refugee migration from the central Mediterranean route to the eastern Mediterranean route (Turkey-Greece).



Visa requirements for Syrians 2010 (Source Mau et al. 2015)



Visa requirements for Syrians 2016 (source: IATA, <https://www.timaticweb2.com/home>)

Islands: Externalisation and Communitarisation in the Social Construction of Borders, *Journal of Immigrant and Refugee Studies* 12(2014), p. 123-142; A. López-Sala: Exploring Dissuasion as a (Geo)Political Instrument in Irregular Migration Control at the Southern Spanish Maritime Border, *Geopolitics* 20 (2015), 513-534.

⁵⁶ See i.a. E. Paoletti and F. Pastore: Sharing the dirty job on the southern front? Italian-Libyan relations on migration and their impact on the European Union, Working Paper 29, International Migration Institute, University of Oxford, 2010.

⁵⁷ I.a. UNHCR expresses concern over new restrictions for Syrian refugees in Egypt, 12 July 2013, <http://www.unhcr.org/51e03ff79.html>, last accessed 23 February 2016.

⁵⁸ We have established this by comparing the data of Mau et al (supra) with data from IATA (<https://www.timaticweb2.com/home>) in February 2016.

To the extent that the EU succeeds in convincing third countries to cooperate, this logically has onward effects in countries closer to the source countries of refugees. Lebanon⁵⁹ and Jordan⁶⁰ now refuse to admit Syrian refugees, while Turkey has announced it will only allow Syrians in directly from Syria,⁶¹ but reports hold that two border crossing points have been closed.⁶²

The effect is that private and public third parties (carriers and third countries) have been incentivized to prevent refugees from reaching the territories of EU countries. At the same time, the international community (including the EU) has not enabled refugees to subsist in the countries where they find themselves. Let us take Syria again as an example. Syria had an estimated 23 million inhabitants before the war.⁶³ Since 2011, the conflict has forced half of the population to flee: 7.5 million refugees within Syria,⁶⁴ 4 million outside Syria (635.000 in Jordan,⁶⁵ or some 8% out of 8 million inhabitants,⁶⁶ 1 million in Lebanon,⁶⁷ or some 17% out of 5.8 million inhabitants,⁶⁸ 2.5 million in Turkey,⁶⁹ or some 3% out of 77.6 million inhabitants⁷⁰). These conservative estimates concern registered refugees, the actual number of refugees is likely to be much higher. The reception of Syrian refugees in the region is seriously underfunded. The United Nations Office for the Coordination of Humanitarian Assistance reported that for 2015, 56% of the required funding had been received.⁷¹ The World Food Programme reports that critical funding shortages forced the organization to reduce the level of assistance, with most refugees now living on 50 cents a day.⁷²

Resettlement of Syrian refugees in other parts of the world – crucial in order to enable especially Lebanon to host Syrian refugees – is not occurring on a scale of any significance. Since the beginning of

⁵⁹ I.a. Lebanon has just done the unthinkable, Al Jazeera 6 January 2015, <http://www.aljazeera.com/indepth/opinion/2015/01/lebanon-just-done-unthinkable-201516114349914185.html>, last accessed 23 February 2016; Al Jazeera 3 January 2015, Syrians to face visa restrictions for Lebanon, <http://www.aljazeera.com/news/middleeast/2015/01/lebanon-visa-restrictions-syrians-2015131029059563.html>, last accessed 23 February 2016.

⁶⁰ On 18 January 2016, the Financial Times reported that 16.000 Syrians were stranded in the desert at the Jordan border.

⁶¹ Hürriyet 18 December 2015, <http://www.hurriyetdailynews.com/Default.aspx?pageID=238&nID=92738&NewsCatID=510>, last accessed 23 February 2016.

⁶² I.a. Amnesty International: Injured Syrians fleeing Aleppo onslaught among thousands denied entry to Turkey, 19 February 2016, <https://www.amnesty.org/en/latest/news/2016/02/injured-syrians-fleeing-aleppo-onslaught-among-thousands-denied-entry-to-turkey/>, last accessed 23 February 2016.

⁶³ https://en.wikipedia.org/wiki/Demographics_of_Syria, last accessed 23 February 2016.

⁶⁴ <http://www.unhcr.org/pages/49e486a76.html>, last accessed 23 February 2016.

⁶⁵ <http://data.unhcr.org/syrianrefugees/country.php?id=107>, last accessed 23 February 2016.

⁶⁶ https://en.wikipedia.org/wiki/Demographics_of_Jordan, last accessed 23 February 2016.

⁶⁷ <http://data.unhcr.org/syrianrefugees/country.php?id=122>, last accessed 23 February 2016.

⁶⁸ https://en.wikipedia.org/wiki/Demographics_of_Lebanon, last accessed 23 February.

⁶⁹ <http://data.unhcr.org/syrianrefugees/country.php?id=224>, last accessed 23 February 2016.

⁷⁰ https://en.wikipedia.org/wiki/Demographics_of_Turkey, last accessed 23 February 2016.

⁷¹ <https://fts.unocha.org/pageloader.aspx?page=special-syriancrisis&year=2015>, last accessed 23 February 2016.

⁷² <http://www.wfp.org/emergencies/syria>, last accessed 23 February 2016.

the conflict, only 162.151 Syrian refugees have been resettled elsewhere in the world⁷³ – 4% of the 4 million Syrian refugees outside Syria, and merely 2% of all Syrian refugees.

The most likely understanding of what happened in 2015 is that the combination of the prohibition approach to refugees, the lack of resettlement, and the inability for refugees to get an acceptable form of subsistence in the region led to a rapid increase in the demand for the services of smugglers on the Turkey-Greece route. Anecdotic evidence suggests that this initially led to a sharp increase in prices. The resulting increase in profit margin attracted more people to the smuggling sector. This led to a rapid increase in supply, which resulted in falling prices. This triggered others than just Syrians (refugees such as Eritreans or Afghans as well as non-refugees) to travel to Europe. This could explain why not only the number of Syrians entering the EU via Turkey has increased sharply, but that of other nationalities as well.⁷⁴ In this analysis, the combination of prohibition and not giving refugees a viable alternative in the region has had the opposite effect of the intended one: it led to more migration, not just of Syrians but also attracting migrants to the eastern Mediterranean routes who would otherwise not have migrated to Europe. If this analysis is correct, it exposes a structural problem in European asylum policy. It combines prohibition and the lack of a viable alternative for refugees in the region. This disregards the interests of both refugees and of countries in the region, who have a shared interest in onward movement of refugees to other regions, for Syrians concretely: to Europe. In order to realize this shared interest, however, there is no other option than illegality. This boosts the smuggling economy and attracts service providers to the smuggling business. The prohibition approach not only incentivizes Syrian refugees to use smugglers, but also stimulates a smuggling economy which leads to more, instead of to less migration. In this analysis, European policy completely backfires and leads to more migration. At present, the data required to put this hypothesis to the test are lacking, but it is this hypothesis which is in line with dominant migration sociology,⁷⁵ and which best explains the data which are available on irregular migration to Europe in the period since 2011.

