



ARE REFUGEES THE REAL THREAT TO EUROPEAN IDENTITY?

IED Research Project: “Migration, borders control and solidarity: Schengen at stake?”

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Abstract: Due to the so-called ‘migrant crisis’, the EU is facing an unprecedented challenge in both political and humanitarian terms. The blurring of the lines between ‘immigrant’ and ‘refugee’, however, has frustrated fair and honest discussion, allowing nationalist, populist sentiment to grow, and far-right, xenophobic forces to gain ground. The arrival of so many desperate people, often of Islamic faith, is associated to the danger of terrorism and perceived as a threat to Europe’s security and social values. Instead of favouring the implementation of a proper system of immigration and asylum policy at European level, the crisis has led many Member States to reinstall internal border controls and closing national frontiers, threatening freedom of movement within the EU. The present paper aims at analysing the situation and its future development, suggesting that migration is not a new phenomenon, and that the real challenge is the ability to hold onto the principles of peace, democracy, rule of law and solidarity that Europe was built upon.

“This publication received financial support from the European Parliament. Sole liability rests with the author and the European Parliament is not responsible for any use that may be made of the information contained therein.”



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“The high contracting parties (...) [express] the wish that all States, recognizing the social and humanitarian nature of the problem of refugees, will do everything within their power to prevent this problem from becoming a cause of tension between States” (preamble to the 1951 Convention Relating to the Status of Refugees)

1. INTRODUCTION

“A lasting solution, the possibility to begin a new life, is the only dignified solution for the refugee himself”¹.

Imprudent past policies of intervention in the Middle East and prolonged inaction in front of the Syrian devastation have not remained without consequences, and these consequences take the form of hundreds of thousands of desperate displaced people showing up in mass at the European Union’s external border. They arrive on unseaworthy boats on the Italian or Greek coast, or on their feet after walking through countries and borders, carrying nothing more than their children and their hopes. The migratory pressure that Europe is facing has brought the current system to collapse, due to the lack of coordinated action and uniform reception policies, and has put the most fundamental principles of the European Union at stake. Many Member States have failed to show solidarity towards the most affected countries, refusing to implement a ‘relocation plan’ and trying to leave the burden on neighbouring countries by closing their national borders.

The crisis is undoubtedly a challenge, but human rights and refugee protection are “embedded in Europe’s DNA”², and the demographic and economic situation of the EU suggests that immigrants might be a useful resource. Yet, instead of stimulating advancement and solutions, the current crisis has brought out all the unpleasant, disappointing sides of the European project. Why did this happen? At present, one of the main obstacles seems to be Europe’s inability to respect the difference between an ‘immigrant’ and a ‘refugee’, making it difficult for states to remember their obligations under international law towards people fleeing war and persecution. This lack of clarity also leads to growing unease among the population, which constitutes fertile ground for populist, nationalist sentiment. All these factors cause the individual states to ‘close up’ in front of the ‘invasion’, putting the Schengen Treaty and the freedom of movement within the Schengen area at serious risk.

The present paper aims at analysing the current situation related to the so-called ‘migrant crisis’, making a criticism of the poor strategy the EU has implemented so far, and addressing

¹ Statement by Mr. Paul Hartling, UN High Commissioner for Refugees, to the Third Committee of the United Nations General Assembly (12 November 1984) <<http://www.unhcr.org/print/3ae68fb38.html>> accessed 10 May 2016.

² Ana Palacio, ‘Clarifying Europe’s refugee problem’ (16 May 2016) <<https://www.project-syndicate.org/commentary/europe-refugee-problem-by-ana-palacio-2016-05>> accessed 17 May 2016.

the violations of international law and human rights that this has entailed. The analysis will start with an overview of the history of the Schengen Agreement, and of the framework of refugee protection and asylum law in Europe. In the second part, the paper examines the future development of the situation, outlining which should be the political objectives at European and national level, and suggesting the strategies needed to implement them.

2. CURRENT SITUATION

“If we want Europe to remain open and tolerant, we can no longer allow ourselves to be helpless”³.

On 14 June 1985, the representatives of five European states gathered in Schengen, Luxembourg, to sign an agreement aiming at the creation of a borderless zone that would facilitate the free movement of goods and labour between states. Even though the Schengen Agreement was little more than an experimental framework between Germany, France, Belgium, Luxembourg and the Netherlands, it was meant to “set an example for a Community approach in the near future”⁴. After the signing of the Schengen Implementing Agreement on 19 June 1990 and its entry into force five years later, a significant number of other states gradually joined. The borderless area expanded to include twenty-two of the twenty-six Member States of the EU beside four non-EU countries: Norway, Iceland, Switzerland and Liechtenstein.

By abolishing border controls and enabling free movement of goods and people within Europe, “the Agreement was (...) meant to increase the likelihood of long-term success of the new union”⁵. Freedom of movement was indeed considered “one of the most important precepts of the internal market”⁶, and “the idea was that crossing borders without being stopped for controls was a major issue on the agenda of creating a European identity”⁷.

³ Donald Tusk, ‘By being tough on migration we can also be humane’ *The Guardian* (22 April 2016) <<http://www.theguardian.com/commentisfree/2016/apr/22/europe-migration-crisis-abandoned-values>> accessed 23 April 2016.

⁴ Aleidus Woltjer, ‘Schengen: The Way of no Return?’ (1995) 2 *Maastricht Journal of European and Comparative Law* 256, 257.