Multi-level governance

Key to understanding some of the failures of the European asylum and border policies is the fragmented nature of EU governance in these fields. The Schengen project has proceeded on a basis of mutual recognition and minimum harmonisation. There is no common asylum law, there are no federal asylum courts and the EU does not have executive powers. The implementation of the EU's policies is fully in the hands of the Member States. The Member States have steadfastly opposed the formation of a

⁷³ <http://www.unhcr.org/52b2febafc5.html> , last accessed 23 February 2016.

⁷⁴ See for the most recent data at the moment of writing p. 6 of the Frontex Risk Analysis report published 20 January 2016, http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q3_2015.pdf, last accessed 23 February 2016. Compare for a similar analysis Optimity Advisors: A study on smuggling of migrants. Characteristics, responses and cooperation with third countries, European Commission, Brussels 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/study_on_smuggling_of_migrants_final_report_master_091115_final_pdf.pdf, last accessed 23 February 2016.

⁷⁵ See for an overview M. Czaika and H. de Haas: Evaluating migration policy effectiveness, in A. Triandafyllidou: Routledge Handbook of Immigration and Refugee Studies, Routledge, London 2015, p. 34-40.

European corps of border guards and have likewise been unwilling to vest any executive power in the European Asylum Support Office (EASO), which is only allowed to assist Member States' asylum authorities.⁷⁶ The EU has no operational assets of its own. Moreover, any EU intervention in the field of asylum and border control requires the consent of the host Member State.

This form of cooperation is vulnerable not only because it allows for considerable disparities between Member States but also because the achievement of commonly formulated goals depends on the effective cooperation of Member States. Multi-level governance can function effective only if the constituent parts identify with their common government and take serious their duty to work together towards their common values.⁷⁷ However, within the field of asylum, national interests are often perceived to run contrary to Union interests.

The present crisis vividly demonstrates the shortcomings of the European cooperation model in the field of Justice and Home Affairs. The unwillingness of Member States to cooperate and their actual resistance to the system explain the difficulty of making border guards and asylum experts available to Member States facing a high influx; explain the delays in making the hotspots in Greece and Italy operational;⁷⁸ explain why the asylum systems in the Member States display fundamental differences; explain why some Member States bear the brunt while others are unresponsive bystanders; explain why even the financial part of the EU-Turkey deal is not materializing; and explain why Balkan countries received little and late EU support in offering basic amenities to transiting asylum seekers. For example, the European Commission acknowledged that under the EU Civil Protection Mechanism, which is designed to offer practical support to countries overwhelmed by a crisis situation, "so far, too few Member States have responded to ... calls" to provide teams, equipment, shelter, medical supplies, expertise and non-food items to assist the Balkan countries.⁷⁹

It is also rather odd that UNHCR, which was never intended to function as operational humanitarian assistance agency but took up that role in states that were incapable of doing so themselves, has become a key player in aiding refugees on the Greek islands by providing emergency shelter and support – forcing UNHCR, which is already facing huge financial and operational challenges elsewhere, into making new emergency appeals to donors.⁸⁰ UNHCR is doing the job, because the EU does not have the required mandate and assets. The deployment of NATO in order to "conduct reconnaissance,

⁷⁶ Regulation (EU) No 439/2010 of the European Parliament and Council of 19 May 2010 of 19 May 2010 establishing a European Asylum Support Office, O.J. 2010, L 132/11.

⁷⁷ F.K. Lister, *The European Union, the United Nations and the Revival of Confederal Governance*, London: Greenwood Press (1996), p. 26 et seq; W. Wallace, 'Europe as a Confederation: the Community and the Nation-State', *Journal of Common Market Studies* (1982), 57-68 at 61.

⁷⁸ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_hotspots_en.pdf, last accessed 9 March 2016.

⁷⁹ http://europa.eu/rapid/press-release_IP-15-6134_en.htm, last accessed 9 March 2016.

⁸⁰ <http://www.unhcr.org/563ccbb86.html>; <http://www.unhcr.org/563b4c186.html>, last accessed 9 March 2016.

monitoring and surveillance of the illegal crossings in the Aegean” also shows the EU’s lack of operational effectiveness.⁸¹

PART II The EU strategy for reform

Considering that the root causes of current refugee flow lie beyond the EU’s regulatory powers in the area of migration and asylum, it seems evident that the EU should at least try to control what is within the scope of its competences. And indeed, as far as this is a *European* refugee crisis, it is a crisis of the EU’s own making, bearing in mind the flaws in its Common European Asylum System, both in set up and implementation, as explained above.

Toward a strong common asylum policy?

The European Agenda on Migration describes the current fragmentation of the asylum system as weakness, as it contributes to asylum shopping and leads to a perception in EU public opinion that the current system is fundamentally unfair.⁸² It would seem, indeed, that a number of concerns that we identified above are shared by the European Commission and that steps are taken to address these.

First, the Commission proposes a new systematic monitoring process to strengthen the implementation of the asylum rules.⁸³ In September 2015, a total of 40 infringement procedures were launched against several Member States for failing to implement EU asylum legislation, which were taken a step further in seventeen cases in December 2015 and February 2016.⁸⁴ Most of these cases concern the failure of effective fingerprinting of asylum seekers, failures in transposing the Asylum Procedures Directive, Reception Conditions Directive and failure to extend the regime of the Long-Term Residents Directive to refugees and beneficiaries of subsidiary protection.

Second, the Commission proposes to step up operational cooperation between Member States. EASO should develop into a role as ‘the clearing house of country of origin information’, encouraging more uniform decisions. EASO would also step up training of asylum officers and the suggestion is made that the agency would administer a network for the pooling of reception places in times of emergency.⁸⁵

Third, the Commission is not proposing a further approximation of the Reception Conditions Directive, Asylum Procedures Directive and Qualification Directive, but it has proposed a common list of safe countries of origin, which would amend the Asylum Procedures Directive.⁸⁶ The idea behind the common list is that all Member State will expeditiously deal with asylum claims made by persons from

⁸¹ http://www.nato.int/cps/en/natohq/opinions_127972.htm, last accessed 9 March 2016.

⁸² COM(2015) 240 final, p. 12.

⁸³ Ibid.

⁸⁴ Press Release 23 Sep. 2015, More Responsibility in managing the refugee crisis: European Commission adopts 40 infringement decisions to make European Asylum System work; Press Release 10 December 2015, Implementing the Common European Asylum System: Commission escalates 8 infringement proceedings; Press Release 10 February 2016, Implementing the Common European Asylum System: Commission acts on 9 infringement proceedings.

⁸⁵ COM(2015) 240 final, p. 12.