⁵ Lauren McCluret, ‘Suspending Schengen: Exceptions to the Schengen Agreement and the Legality of France’s Decision to Close Its Borders with Italy’ (2011-2012) 9 *Loyola University Chicago International Law Review* 327, 331.

⁶ Maartje A.H. van der Woude and Patrick van Berlo, ‘Crimmigration at the Internal Borders of Europe? Examining the Schengen Governance Package’ (2015) 11 *Utrecht Law Review* 61, 67.

⁷ Antje Wiener, ‘Forging Flexibility - The British ‘No’ to Schengen’ (1999) 1 *European Journal of Migration and Law* 441, 441.

Consequently, the Schengen Agreement was incorporated into EU law by the Treaty of Amsterdam, which came into force in 1999, and became “one of the core legal frameworks of the European Union”⁸.

The implementation of the Schengen area was historical and revolutionary. Borders certainly touch upon the core concept of sovereignty, “both in setting its legal boundaries and in constructing the social boundaries”⁹, and giving up on national border politics, which “have been crucial to and are influenced by state-formation in the modern world”¹⁰, means calling for the assumption that national interests are secondary to cooperation and solidarity between states¹¹. For these reasons, the creation of an area without borders, a fundamental step towards the formation of the European Union as we know it today, resulted from a very arduous process.

The difficulties arose not only from the challenge of giving up such a defining element of internal politics and national identity, but also from the complexity of developing a common policy for the management and protection of the external borders. As rightly observed, “the fact that it took five years to transform the Schengen Agreement 1985 into the Schengen Implementation Convention 1990 and still another five years before this Convention could enter into force (1995), was (...) a clear sign that even at the negotiating tables it was an uphill battle to agree upon an effective and fair system of control at the external borders of the European Union and upon an equally workable system of cross-border cooperation at the common borders of its Member States”. In order to administer border controls, the EU created FRONTEX, an independent and specialized agency with the aim to coordinate cooperation among the member states and complement the national systems of border management¹². Thus, despite the difficulties, the battle seemed won, and the dream of a peaceful and united Europe without internal borders was complete.

With that dream, however, came challenges and responsibilities that the EU and its Member States are now struggling to cope with. A common policy of management and protection of the external border, indeed, entails a common policy on immigration and asylum, and the inadequacy of the system put in place so far has become evident during the

⁸ Van der Woude and van Berlo (n 6), 67.

⁹ Wiener (n 7) 455.

¹⁰ *Ibid.*

¹¹ *Ibid.* 451.

¹² McCluret (n 5) 331.

past few years. In fact, it has put the EU through a crisis that is endangering Europe's most fundamental principles and jeopardising the future of the union itself.

The Schengen Convention “hardly contains any criteria for admission or immigration procedures in the field of immigration and asylum law”¹³. Articles 28 to 38 affirm the obligations of the Contracting Parties under the Geneva Convention relating to the Status of Refugees of 28 July 1951 (as amended by the New York Protocol of 31 January 1967) and lay down the criteria to determine which state is responsible for dealing with an asylum request¹⁴. However, “the Convention lacks material or procedural provisions on status determination of refugees”¹⁵, and its provisions on responsibility were set aside once the so-called ‘Dublin Agreement’ came into force in 1997 and was reformed in 2003 (Dublin II) and 2013 (Dublin III).

Both the Schengen Convention and the Dublin Agreement “are based on the principle that *at least* one state is responsible for accepting and processing an asylum application”¹⁶ and the criterion of responsibility introduced by the Dublin Convention is the ‘country of first entry’ principle. This, of course, has put a disproportionate burden on the countries on the Southern border, in particular Greece and Italy. Already struggling with a dramatic financial and economic crisis in recent years, these countries have been overwhelmed by the numbers of people fleeing war and conflict and seeking refuge in Europe, and have found themselves inadequately prepared to face the growing flows of migrants and asylum-seekers.

The limits of the Convention were evident from the beginning¹⁷. The Dublin system is unfair towards asylum-seekers and refugees, “who often aim to join their families or try their luck in countries different from the ones on which they entered European territory”¹⁸, and clearly unequal among Member States. According to the Convention, only some states bear the financial and social costs of processing a high number of asylum requests and consequently take the blame for manifestly failing “to guarantee adequate living conditions

¹³ Woltjer (n 4) 262.

¹⁴ European Union, *Schengen Implementation Agreement*, 19 June 1990, Chapter 7.

¹⁵ Woltjer (n 4) 262.

¹⁶ *Ibid.* 263.

¹⁷ Jean-Baptiste Farcy, Eimear O’Neill and David Watt, ‘Desperately searching for solidarity: the EU asylum saga continues’ (1 April 2016) <<http://eumigrationlawblog.eu/desperately-searching-for-solidarity-the-eu-asylum-saga-continues/>> accessed 10 April 2016: “It has been widely acknowledged that the system is no longer working, (...) what is less often admitted is that it has in fact never worked”.

¹⁸ Serena Brugnola, ‘Syrian refugees in Europe: Protection in principle, chaos in practice’ *Al Marsad – Arab Centre for Human Rights* (March 2016) 17, available at <<http://golan-marsad.org/en/latest-publication-syrian-refugees-in-europe-protection-in-principle-chaos-in-practice/>> accessed 10 May 2016.

for those seeking protection in Europe”¹⁹. The truth is, however, that this manifest failure is on the entire European Union.

The Dublin system officially collapsed during the first eight months of 2015, when the ‘Syrian diaspora’ brought thousands of desperate people to the European borders and caused an unprecedented humanitarian disaster. The emerging ‘migrant crisis’ hit Europe with unexpected violence. During that time, the number of applications in the Member States exceeded 530.000²⁰, mainly by citizens of war torn countries like Syria, Iraq and Afghanistan. It was the beginning of the biggest refugee crisis since the Second World War²¹.

Initially, the greatest burden was on Greece, Italy, Hungary, Austria and Croatia, but the crisis soon reached a deeper and more dramatic level, and by August 2015, “no one could speak of this crisis as a local problem – for it now engulfed Europe”²². As rightly observed, what made this a crisis was not only the massive number of persons seeking protection, “but rather how they strained an already fragile EU agreement on migration to breaking point”²³. In a tragic attempt to put the situation under control, many states such as Hungary, Germany, Austria, Slovakia, the Netherlands, Denmark and Sweden closed their borders or introduced temporary border controls. According to article 23 of the Schengen Convention, “where there is a serious threat to public policy or internal security, a Member State may exceptionally reintroduce border control at its internal borders for a limited period of no more than 30 days or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days”²⁴.

The fences built across Europe, however, are a disheartening symbol of the states’ tendency to protect their own national interests instead of complying with Europe’s principles of union and solidarity. Reinstalling internal border controls instead of implementing a

¹⁹ Minos Mouzourakis, ‘The reception of asylum seekers in Europe: failing common standards’ (20 April 2016) <<http://eumigrationlawblog.eu/the-reception-of-asylum-seekers-in-europe-failing-common-standards/>> accessed 10 May 2016.

²⁰ Viljar Veebel and Raul Markus, ‘Europe’s Refugee Crisis in 2015 and Security Threats from the Baltic Perspective’ (2015) 8 *Journal of Politics and Law* 254, 255.

²¹ *Ibid.*

²² Thom Brooks, ‘The EU Migration Crisis – What Next’ (2016) 34 *Netherlands Quarterly of Human Rights* 4, 4.

²³ *Ibid.*

²⁴ Schengen Implementation Agreement, Art. 23.1.

Article 26, on the other hand, draws the procedure for prolonging border control at internal borders: “Member States may only prolong border control at internal borders under the provisions of Article 23(2) after having notified the other Member States and the Commission. (...) [They] shall supply the other Member States and the Commission with all relevant information on the reasons for prolonging the border control at internal borders”.

burden-sharing mechanism that would ensure equality between Member States and guarantee the rights of migrants and refugees is historically misplaced and strategically inconvenient.

Why are states so reluctant to accept refugees? If we managed to tackle the reasons for this unwillingness and question their validity, perhaps we would be able to respond responsibly to the situation. Since the majority of people seeking refuge in Europe come from war torn areas of the Middle East and are of Islamic faith, they are often perceived as a threat to the laic values of Europe and as a danger to our secular society. Moreover, due to the raise of ‘Islamic terrorism’ in recent years, a segment of the public opinion and a number of political leaders associate the waves of Muslim asylum-seekers to the risk of terrorist infiltrations. Consequently, “safety and security are of course frequently invoked”²⁵ as categorical reasons to deny reception and protection, and “migration has been increasingly presented as a security threat”²⁶.

On the other hand, “most governments believe that refugees who arrive at their borders impose unconditional and indefinite obligations on them – and on them alone”²⁷. Given the economic vulnerability of the EU and its Member States, dedicating financial resources to processing asylum applications and investing in integration services and social guarantees for a conspicuous number of refugees is perceived as an unjustifiable form of injustice by the segment of European population who is economically struggling. In such a financially troubled situation for various states, higher expenditure for the rising number of asylum applicants means subtracting resources from the countries’ restrained budget that could otherwise be assigned for ordinary local services, and this can easily create frustration at the national level²⁸.

A large part of the population feels economically disadvantaged by the refugee influx and, in consequence of this growing unease, turns to extremist, xenophobic forces²⁹. As has been rightly observed, “the debate has become so toxic that political leaders are afraid to challenge the arguments of the far right (...) and the leaders are instead (...) questioning

²⁵ Cathryn Costello, ‘European justice for migrants and refugees’ (14 June 2015) <<http://verfassungsblog.de/european-justice-for-migrants-and-refugees-2/>> accessed 10 May 2016.

²⁶ Wiener (n 7) 453.

²⁷ *Ibid.*

²⁸ Veebel and Markus (n 20) 258.

²⁹ For a thorough analysis of the rise of nationalism in Europe based on the results in the most recent national elections, see for example: ‘Austria far right thwarted, Van der Bellen elected president’ *BBC News* (23 May 2016) <<http://www.bbc.com/news/world-europe-36362505>> accessed 24 May 2016.

whether Europe should be taking in refugees at all”³⁰. In such situation, indeed, “even the most well-meaning and justice oriented leaders may find it hard to justify absorbing large numbers of refugees when their own citizens are facing unemployment, insecurity and persistent poverty”³¹. This way, the issue of migration becomes politically twisted, with party leaders of many European countries taking advantage of their citizens’ fears and frustrations as an effortless way to win their votes and ensure their own (re-)election, strengthening xenophobic, anti-Islamic and anti-EU sentiment and discourse.