⁸⁶ COM(2015) 452 final.

countries with generally high application numbers but low recognition rates, with a view to causing a deterrent effect and to increase the overall efficiency of asylum systems.

For the longer term, the Commission will initiate debate on further development of the Common European Asylum System, including a possible common Asylum Code and the mutual recognition of asylum decisions, and even ‘a longer term reflection towards a single asylum decision process’.⁸⁷ Key, moreover, is that the Commission undertakes an evaluation of the Dublin system in 2016, which will start the debate over a permanent revision of the legal parameters for distributing asylum seekers.

On reflection, the proposals in the sphere of further harmonization of asylum standards are quite meagre. Moreover, on substance they illustrate rather than address the current limitations of EU law to arrive at a truly common asylum policy. It is doubtful, for example, whether the safe country of origin proposal will lead to further convergence, because the legal consequences of applying the concept are not fully harmonized. The proposal obliges Member States to regard countries on the common list as safe countries of origin, but the Procedures Directive leaves it to the Member States (“may provide”) to decide whether they process applications of persons from such countries in a border procedure or accelerated procedure (Art. 31(8)). Moreover, the Procedures Directive specifies only in limited detail what an accelerated or border procedure entails. Some Member States have rather short accelerated asylum procedures with a maximum duration of only a few days (such as Malta, Bulgaria and the United Kingdom), but it may take longer in other Member States such as France (15 days), Poland (30 days) and Sweden and Greece (three months). And some EU Member States, like Italy and Hungary, have no accelerated asylum procedure at all.⁸⁸ Further, in view of divergent recognition rates in the Member States, it is quite problematic to arrive at a common conception of which third countries are safe.⁸⁹

Likewise, the trend towards the production of European country of origin reports may well ‘encourage’ (the word use by the Commission) more uniform decisions, but does not guarantee them. For example, a joint report written by country analysts from Belgium, the Netherlands, Norway and Sweden about the safety situation in Libya published in December 2014 did not result in a common approach adopted in individual procedures to the question whether expulsion to Libya could be executed.⁹⁰ This is to be attributed to the fact that the Member States remain largely autonomous in legally qualifying facts in terms of EU law.

⁸⁷ COM(2015) 240 final, p. 17.

⁸⁸ See, extensively, Meijers Committee, Note on an EU list of safe countries of origin Recommendations and amendments, Utrecht, 5 Oct. 2015, http://www.commissie-meijers.nl/sites/all/files/cm1515_an_eu_list_of_safe_countries_of_origin.pdf, last accessed 4 March 2016.

⁸⁹ ECRE reported for example that the recognition rate for Albanians (Albania is on the proposed list) during the first quarter of 2015 varied from 0% in The Netherlands and Ireland to 54% and 33% in Italy and Switzerland: ECRE Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin and amending the recast Asylum Procedures Directive (COM(2015) 452), October 2015, retrieved from <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1231-ecre-argues-against-a-common-eu-list-of-safe-countries-of-origin-.html>.

⁹⁰ Report Libya: Security Situation 19 December 2014; Rb. Den Haag, zp. 's-Hertogenbosch 24 november 2015, AWB 14/19490.

Relocation and Hotspots: a way forward?

There is a growing consensus among academics but also among Member States that the legal parameters of Dublin must be revised. In September 2015, the European Commission tabled a proposal for a crisis relocation mechanism, which would function as emergency valve in the Dublin Regulation.⁹¹ We will not enter into the debate of how a revised Dublin should look like,⁹² but limit our observations to the functioning of the two emergency decisions of the Council providing for the relocation of 160,000 asylum seekers from Italy and Greece.⁹³ These decisions by and large follow the model of the proposed revision of the Dublin Regulation and could provide a foretaste of the future EU approach. We will show that the relocation mechanism is not working as intended,⁹⁴ because it is still based on the idea of coerced transfer; is premised on a distorted idea of solidarity; and because the EU has neither the mandate nor operational capacity to implement the mechanism.

The relocation mechanism centers around the concept of hotspots that was introduced in the Agenda on Migration that would take on an increasingly important meaning in the year to follow. In areas of high migratory pressure, EASO, Frontex and Europol will work on the ground with what are now frequently called “frontline” Member States to swiftly identify, register and fingerprint incoming migrants and asylum seekers. Frontex was soon to become the main actor in setting up these hotspots.⁹⁵ In fact the concept was first coined in a consultancy study on the feasibility for a European system of border guards.⁹⁶ This prominence of Frontex, seems to contradict the multi-actor approach underlying the hot spot concept and again shows the focus on border control over protection needs.

Although the relocation system takes account of the private, family and personal circumstances of asylum-seekers in making relocation decisions, it does not require the consent of the persons involved.⁹⁷ NGOs report that relocation is not popular among asylum seekers because they have no idea of where they will be sent to⁹⁸ - while, as indicated above, they have high stakes in ending up in some Member States and not in others. The reality is that the majority of arrivals are not going through the hotspots, but elect to relocate themselves. Although the combination of a distribution key coupled with matching

⁹¹ COM(2015) 450 final.

⁹² See eg Guild at al, *supra* note 16; Adviescommissie voor Vreemdelingenzaken, *supra* note 16.

⁹³ Council Decision 2015/1523; Council Decision 2015/1601.

⁹⁴ As of 10 February 2016, 218 persons were relocated from Greece and 279 from Italy, COM(2016) 85 final, annex 4.

⁹⁵ See also COM(2015) 671 final, article 17.

⁹⁶ Unisys, ‘Study on the feasibility of the creation of a European System of Border Guards to control the external borders of the Union (ESBG) (2014)’, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/border-crossing/docs/20141016_home_esbg_frp_001_esbg_final_report_3_00_en.pdf, last accessed 4 March 2016.

⁹⁷ Recital 34: “Therefore, in order to decide which specific Member State should be the Member State of relocation, specific account should be given to the specific qualifications and characteristics of the applicants concerned, such as their language skills and other individual indications based on demonstrated family, cultural or social ties which could facilitate their integration into the Member State of relocation.”

⁹⁸ M. de la Baume, ‘Why the EU’s refugee relocation policy is a flop’, Politico, 6 Jan. 2016, retrieved from <http://www.politico.eu/article/why-eu-refugee-relocation-policy-has-been-a-flop-frontex-easo-med/>; also UNHCR, ‘Building on the Lessons Learned to Make the Relocation Schemes Work More Effectively: UNHCR’s Recommendations’, January 2016.

looks good on paper, UNHCR reports that matching takes place not on the basis of asylum seekers needs or preferences, but on the basis of Member States' indications of what kind of persons they are willing to accept.⁹⁹ This is selection rather than matching. The importance of procuring consent of the asylum seeker was noted by EASO in its evaluation of the Malta relocation scheme: "In general, respondents asserted that relocation should always be a voluntary decision both on the side of the beneficiary and that of the receiving country. If the voluntary aspect is removed, integration difficulties might arise, which could lead to secondary movements [...]."¹⁰⁰ This does not necessarily mean that voluntariness is an absolute requirement for a distribution system to work, but it is likely to contribute to its effectiveness.

Although the second relocation decision distributes asylum seekers in accordance with a key in which GDP and population size are the primary determinants, its full implementation would only result in an even more unbalanced distribution of asylum seekers among the Member States. Apart from capping the total relocation number at 160,000 (thus assigning each person above that number entering Greece and Italy to those countries), the Decisions only apply to those nationalities whose applications have a 75% recognition rate (i.e. Syrians, Iraqis and Eritreans), making Italy and Greece *de jure* responsible for processing all other nationalities. That Greece is organizing buses to the border with Macedonia instead of to a relocation hotspot and is accused of other forms of feet-dragging demonstrates its ambivalence towards the scheme, which however is perfectly comprehensible. At the receiving end, the distribution key hardly considers whether a Member State has already taken in a high number of asylum applications. Member States which are already doing more than their share such as Sweden, Austria or Germany are only allotted more asylum seekers in the relocation decisions.¹⁰¹

A major liability of the relocation system is that it depends on the consent and operational capacity provided by twenty-five Member States (excluding the United Kingdom, Ireland and Denmark). The European Commission identified as main bottlenecks the time it takes to get approvals from receiving Member States and the low number of relocation pledges by other Member States.¹⁰² The Commission also reports that insufficient officers are made available to EASO and Frontex, and that too little humanitarian aid and means of transport such as buses are made available to the EU Civil Protection Mechanism.¹⁰³ Delays in registration have discouraged asylum seekers from applying for relocation, and delays in executing transfers have caused asylum seekers to abscond.¹⁰⁴ As UNHCR has stressed, an absolute prerequisite for the successful implementation of the relocation schemes are adequate reception capacities, not only for ensuring the presence of asylum seekers throughout the procedure

⁹⁹ According to UNHCR, some Member States have attached to their indications a long list of preferences and additional limiting conditions related to *inter alia* language skills and vulnerabilities. Other Member States have limited places to just one of the qualifying nationalities due to a lack of interpreters, or have explicitly excluded vulnerable cases, *ibid*, p. 6.

¹⁰⁰ EASO report (2012), 'EASO fact finding report on intra-EU relocation activities from Malta', retrieved from <http://www.refworld.org/pdfid/52aef8094.pdf>.

¹⁰¹ The distribution key does take previous intake into account, but with a 10% weighting.

¹⁰² COM(2015) 678 final, p. 3.

¹⁰³ COM(2016) 85 final, Annex 2.

¹⁰⁴ UNHCR, *supra* note 98.

but also to make the deal attractive to them. Greece struggles, however, in making these available, and is further urged to provide leaders for EASO and Frontex teams, as well as interpreters and legal aid.¹⁰⁵

In short, the relocation mechanism would seem to be the proverbial cart before the horse. It is premised on a functioning asylum system which is absent in Greece and to a lesser extent in Italy; and it is premised on the willingness of other Member States to share the burden, which is mostly absent. The mechanism is failing, because it is built on existing weaknesses in the fabric of the common European asylum policy.

Towards a shared management of the external borders?

The European Agenda on Migration's short-term response to the refugee crisis consisted of a reinforcement of joint operations under the coordination of Frontex and the establishment of EU-Navfor, a Common Foreign and Security Policy mission targeting human smugglers.¹⁰⁶ Although still a civilian mission, more precisely a police mission with military means, EU-Navfor is not a border management operation. The legal framework within which it operates is indicative of the security dimension that this crisis has taken in the eyes of European policy makers.

Long term, the Agenda announced 'reflections' on the shared management of the European border. This would include a European System of Border Guards, as well as a possible European Coast Guard.¹⁰⁷ Within the context of the refugee crisis it only took a few months to move from reflections to a concrete proposal to transform Frontex into a European Border and Coast Guard Authority in December 2015.¹⁰⁸ A number of factors played a role in the momentum for such proposal. Politically it was very important to counter the image of uncontrolled flows of people entering the European Union. The management of the external borders now became a prerequisite to save Schengen. It would allow for the 'economic' migrant and potential terrorist to be separated from the 'genuine' asylum seeker and individual Member States would be disciplined into either remedying the deficiencies in their border controls or forcing them to put human and technical resources at the disposal of Frontex.

Already in its Communication on European Border Management in 2002, the Commission had contemplated the establishment of a true European corps of border guards, disposing of executive powers independent from the Member State.¹⁰⁹ Resisting this move, Member States in the Council adopted Frontex as a regulatory agency tasked merely with the coordination of Member States cooperation. Frontex's powers and resources have been consistently reinforced in the first decade of its

¹⁰⁵ *Supra* note 103.

¹⁰⁶ Council Decision (CFSP) 2015/778 of 18 May 2015 on a European Union military operation in the Southern Central Mediterranean (EUNAVFOR MED), OJ 2015 L 122/31. The operation has since been named 'Sophia'.

¹⁰⁷ COM(2015) 240 final, p. 17.

¹⁰⁸ European Commission, 'Proposal for a Regulation on the European Border and Coast Guard ...', COM(2015) 671 final, 15 December 2015.

¹⁰⁹ Commission, 'Towards Integrated Management of the External Borders of the Member States of the European Union' (Communication), COM (2002) 233 final, 22.

existence, however always resisting a true centralization and transfer of executive power.¹¹⁰ From that point of view the Commission's proposal constitutes an evolution rather than revolution, because it does not change that fundamental premise. The proposal does qualify border management a shared responsibility and makes the Agency responsible, as a *primus inter pares*, for a European strategy for integrated border management, with which national strategies must be in line.¹¹¹ The two biggest innovations however are the obligation to make border guards available for joint operational activity, as well as the power for the Agency to intervene in emergency situations irrespective of an EU member state's approval, based on a prior Commission decision.

The Commission proposal is also significant in that it proposes to Frontex an important role in the evaluation of Member States' border management systems ('vulnerability assessment') through the posting of liaison officers in the Member States. This would reinforce the Schengen Evaluation System as adopted in 2011 under which the Council can issue an implementing decision with recommendations for improvement.¹¹² Under the proposed Regulation the Agency could issue such decision with corrective measures.

It is questionable whether the proposal as it stands will be acceptable to the Member States. Indeed, in the Council negotiations, the 'right to intervene' was deleted and the obligation to make border guards available weakened.¹¹³ Still, what was initially contemplated as a long-term solution is now presented as a quick fix. Making the EU and its Member States jointly responsible for the management of the external border sounds good in practice, but as long as the Agency does not have actual powers of command and control, it seems to remain a legal fiction.

Toward legal channels for forced migration?