3. FUTURE DEVELOPMENT: EU’S POLITICAL OBJECTIVES AND RELATIVE STRATEGIES

3.1 FIGHTING POPULISM

“Achieving a fair and functioning system will require that politicians begin to lead public opinion rather than follow it”³².

It is indubitable that any effort to save Schengen and implement a better and more sustainable system of refugee protection must be accompanied by a genuine effort to change the discourse. In order to halt the vicious cycle of politicians riding the citizens’ frustrations and thus fomenting them, it is vital to make the wider public opinion aware of *why* so many people are coming to Europe, and of what they are escaping from. To many Europeans, it appears that the waves of Syrians, Iraqis, Afghans and Eritreans arriving on the continent have *chosen* to come to Europe in search of a better life. More often than not, however, these people do not have a choice: escaping from their beloved homeland and trying to reach our borders is the only chance they have to have a life at all.

However, as long as refugees are portrayed as economic and security threats, “states are unlikely to put refugees first”³³. On the contrary, they will intensify their impulsion to

³⁰ Susi Dennison and Josef Janning, ‘Bear any burden: How EU governments can manage the refugee crisis’ *ECFR/167* (28 April 2016) 13, available at <http://www.ecfr.eu/publications/summary/bear_any_burden_how_eu_governments_can_manage_the_refugee_crisis> accessed 10 May 2016.

³¹ Roni Amit and Loren B. Landau, ‘Refugee protection is politics’ (31 March 2016) <<https://www.opendemocracy.net/openglobalrights/roni-amit-loren-b-landau/refugee-protection-is-politics>> accessed 10 May 2016.

³² Farcy, O’Neill and Watt (n 17).

protect themselves by building fences and enforcing border controls. It is for this reason that “no solution to a refugee problem can be effective if it ignores the situation in the country of origin”³⁴. The future of Schengen and of the European Union is inextricably dependent upon changing the way states see refugee protection from a burden on their social and economic systems to a non-negotiable obligation to protect human rights. Refugees are not immigrants, and they should not be subjected to instrumentalisation and scapegoating³⁵.

To more effectively describe the populist discourse surrounding groups of asylum seekers arriving in Europe, it can be useful to explore the example of Afghan migrants. Afghans are the second biggest group of asylum seekers arriving in Europe, and the world’s third largest refugee population (after Palestinians and now Syrians), with three million people fleeing the country and seeking protection abroad³⁶. This group poses a particularly difficult challenge for Europe not only because, given the current situation in Afghanistan and the wider region, the numbers are likely to rise, but also because Afghans come in mixed flows of refugees and so-called economic migrants, who can be hard to distinguish from each other. In some cases, however, this difficulty is due to our own inability or unwillingness to go into depth into the reasons of the single individuals for leaving, coupled with a lack of awareness about the situation in such a complex country. These factors have caused the European population to perceive Afghans as an invading force, which comes to Europe to pursue their economic interests and a financially more rewarding life, at the expense of European economic stability and social values. The truth, as usual, is much more complex than that.

One factor that contributes to the perception and categorization of Afghans as economic migrants is the fact that, unlike Syrians, they do not travel with families and their group is not composed by a majority of women and children, but rather of young men in a working age. A young male person traveling alone is more likely to be perceived as an economic migrant looking for a better-paid job, than a woman or a child. Nevertheless, the

³³ Amit and Landau (n 31).

³⁴ Irene Khan, ‘Burden-sharing: Utopian dream or principled pragmatism?’ (6 April 2016) <<https://www.opendemocracy.net/openglobalrights/irene-khan/burden-sharing-utopian-dream-or-principled-pragmatism>> accessed 10 May 2016.

³⁵ Amit and Landau (n 31).

³⁶ Angela Stanzel, ‘Eternally displaced: Afghanistan’s refugee crisis and what it means for Europe’ *ECFR/170* (10 May 2016) 2, available at <http://www.ecfr.eu/publications/summary/eternally_displaced_afghanistans_refugee_crisis_and_what_it_means_for_europ> accessed 11 May 2016.

working age of a man coincides with his fighting age, and thus many of these men escape from regions controlled by Taliban groups in order not to be forced to join the fights. They are often sent away by their own mothers and families, who, even if living in a less than ideal situation themselves, are paradoxically subjected to fewer risks to their safety and security. Afghanistan is a very unstable and unsafe country, with the level of danger and the intensity of fighting varying from one region to another. Knowledge and awareness of these stories and situations would help people and governments to distinguish between particular cases, increase solidarity towards individuals who would not have left their families, homes and land if it were not a matter of survival.

Under international law, these refugees arriving in Europe cannot be denied protection. However, “like other refugee populations, Afghans often travel in stages, first to neighbouring countries – mainly Pakistan and Iran – and then onwards, often following the path from Pakistan to Iran, Turkey, and then Greece”³⁷. Since Europe is struggling to cope with the increasing pressure of asylum-seekers landing on its shores, agreements and cooperation with Afghanistan’s neighbouring countries “to improve the situation of Afghan refugees and migrants in the region”³⁸ could be the key to find the balance between coping with the unprecedented number of displaced people and guaranteeing the rights of every single individual seeking protection. If refugees found better reception conditions in countries such as Iran or Pakistan, they would not need to risk their lives and resort to the criminal smuggling network to undertake perilous journeys to Europe. Moreover, an effort on the part of the EU is needed to cooperate with Kabul to put in place an effective migration policy and a long-term strategy to cope with the country’s “worsening prospects in terms of security, politics, and the economy”³⁹, in order to allow these refugees to keep hope of returning home. As will be outlined in the following chapter, the development of a new dimension of foreign policy is fundamental as part of an effective response to the current European crisis. As long as there will be no signs of improvement in terms of security and stability in places like Afghanistan, Syria and the wider Middle East, “refugees will continue to come to Europe, and resettlement will be hard to implement”⁴⁰.

³⁷ *Ibid.*

³⁸ *Ibid.* 1.

³⁹ *Ibid.* 4.

⁴⁰ *Ibid.*

3.2 DEVELOPING A NEW FOREIGN POLICY DIMENSION

“It has taken the arrival of the refugee crisis on the beaches and in the cities of Europe to drive home the need for a sustained political will to find solutions to the wars that have sent their victims to European shores”⁴¹.

The root causes of the refugee crisis “mainly relate to systemic poverty and corruption, failed states, dictatorship and terrorism, war and civil war”⁴², and the European Union should do a genuine effort to “question to what extent these causes also are rooted in the foreign and the security policy as well as the economic and agricultural policy of (Member states of) the European Union itself. Like other powerful states and federations in the West, the East and the South of the globe, this Union is not only part of the solution but also part of the problem”⁴³. It is vital for the West to acknowledge its historical responsibilities in the factors driving migration today, especially from North Africa and the Middle East.

As of mid-2015, wars in Syria, Somalia and Afghanistan alone were responsible for half of the world’s refugee population. The Syrian war alone, since its start in March 2011, has accounted for nearly 12 million forcibly displaced people, over half of the total population of the country and one fifth of the world’s total displaced⁴⁴. The number of armed conflicts in the world rose dramatically in the last decade, but as the cases of Syria and Afghanistan sadly show, wars also became more deadly, with belligerent parties often deliberately targeting the civilian population and repeatedly violating the norms of international humanitarian law designed to protect civilians in conflict. Leaders and public opinion should acknowledge the fact that it was not when the massive flows of refugees trying to enter Europe made it to the front pages of Western newspaper that the ‘crisis’, the tragedy, began. Countries neighbouring wars, such as Turkey⁴⁵, Pakistan and Lebanon, had

⁴¹ Jean-Marie Guéhenno, ‘Conflict is key to understanding migration’ (13 May 2016) <<http://www.crisisgroup.org/en/regions/op-eds/2016/guehenno-conflict-is-key-to-understanding-migration.aspx>> accessed 14 May 2016.

⁴² Cyrille Fijnaut, ‘The Refugee Crisis: The End of Schengen?’ (2015) 23 European Journal of Crime, Criminal Law and Criminal Justice 313, 314.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ According to the UNHCR, “in 2014, the country hosting the largest number of refugees was Turkey, with 1.59 million refugees. By the end of 2014, Syria had become the world’s top source country of

been sheltering the most refugees for years, and as of 2014, “some 86 percent of the world’s displaced were living in developing countries that already struggled with enormous economic, development, and governance challenges”⁴⁶.

The long-term response to the current situation must turn from protection of national interests to implementation of a stronger foreign policy dimension at European level, focusing on prevention and anticipation of conflicts, terrorism and war, and on the development of an effective strategy to ensure respect and enforcement of international humanitarian law and human rights law. Until recently, it was widely believed that the effects of wars and conflicts in other states or continents would not reach Europe. This assumption proved wrong, and “the impacts of conflicts in the wider neighbourhood are now reaching the EU at full force”⁴⁷. In this scenario, “the movement of refugees also serves a signalling function, focusing world attention on severe human rights violations in refugee-generating countries, [and] the burdens resulting from the non-refoulement promise [should] create incentives for refugee-receiving states to take steps to halt these violations”⁴⁸, through diplomatic efforts and humanitarian aid.

European foreign policy, however, should not “merely react to the current push factors driving refugee flows, such as the Syrian war”⁴⁹, but also anticipate those factors and the tragedies that force people to leave their homeland and flee. In other words, “policymakers must do more to de-escalate the international and regional geopolitical rivalries that feed off wars, do better at conflict prevention, and pay more attention to the political, economic and development failures and grievances that turn into violence”⁵⁰. It needs to be remembered, indeed, that if there were no wars, there would be no refugees.

refugees, overtaking Afghanistan, which had held this position for more than three decades. Today, on average, almost one out of every four refugees is Syrian, with 95 per cent located in surrounding countries”. UN Refugee Agency, ‘Facts and Figures about Refugees’ (2014) <<http://www.unhcr.org.uk/about-us/key-facts-and-figures.html>> accessed 25 May 2016.

⁴⁶ Guéhenno (n 41).

⁴⁷ Dennison and Janning (n 30) 12.

⁴⁸ Gerald L. Neuman, ‘Buffer Zones Against Refugees: Dublin, Schengen, and the German Asylum Amendment’ (1992-1993) 33 *Virginia Journal of International Law* 503, 505.

⁴⁹ Dennison and Janning (n 30) 1.

⁵⁰ Guéhenno (n 41).

3.3 IMPLEMENTING SOLIDARITY AND SUSTAINABILITY IN EUROPE

“EU immigration will not be sustainable if different countries are forced to accept significant burdens while others stand by watching”⁵¹.