Although legal channels for forced and voluntary migration are an oft-repeated mantra, the outcomes of this element of the Agenda is almost nil, and not likely to amount to much in the near future. The EU has not changed its visa policies for the countries of origin of asylum seekers and refugees, nor has it changed its carrier sanction policy. Countries neighbouring source countries have imitated the European prohibition paradigm, either under European pressure or because they saw no other option. In the

¹¹⁰ See in more detail: J. Rijpma, 'Frontex and the European System of Border Guards: The Future of European Border Management', in Maria Fletcher *et al.* (Eds), *The European Union as an Area of Freedom, Security and Justice*, Routledge, London, 2016 (forthcoming).

¹¹¹ De Bruycker, 'Solidarity as a sovereignty-reducing penalty for failing to meet responsibility in the European Border and Coast Guard', 13, <http://odysseus-network.eu/wp-content/uploads/2015/09/Searching-for-Solidarity-Short-Papers.pdf>, last accessed 4 March 2016.

¹¹² Council Regulation (EU) No 1053/2013 of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, O.J. 2013, L 295/27. See the Council Implementing Decision setting out a Recommendation on addressing the serious deficiencies identified in the 2015 evaluation of the application of the Schengen acquis in the field of management of the external borders by Greece (Council Document 5985/16 of 12 February 2016).

¹¹³ See for a consolidated text as put together by S. Peers on the basis of Council documents 6359/1/16, 6884/16, 6652/16 and 6744/16: Statewatch Analysis, 'The EU Border Guard takes shape' (13 March 2016), <http://www.statewatch.org/analyses/no-285-eu-border-guard.pdf>, last accessed 21 March 2016.

European agenda on migration, the Commission announced that aims at an EU-wide resettlement scheme for 20.000 refugees per year, to be distributed over the Member States on the basis of criteria such as GDP, size of the population, unemployment rate and past numbers of asylum seekers and refugees. The target of 20.000 should be reached in 2020.¹¹⁴ The Commission adopted a Recommendation asking Member States to resettle 20.000 refugees over a period of two years, based on a distribution key.¹¹⁵ More specifically, as a beginning of the cooperation with Turkey (see below), the Commission adopted a Recommendation for a voluntary readmission scheme with Turkey, which should lead to resettlement of Syrian refugees from Turkey in the EU.¹¹⁶ These resettlement numbers are minimal, and no reports on the implementation of even this are available.

Return policies are to be improved by pressuring third countries to take back their own nationals residing irregularly in Europe,¹¹⁷ where necessary with an EU laissez-passer and spurred by European Migration Liaison Officers.¹¹⁸ This will be enforced by high-level dialogues at the EU level, regular bilateral meetings, enhanced cooperation and - where necessary - the use of “adequate leverage”,¹¹⁹ most notably visa policy even though the Commission itself notes that this is hardly useful as the relevant countries are subject to visa requirements not likely to be lifted.¹²⁰ Development cooperation and trade policies are mentioned as additional sources of leverage.¹²¹ Existing fora such as the Rabat and the Khartoum Process will be fully used to enhance cooperation on readmission.¹²² A pilot project with Pakistan¹²³ and Bangladesh will show the way forward.¹²⁴ Furthermore, North-African countries must be motivated to readmit third country nationals who transited through their territory,¹²⁵ and will be stimulated to return migrants to their country of origin before they try to reach Europe.¹²⁶ The

¹¹⁴ COM(2015) 240 final p. 4-5.

¹¹⁵ C(2015) 3560 final, 8 June 2015. A number of 5.331 persons were due to be resettled in 2015, with confirmation that only 779 had been resettled. 22.504 refugees are due to be resettled by the end of 2017, European Commission – Press release. Refugee crisis: Commission reviews 2015 actions and sets 2016 priorities, Brussels, 13 January 2016, IP/16/65, http://europa.eu/rapid/press-release_IP-16-65_en.htm, last accessed January 20, 2016.

¹¹⁶ C(2015) 9490, 15 December 2015.

¹¹⁷ COM(2015) 240 final p. 9; the Commission’s approach is supported by the Council, EUCO 26/15, 2(o), (p), and (q).

¹¹⁸ COM(2015) 453 final, p. 9.

¹¹⁹ COM(2015) 453 final, p. 10. A term used in this respect is also improving the coherence of EU policy, COM(2015) 285 final, p. 9.

¹²⁰ COM(2015) 453 final, p.14.

¹²¹ COM(2015) 453 final, p. 14.

¹²² COM(2015) 453 final, p. 11.

¹²³ Pakistan has begun to implement what could be termed reverse carrier sanctions. It returns people deported from Europe back to Europe if they are not properly documented, and threatened carriers with fines. See i.a. *30 deportees from Greece sent back after being held at Islamabad airport*, dawn.com, December 3, 2015, <http://www.dawn.com/news/1223954>, last accessed January 20, 2016; *Illegal migrants: Deportation deal back on track, says EU official*, Tribune November 25, 2015, <http://tribune.com.pk/story/997196/illegal-migrants-deportation-deal-back-on-track-says-eu-official/>, last accessed January 20, 2016; *Successful talks held with EU on deportation of Pakistanis*, The News, November 24, 2015, <http://www.thenews.com.pk/print/15815-successful-talks-held-with-eu-on-deportation-of-pakistanis>, last accessed January 20, 2016.

¹²⁴ COM(2015) 240 final p. 10-11.

¹²⁵ COM(2015) 453 final, p. 11; comp. COM(2015) 285 final, p. 8.

¹²⁶ COM(2015) 453 final, p.13.

Commission will explore ways to expand the support provided by Frontex to countries in the EU's neighbourhood.¹²⁷ In order to assist countries of origin and transit to cooperate in readmission, the EU will focus on "readmission capacity building", which consists of "development of centralised automated civil registers and of systems for issuing biometric passports and identity documents, launching automated means of transmitting and processing readmission requests (such as fingerprinting machines), or providing material resources necessary for processing readmission requests and receiving returnees, such as means of transport or temporary accommodation facilities."¹²⁸

In its Agenda on Migration, the Commission envisions to promote stability in Libya and Syria, as well as providing humanitarian, stabilisation and development assistance inside Syria and to help Syrian refugees in countries like Lebanon, Jordan, Turkey and Iraq.¹²⁹ The EU will help to mitigate the impact of the refugee crisis at the local level by being a major donor.¹³⁰

Concrete examples of the intention to combine the prohibition approach with assistance to refugees in the region are the EU plans on Turkey and the Western Balkans. On 15 October 2015, the Commission announced an EU-Turkey Joint Action Plan,¹³¹ which was welcomed by the Council,¹³² and which was implemented in March 2016.¹³³ The plan has the dual aim of supporting Syrians in Turkey, and of preventing migration to the EU. As to the first aim, the EU pledges to mobilise new funds,¹³⁴ notably through the EU Trust fund for the Syrian crisis, while Turkey promises to continue giving international protection to Syrian refugees. The EU is to contribute €3 billion in 2016 and 2017, with €1 billion to be

¹²⁷ COM(2015) 453 final, p. 8.