Article 80 of the Treaty on the Functioning of the European Union (TFEU), contained in the Chapter that regulates policies on border checks, asylum and immigration, establishes that “the policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle”. Despite this fundamental principle, a centralised, common asylum system has not yet been implemented. In order to save Schengen, the current unequal and irresponsible system, based on the Dublin Regulation, needs to be sacrificed and promptly substituted by a far-reaching, voluntary scheme in which the burden and responsibility for managing the crisis are truly shared between all the Member States.

So far, the main policy response has been focusing only on the number of refugees that each state is willing to receive, but this strategy has proven ineffective. The new agreement should focus on a broader conception of the contributions that the different states can make, “from financial support and human resources for reception, accommodation, and integration, to external border management”⁵². In other words, this new system for sharing the dutiful task of refugee protection should be designed upon each state’s financial resources and absorptive potential⁵³.

The ‘country of first entry’ criterion must be removed. A single European asylum system must be established, where “all asylum seekers coming to the EU would apply for protection at the European level”⁵⁴. Once the applicant is recognized as entitled to the refugee

⁵¹ Brooks (n 22) 6.

⁵² Dennison and Janning (n 30) 5.

⁵³ A similar system had been suggested already in 1991 by James Hathaway, ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4 Journal of Refugee Studies 113.

⁵⁴ Sebastian Dullien, ‘Paying the price: The cost of Europe’s refugee crisis’ *ECFR/168* (28 April 2016) 6, available at <http://www.ecfr.eu/publications/summary/paying_the_price_the_cost_of_europes_refugee_crisis> accessed 10 May 2016.

protection, a supervisory agency would determine which state has the initial responsibility to admit him and provide protection while he waits for a definite decision on his status.

This would allow improving and quickening of the admission and decision process, because “if the initial host countries knew that they might well be providing only temporary protection for someone, then they would certainly be more willing to carry out the validation process in service of all member-states”⁵⁵. Once the application is successful, the refugee might be reallocated to a different country. It is important that his wishes be taken into account as far as possible during the allocation process, because, “if refugee law is genuinely to reflect a commitment to international human rights, it is not enough that refugees be the intended beneficiaries of a system in which they have no voice”⁵⁶. Therefore, the fact that somebody obtained refugee status in a specific country would no longer entail that he is not free to leave that country.

Each state would receive a certain number of refugees according to its capacity, and would have the power to “assume part of another state’s asylum quota in return for cash or development assistance on such terms as might be mutually agreeable, subject to approval by the supervisory agency”⁵⁷. Provided that they meet certain standards on living conditions and integration, these countries would thus receive a certain amount per refugee hosted, from a common, centralized fund. This system would be especially efficient considering the fact that certain states have shown to be reluctant to host refugees but would be able to contribute financially, while certain others (such as Portugal) have declared to be willing to host refugees but are unable to do so. Therefore, “one option for encouraging countries in a tough fiscal position to accept refugees would be to cover the costs of their food and accommodation, as well as some overhead to invest in local infrastructure, from a central budget”⁵⁸.

This would give the poorer states a marginal duty to provide for refugees beyond the stage of reception and application, and at the same time provide them with access to financial resources and development assistance. It would also have a positive impact on the current anti-immigration, populist discourse, since countries that are severely affected by

⁵⁵ Jürgen Bast, ‘In Europe there is no solidarity in terms of the asylum system’ (21 October 2013) <<http://verfassungsblog.de/in-europe-there-is-no-solidarity-in-terms-of-the-asylum-system/>> accessed 10 May 2016.

⁵⁶ Hathaway (n 53) 118.

⁵⁷ *Ibid.* 127.

⁵⁸ Dullien (n 54) 6.

unemployment, public deficits and high public debt, could present the reception of refugees as an opportunity to get funds for ordinary public services, rather than only as a morally right thing to do on humanitarian grounds⁵⁹.

3.4 BRIDGING THE GAP BETWEEN THEORY AND REALITY OF PROTECTION AND INTEGRATION

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union”⁶⁰.

At present, there is an undeniable tension in Europe between the fundamental right to asylum and access to this right⁶¹. The first and fundamental problem is that the EU seems to extend the right to asylum only “to those who reach its territory, while doing all it can to prevent them from getting there”⁶². It seems that “we are willing to spend billions on rescue at sea, but not provide safe means of access to refugees”⁶³. This way, those most in need have to resort to smugglers and risk their lives to reach Europe.

The EU should steadily work on a second channel for people to apply for asylum from outside the EU. The creation of legal entry channels would allow regaining control over migrant flows and over Europe’s border policy, which has been delegated to criminal smuggling networks for too long. Asylum processing centres should be established outside the borders of the EU, in countries neighbouring persecutory states and hosting large numbers of displaced people. In these centres, asylum seekers would be hosted and protected, and would have the chance to apply for asylum in the EU with the assistance of the UNHCR. A

⁵⁹ *Ibid.* 8: “Politicians could sell refugees as an opportunity for ailing regions to create jobs and get money to renovate schools”.

⁶⁰ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Art. 18.

⁶¹ Bast (n 55).

⁶² Henri Labayle and Philippe de Bruycker, ‘The EU-Turkey agreement on migration and asylum: False pretences or a fool’s bargain?’ (1 April 2016) <<http://eumigrationlawblog.eu/the-eu-turkey-agreement-on-migration-and-asylum-false-pretences-or-a-fools-bargain/>> accessed 10 May 2016.