¹²⁸ COM(2015) 453 final, p. 12-13. Comp. in the context of human smuggling COM(2015) 285 final, p. 9.

¹²⁹ COM(2015) 240 final, p. 5 refers to "€3 .6 billion in humanitarian, stabilisation and development assistance inside Syria and to help Syrian refugees in countries like Lebanon, Jordan, Turkey and Iraq."

¹³⁰ COM(2015) 240 final p. 8: "The EU is a leading international donor for refugees with EUR 200 million in ongoing projects from development assistance and over EUR 1 billion of humanitarian assistance dedicated to refugees and IDPs since the beginning of 2014. A strategic reflection is now under way to maximise the impact of this support, with results expected in 2016."

¹³¹ European Commission – Fact Sheet. EU-Turkey joint action plan, Brussels, 15 October 2015, MEMO/15/5860, http://europa.eu/rapid/press-release_MEMO-15-5860_en.htm, last accessed January 20, 2016.

¹³² Press office – General secretariat of the Council. Meeting of heads of state or government with Turkey – EU-Turkey statement of 29 November 2015, Statements and Remarks 870/15, http://www.consilium.europa.eu/press-releases-pdf/2015/11/40802205539_en_635846527200000000.pdf, last accessed January 20, 2016; EUCO26/15.

¹³³ Statement of the EU Heads of State or Government, 7 March 2016, http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/?utm_source=dsms-auto&utm_medium=email&utm_campaign=Statement+of+the+EU+Heads+of+State+or+Government%2c+07%2f03%2f2016, last accessed 29 March 2016; EU-Turkey Statement, 18 March 2016, press release 144/16, http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en_635939208600000000.pdf, last accessed 29 March 2016. Notably, this important agreement is laid down in a press release. Is this an international treaty? If so, Article 218 TFEU provides for a procedure to be followed, which has not been activated so far. However, it is clearly "an international agreement concluded between States in written form and governed by international law" in the sense of Article 2(1)(a) of the Vienna Convention of the Law of Treaties.

¹³⁴ European Commission – Press Release. EU-Turkey Cooperation: A €3 billion Refugee Facility for Turkey, Brussels, 24 November 2015, IP/15/6162, http://europa.eu/rapid/press-release_IP-15-6162_en.htm, last accessed January 20, 2016.

financed from the EU budget and €2 million by Member states.¹³⁵ The first €95 million projects were announced on 4 March 2016.¹³⁶ As to the second aim, the EU pledges to support Turkey in combating migrant smuggling and irregular migration, while Turkey agrees to strengthen its interception capacity, to smoothly readmit irregular migrants who entered the EU via Turkey.¹³⁷ In March, the EU and Turkey agreed to return “all new irregular migrants” to Turkey as of 20 March 2016. For every Syrian returned to Turkey, another Syrian will be resettled from Turkey to the EU. The Commission has proposed to use 54.000 places which were reserved for relocation from Greece and Italy for resettlement from Turkey.¹³⁸ It is not clear which Syrians would benefit, and it is not clear which Member States would accept Syrians from Turkey, nor is it clear what legal status the Syrians should have (the proposal speaks of “resettlement, humanitarian admission or other forms of legal admission”¹³⁹). The first reports on the implementation of this plan show a number of legal issues. Asylum seekers seem to be routinely detained, which does not sit easily with Article 26 of Directive 2013/32 (the Procedures Directive), which provides that asylum seekers shall not be detained for the sole reason that they have applied for asylum. Furthermore, the provision that “all new irregular migrants crossing from Turkey into the Greek islands as of 20 March 2016 will be returned to Turkey” suggests that the EU intends to engage in collective deportation, which is contrary to Article 4 Protocol 4 to the European Convention on Human Rights. On the other hand, it is foreseen that all migrants will be allowed to apply for asylum in accordance with European law. Whether and how the tension between the intention of the EU-Turkey agreement (return of all migrants) and international and European asylum law (where return to Turkey is evidently problematic, see above footnote 50) can be resolved remains to be seen.¹⁴⁰ UNHCR has announced that it does not want to be involved in implementation of the EU-Turkey agreement,¹⁴¹ while

¹³⁵ Council of the EU: Refugee facility for Turkey: Member states agree on details of financing, press release 25/16, 3 February 2016, http://www.consilium.europa.eu/press-releases-pdf/2016/2/40802208322_en_635901838200000000.pdf, last accessed February 4, 2016.

¹³⁶ Press release IP/16/584 of 4 March 2016, <http://europa.eu/rapid/press-release-IP-16-584-en.htm>, last accessed 29 March 2016.

¹³⁷ Article 4 of the *Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation*, signed 16 December 2013, OJ L134/3, 7 May 2014, provides that Turkey shall readmit without formalities third country nationals in an irregular situation if, i.a., they have illegally and directly entered the territory of a Member State after having stayed on, or transited through, the territory of Turkey.

¹³⁸ Proposal for a Council Decision amending Council Decision (EY) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, COM(2016) 171 final, 21 March 2016.

¹³⁹ *Ibid.* p. 2.

¹⁴⁰ For first analyses of the agreement see Steve Peers: The final EU/Turkey deal: a legal assessment, 18 March 2016, <http://eulawanalysis.blogspot.nl/2016/03/the-final-euturkey-refugee-deal-legal.html>, last accessed 29 March 2016; the interviews with Hathaway and Hailbronner at *verfassungsblog*, <http://verfassungsblog.de/three-legal-requirements-for-the-eu-turkey-deal-an-interview-with-james-hathaway/> and <http://verfassungsblog.de/legal-requirements-for-the-eu-turkey-refugee-agreement-a-reply-to-j-hathaway/>; and Henri Labayle and Philippe De Bruycker: L'accord Union européenne-Turquie: faux semblant ou marché de dupes?, 23 March 2016, <http://eumigrationlawblog.eu/laccord-union-europeenne-turquie-faux-semblant-ou-marche-de-dupes/>, last accessed 29 March 2016.

¹⁴¹ “UNHCR redefines role in Greece as EU-Turkey deal comes into effect”, Briefing Notes 22 March 2016, <http://www.unhcr.org/56f10d049.html>, last accessed 29 March 2016. See for UNHCR's view on the legal aspects “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-

other humanitarian organizations likewise have pulled out from activities which could support it.¹⁴² Further elements also bide ill for the viability of the agreement. Immediately after the EU-Turkey agreement, the Turkish ambassador to the EU indicated that Turkey is not willing to give up the geographical limitation to the Refugee Convention, which results in Turkey not having obligations under the Refugee Convention for non-European refugees (such as Syrians).¹⁴³ Furthermore, hours after the agreement was reached, Amnesty International reported Turkey expelled Afghans in violation of international law,¹⁴⁴ consistent with earlier reports on refugee law violations by Turkey.¹⁴⁵ Both gestures suggest that Turkey may not see an interest in being a safe third country. One of the elements of the EU-Turkey cooperation which is meant to incentivize Turkey is visa liberalization and re-energising the accession process with Turkey.¹⁴⁶

On 25 October, a meeting was held in Brussels with representatives of Greece, Albania, Macedonia, Serbia, Bulgaria, Romania, Croatia, Slovenia, Hungary, Austria and Germany.¹⁴⁷ Together, these countries form the corridor between Turkey and the heart of the European Union. The three main points of the action plan is to provide more shelter along the route; to register migrants (under the rubric of “migration management”); and to combat irregular migration (under the rubric “border management”). For providing shelter, it was specifically agreed that Greece would increase its reception capacity to 30.000 places by end 2015,¹⁴⁸ while UNHCR was to provide for at least 20.000 more people; “financial support for Greece and UNHCR is expected.” Further along the route, UNHCR was to increase reception facilities by 50.000 places.¹⁴⁹ In order to manage migration flows together, it was agreed that all arrivals were to be registered, that information about them would be exchanged and that return policies were

Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept” 23 March 2016, <http://www.refworld.org/docid/56f3ee3f4.html>.

¹⁴² “Greece: MSF ends activities in the Lesbos “hotspot””, press release 22 March 2016, <http://www.msf.org/article/greece-msf-ends-activities-inside-lesvos-%E2%80%99Chotspot%E2%80%9D>.

¹⁴³ <https://euobserver.com/migration/132779>.

¹⁴⁴ “Turkey has forcibly returned dozens of Afghans despite Taliban persecution risk”, press release <https://www.amnesty.org.uk/press-releases/turkey-has-forcibly-returned-dozens-afghans-despite-taliban-persecution-risk>, 23 March 2016, last accessed 29 March 2016.

¹⁴⁵ Amnesty International: Europe’s gatekeeper: Unlawful detention and deportation of refugees from Turkey, 16 December 2015, EUR 44/3022/2015.

¹⁴⁶ E.g. EUCO26/15, 2(2); IP/15/6162; Press office – General secretariat of the Council. Meeting of heads of state or government with Turkey – EU-Turkey statement of 29 November 2015, Statements and Remarks 870/15, http://www.consilium.europa.eu/press-releases-pdf/2015/11/40802205539_en_635846527200000000.pdf, last accessed January 20, 2016; EU-Turkey Statement, 18 March 2016, press release 144/16, http://www.consilium.europa.eu/press-releases-pdf/2016/3/40802210113_en_635939208600000000.pdf, last accessed 29 March 2016.

¹⁴⁷ European Commission – Press release. Meeting on the Western Balkans Migration Route: Leaders Agree on 17-point plan of action, Brussels 25 October 2015, IP/15/5904, http://europa.eu/rapid/press-release_IP-15-5904_en.htm, last accessed January 20, 2016.

¹⁴⁸ From the state of play report of 15 December 2015, it seems clear that Greece has not implemented this (in the column *what remains to be done*, it is stated: “Create the extra 23,000 places committed by Greece to reach the 50,000 target”) European Commission: Managing the refugee crisis: Western Balkans route: State of play report, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/western_balkans_route_state_of_play_report_en.pdf, last accessed January 20, 2016.

¹⁴⁹ The 15 December 2015 State of play states that 20.000 of these have been created.

to be intensified. For combating irregular migration, the action plan emphasises cooperation with Turkey (see above), as well as intensifying cooperation in the field of border controls (Operation Poseidon Sea, support for various land border controls in the region, among which 400 police officers to be deployed through bilateral arrangements in Slovenia within a week¹⁵⁰). In February 2016, the EU framework was disregarded by a meeting of Croatia, Slovenia and Austria (with Bulgaria as an observer) with “the Western Balkan 6” (i.e. Albania, Macedonia, Kosovo, Montenegro, Serbia, Bosnia & Herzegovina) which sought border closure and put less emphasis on refugee rights.¹⁵¹ One of their conclusions, “It is not possible to process unlimited numbers of migrants and applicants for asylum” can be taken as a direct rebuff of Angela Merkel’s “Wir schaffen dass”. This move by a limited number of Member States, in cooperation with non-Member states, and excluding crucial states like Germany and Greece, underlines the lack of agreement among Member States on the approach to be taken and on the Common European Asylum System.

So we can see that the prohibition approach is intensified, not just by stepping up enforcement at the European external borders (including collective returns to Turkey), but also by pressuring Turkey to expand visa obligations. At the same time, promises are made about resettlement and more funding for refugee assistance in the region, but these are not operational. Also, all attention is focused on Turkey, while Lebanon and Jordan (facing a substantially bigger problem than Turkey, but with no shared borders with the EU) do not receive substantial attention. In addition, while the idea is that Turkey will patrol Europe’s borders and readmit refugees and asylum seekers, there is very little attention for why Turkey would have any interest in doing so, or why Turkey would find it fair to shoulder a much bigger part of the refugee issue than Europe is willing to. Therefore, to the extent that the intensification of the prohibition approach is successful, it is likely to boost the market for smuggling services, and hence to increase irregular migration towards Europe. This is all the more likely as elements in the EU’s response in 2015 which might contribute to interrupting the smuggling market cycle (increasing assistance capacities in Lebanon, Jordan, Iraq and Turkey; resettlement) are barely worth the paper they are written on.

Toward federalisation?

In suggesting a longer term reflection towards establishing a single asylum decision process and a common asylum code, the Commission does appear to recognise the limitations of the current approach. This is in line with what seems to be a growing discourse on the need for transferring more competence to the EU, including the power to decide on individual asylum applications. Goodwin-Gill, for example, observed recently that “[t]he strategy of implementing a common policy through twenty-eight national systems ... was always bound to fail, no matter how comprehensive the top-down,

¹⁵⁰ The 15 December 2015 state of play mentions that 200 had been deployed by then.

¹⁵¹ Note from General Secretariat of the Council, 6481/16, 25 February 2016, ASIM18, RELEX135, COWEB17, ENLARG11, circulating the Declaration Managing Migration Together, Vienna 24 February 2016.

legislative agreement on qualification, standards and criteria.”¹⁵² He suggests setting up a European Migration and Protection Agency competent ‘to fulfil collectively and to implement the individual obligations of Member States’. Hailbronner also suggests the transfer of competence for implementing a single asylum procedure, to be carried out in central reception centers in the hot spots. Appeals procedures should in his view only be based on EU asylum law and should be dealt with by specialized EU courts.¹⁵³ There are also several reports calling for centralized asylum decision-making.¹⁵⁴ The question is whether this could be done on the current Treaty basis of Article 78(2) TFEU. Although some argue that implied in this article is that asylum decisions need to be made by the Member States (Article 78(2)(e) TFEU refers to establishing rules for determining responsibility), we do not believe such transfer of power would be impossible the basis of this article in view of the Treaty’s clearly stated objective of a Common European Asylum System.