⁶³ Costello (n 25).

second system could be based on humanitarian visas, which would allow asylum seekers to come to Europe legally while their asylum application is processed⁶⁴. If these mechanisms were implemented, “refugees would be able to apply without having to place their lives in the hands of smugglers and risking them in deadly journeys”⁶⁵.

In the case of the Middle East, however, particularly for Syrians living in transit countries, the chances of an asylum request being rejected are very low. Therefore, it would be more appropriate to consider the introduction of a ‘resettlement programme’ – “that is, admitting contingents of refugees who already find themselves outside the borders of the persecutory state and who have been provisionally admitted by a third state”⁶⁶. These people, indeed, do not have any prospect of returning to their homeland nor of being integrated into the transit country⁶⁷ and thus should be collectively taken up by the EU and distributed among Member States according to the criteria previously outlined. So far, the focus of the EU has been only on resettlement of Syrian refugees from Turkey, through a controversial deal that has been heavily criticised as contrary to international law and disrespectful of human rights⁶⁸. Rather than negotiating with an autocratic, undemocratic regime, “the EU should (...) work at UN level to push for a global programme of resettlement to alleviate the pressure on countries such as Jordan and Lebanon, and those in the Horn of Africa and sub-Saharan Africa”⁶⁹. A project of this nature was launched this year by a number of Italian religious organizations of both the Catholic and the Protestant church, such as the ‘Community of Sant’Egidio’. These organizations have allowed a group of Syrian refugees, who had so far been living in camps in Lebanon, to fly to Italy from Beirut after being granted humanitarian visas⁷⁰. Moreover, “Italian churches have committed to provide housing, cultural orientation and language lessons for the refugees during their first months in

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Bast (n 55).

⁶⁷ Kareem Shaheen, ‘Nobody wants to stay in Lebanon. It’s a miserable life’ *The Guardian* (6 April 2016) <http://www.theguardian.com/world/2016/apr/06/lebanese-refugees-nobody-wants-stay-lebanon-miserable-life?CMP=Share_iOSApp_Other> accessed 10 May 2016.

⁶⁸ Damien Gayle, ‘EU-Turkey refugee plan could be illegal, says UN official’ *The Guardian* (2 April 2016) <<http://www.theguardian.com/world/2016/apr/02/eu-turkey-refugee-plan-could-be-illegal-says-un-official>> accessed 10 May 2016.

⁶⁹ Dennison and Janning (n 30) 12.

⁷⁰ ‘Italy flies in Syrian refugees via air “humanitarian corridor”’ *EuroNews* (29 February 2016) <<http://www.euronews.com/2016/02/29/italy-flies-in-syrian-refugees-via-air-humanitarian-corridor/>> accessed 10 May 2016.

Italy”⁷¹. This scheme, for now only of private sponsorship initiative, allows refugees to leave situations in which their human rights are at risk and discourages dangerous and irregular border crossing through the Balkan route or across the Mediterranean, and it should be a model for European countries and governments to follow under more official bilateral agreements between states.

The establishment of asylum centres outside the European borders, as much as the implementation of a ‘resettlement programme’ and a system of humanitarian visas, would also allow to screen the applicants before their arrival. This way, it would be possible to distinguish between economic migrants and refugees, “to prioritize the most vulnerable and to conduct robust security checks, countering the fear that terrorists or fighters returning from Syria could conceal themselves among refugee flows in order to enter Europe”⁷². This would once again help to reduce fears and frustrations of many European citizens and thus to attenuate the xenophobic, anti-immigration populist discourse that is worryingly expanding across Europe.

The second aspect to analyse when considering whether states’ obligations towards people in need are fully met is represented by the reception conditions refugees find when arriving in the host state. Unfortunately, Europe’s failure to find a response to the current crisis has affected significantly its ability to provide suitable living conditions to those seeking asylum in the continent⁷³. According to Article 17 of the Reception Conditions Directive, “Member States shall ensure that material reception conditions provide an adequate standard of living for applicants, which guarantees their subsistence and protects their physical and mental health”. Since the summer of 2015, however, the “sharp increase in arriving asylum seekers, coupled with a lack of preparedness on the part of European asylum systems to adjust to higher numbers, has revealed more marked a divide than ever between the theory and reality of reception standards”⁷⁴, between the theory of international human rights law and its implementation⁷⁵. This cannot be allowed, and the situation must be

⁷¹ ‘1.000 refugees reach Italy through “Humanitarian Corridors”’ *Anglican Communion News Service* (9 February 2016) <<http://www.anglicannews.org/news/2016/02/1000-refugees-reach-italy-through-humanitarian-corridors.aspx>> accessed 10 May 2016.

⁷² Dennison and Janning (n 30) 12.

⁷³ Mouzourakis (n 19).

⁷⁴ *Ibid.*

⁷⁵ See, for example: Mark Townsend, ‘Protests grow as Greece moves refugees to warehouses “not fit for animals”’ *The Guardian* (28 May 2016) <http://www.theguardian.com/world/2016/may/28/greece-refugee-warehouses-not-fit-for-animals?CMP=Share_iOSApp_Other> accessed 29 May 2016.

addressed to ensure respect of the refugees' rights and of EU's obligations under international law.