Although we share the analysis behind these suggestions, we are nonetheless hesitant in embracing federalisation as panacea for the current failures. There are certain risks to a further transfer of competences which need to be thoroughly thought through. It could add a further level of fragmentation whereby competences at the EU level may interfere with national competences and vice versa. Decisions on asylum applications may, for example, have legal effects in the spheres of detention, reception, return and relocation. Centralizing status determination without a concurrent transfer of power in the spheres of border control, return and detention (as is proposed by ALDE, for example¹⁵⁵) will give rise to complex issues of cooperation between Member States and the EU. As long as Member States remain responsible for executing part of the EU asylum policy (detention, return, relocation), the system is vulnerable. There are also a range of practical issues, such as the question which Member State becomes responsible for taking in failed asylum seekers whose return cannot be effectuated.

There are also important constitutional limits to the transfer of executive powers to Union bodies outside the EU institutions. It is true that in the ESMA-case the Court limited the effects of the Court’s anti-delegation (‘Meroni’) doctrine, by allowing for the establishment of agencies with decision-making power as ‘operational support mechanism’ in the internal market.¹⁵⁶ It seems tempting to transpose that logic to the Area of Freedom, Security and Justice. However, it is submitted that border management is essentially a policing power, which may involve the use of force and coercion, which requires a level of discretion that is difficult to regulate, in any case in absence of a European rules of

¹⁵² G. Goodwin-Gill, ‘Refugees and Migrants at Sea: Duties of Care and Protection in the Mediterranean and the Need for International Action’, Notes for a Presentation at Jean Monnet Centre of Excellence on Migrants’ Rights in the Mediterranean, University of Naples ‘L’Orientale, 11 May 2015.

¹⁵³ Hailbronner, *supra* note 34.

¹⁵⁴ Guild et al, *supra* note 16, at 59; S. Carrera et al, ‘What Priorities for the New European Agenda on Migration?’, CEPS, April 2015.

¹⁵⁵ ALDE, ‘Roadmap to get a grip on the refugee crisis’, February 2016.

¹⁵⁶ Case C-270/12 *UK v European Parliament and Council (‘ESMA’)*. See Van Cleynenbreugel, ‘Meroni Circumvented? Article 114 TFEU and EU Regulatory Agencies’ (2011) 21 *Maastricht Journal of European and Comparative Law*, 87.

engagement. In this different policy context, the limitations of the Meroni-doctrine, such as the need for a precise delimitation of powers, will much more readily apply.¹⁵⁷

Although a full transfer of powers to a European Asylum Authority or European Border Agency would have the obvious advantage of a clear-cut division of responsibility, it would require judicial review of decisions taken by these agencies, such as against the refusal to grant asylum or a decision to deny entry at the border. Being a European body, an appeal against such decision would have to be brought before the CJEU.¹⁵⁸ One could envisage a novel system, following the example of the proposal for a European Public Prosecutor's Office, under which delegates of the European agencies would operate within specific Member States, subject to the control of national judges.¹⁵⁹ There are some signs that the hotspot approach is moving in that direction. The Greek government tabled a bill in February 2016 for a new detention and reception regime in the hotspots which would grant EASO and FRONTEX the power to observe or participate in reception and identification procedures.¹⁶⁰ In theory, this model could be extended to give, to the extent deemed necessary, EU agencies delegated executive power under Greek law. Such arrangements obviously depend on Greek cooperation and consent, but seem better feasible than the federalisation of asylum-decision-making.

A full centralization of powers of in border management would also undermine the constitutional principle that the Member States are ultimately responsible for their own internal security (Article 4(2) TEU and Article 72 TFEU). This point was first raised in 2007 when an amendment to the Frontex regulation introduced the obligation to make national border guards available for Rapid Border Interventions. That obligation was therefore qualified, allowing Member States to refuse deployment of its national border guards when 'faced with an exceptional situation substantially affecting the discharge of national tasks.'¹⁶¹ The removal of this exception, as well as the power to intervene without the request of a Member State, in the current proposal for a European Border and Coast Guard Agency seems to encroach upon this principle. It also seems rather odd that whereas the Treaty explicitly states in relation to Eurojust and Europol that coercive measures remain with the Member States, a similar limitation would not apply to a European Border Agency, which would be based on the much more broadly formulated Article 77(2)(d) TFEU.¹⁶²

As we argued above, the present confederal model is likely to work more smoothly if the Member States have a sincere interest to cooperate. In view of the legal, practical and political constraints to federalisation, it is all the more imperative that the right incentives are put into place for Member States as well as asylum seekers to work with instead of against the system. We agree that the Commission

¹⁵⁷ See Rijpma, *supra* note 110.

¹⁵⁸ Case 314/85, *Foto-frost*.

¹⁵⁹ European Commission, Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17 July 2013.

¹⁶⁰ ECRE Press release 12 Feb. 2016, 'New Greek law to include detention regime in 'hotspots''.

¹⁶¹ Article 4(3), Regulation (EC) No 863/2007 of the European Parliament and of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, O.J. 2007, L 199/30.

¹⁶² Article 85 and 88 TFEU.

should be invited to play its role as guardian of the treaty more forcefully, but one cannot hope the Union, be it in a federal or confederal constellation of governance, to enforce compliance with a system which meets resistance on so massive a scale.

CONCLUSION

The European response to the refugee policy crisis is premised on an intensification of the prohibition of the cross-border movement of refugees, combined with neglect of the position of refugees in the region. It is unlikely that even the number of resettlements proposed by the Commission (which are entirely inadequate) will be realized. The prohibition approach to refugee movement is both unrealistic (refugees are bound to seek safety, whether we like it or not), and it is illegitimate morally (article 14 UDHR grants everyone the right to seek asylum) as well as legally (the principle of non-refoulement). At the external borders, the European response does not do away with the unrealistic expectations of what borders can achieve, because it is assumed that border controls can bring down the number of migrants and because policy makers still dream on about push-backs without meaningful individual assessment. In the Common European Asylum System, the uneven sharing of the burden among Member States and the drastic divergence in the protection afforded by Member States to refugees remain to be addressed.

It has to be emphasised that the present European crisis is a crisis of refugee policy, not a refugee crisis. The numbers in themselves are not the problem; the way in which the European deals with them is. The direction in which the European Union is now taking asylum law and policy mainly reproduces, and in important ways intensifies those elements of European law and policy which have caused the crisis. Therefore, the European response is likely to make the crisis worse. This is tragic, all the more so because it is not necessary. A less disastrous approach would require doing away with the tunnel vision in which European policy makers are presently caught – would require doing away with the idea that if policy doesn't work, more of the same policy is the appropriate response. It would require a reconsideration of the very fundamentals of the Common European Asylum System: coercion, prohibition, unrealistic expectations of what borders can do, and a confederate approach without addressing legitimate concerns of Member States, third states and refugees.