Refugee protection is a human rights issue that entails obligations, not options, and refugees can be a resource, not a misfortune, if integration programmes and tailor trainings are implemented. These type of measures surely cost extra money at the beginning, but they would undoubtedly pay off in the long term. According to recent studies, “refugees will create more jobs, increase demand for services and products, and fill gaps in European workforces – while their wages will help fund dwindling pensions pots and public finances. (...) While of course the primary motivation to let in refugees is that they're fleeing death, once they arrive they can contribute to the economy”⁷⁶. The initial investments and efforts are necessary, and this is fundamental for European leaders to understand, because “managing the inflow in a way that can be sustained for an extended period is a fundamental aspect of any durable solution to the humanitarian crisis”⁷⁷.

Providing refugees with adequate living conditions, and investing on their integration into both the labour market and European society, is not only a moral and legal obligation; it is also the most effective way to ensure that they are not perceived as a threatening and endangering invasion, but rather as an enriching resource. This would increase solidarity and attenuate tensions between states and between segments of society.

⁷⁶ Patrick Kingsley, ‘Refugees will repay EU spending almost twice over in five years – report’ *The Guardian* (18 May 2016) <<http://www.theguardian.com/world/2016/may/18/refugees-will-repay-eu-spending-almost-twice-over-in-five-years-report>> accessed 19 May 2016.

⁷⁷ Dullien (n 54) 2.

4. CONCLUSION

*“I ran until I couldn’t run (...)
But war had followed me.
It was underneath my skin,
behind my eyes,
and in my dreams”⁷⁸.*

The life cycle of a refugee crisis is not short, and a long-term problem requires a long-term mind-set. The European Union should widen its perception about the current situation of mass exodus: this is not a European temporary emergency, it is a “global crisis of displacement that endangers the international order”⁷⁹, largely born out of warfare. In order to save Schengen and safeguard the future of the EU itself, it is fundamental that Europe acknowledges its responsibilities for the factors driving migration from the Middle East and North Africa today, and abides by its obligations towards the people fleeing war, poverty, and devastation. Europe is facing a double challenge: protecting refugees, as demanded by European and international law; and developing an adequate and enduring policy of immigration and integration that will benefit the EU.

The first condition to achieve these goals is an honest and constructive discussion. Nationalism is not the answer. Building fences along the national borders is not the answer. As seen already, “closing frontiers does not stop people from trying to cross them”⁸⁰. Migration is not a new phenomenon, and there is no ‘end’ to it. The sooner Europe will accept the situation as it is and face it, rather than try to ‘stop’ it or ignore it, the sooner the EU will be able to come out of the current political and humanitarian crisis and implement a sustainable and beneficial strategy.

The said strategy should start with the leaders’ effort to raise awareness about the factors driving so many refugees to the continent, and of the distinction between a ‘refugee’

⁷⁸ Nicola Davies, ‘The Day the War Came – a poem about unaccompanied child refugees’ *The Guardian* (28 April 2016) <<http://www.theguardian.com/childrens-books-site/2016/apr/28/the-day-the-war-came-poem-about-unaccompanied-child-refugees>> accessed 29 April 2016.

⁷⁹ Guéhenno (n 41).

⁸⁰ Woltjer (n 4) 262.

On how the closure of the Balkan route caused new routes, such as the one from Libya to Italy through the Mediterranean, to open, see also: Patrick Kingsley, ‘Balkan countries shut borders as attention turns to new refugee routes’ *The Guardian* (9 March 2016) <<http://www.theguardian.com/world/2016/mar/09/balkans-refugee-route-closed-say-european-leaders>> accessed 25 May 2016.

and an ‘immigrant’. Understanding the situations from which these desperate people escape, and the rights and relative obligations that these entail, would help to contain the fears and frustrations related to security issues and social implications of refugee reception, and would increase solidarity and responsibility towards people in need. Another element of the strategy must be the development of a new dimension of foreign policy, aiming at reasserting the primacy of international humanitarian and human rights law, and at supporting and assisting extra-European states that host refugee populations. The external dimension of migratory policy has a fundamental role to play in the preservation of Schengen.

In order to respect its obligations, Europe needs also to improve its reception conditions, and establish legal entry channels and a system of humanitarian visas for asylum seekers and refugees. This would allow distinguishing between regular migrants and individuals entitled to asylum and international protection, and it would save the lives of those who risk finding death along the journey to the European territory. Moreover, it would ensure better control of the external borders, thus safeguarding freedom of movement within the frontiers. Integration, both in society and into the labour market, is also a crucial issue, which requires an initial investment but will surely pay off in the long-term. A political, social and financial effort of such nature seems impossible for Europe to face, but “without such effort, populists seeking to tear us apart with their simplistic xenophobic propaganda will thrive”⁸¹. Finally, a burden-sharing mechanism between Member States has long been discussed, but not yet implemented. We cannot afford to wait any longer. The Dublin system must be overcome, and replaced by a scheme that is not based on the *number* of refugees each state is willing to receive, but rather on the *resources* it is able to contribute with.

As has been said, “there is no reason for Europe to fear crises. They set things in motion and provide an opportunity for the EU to move forward and become stronger”⁸². The condition for this to happen, however, is that the EU and its Member States hold onto the principles of peace, democracy, prosperity and rule of law that the European project has managed to realize, and which are the exact reasons why so many refugees risk their lives to cross the border to the continent. The challenge is to share these principles and achievements with more people, in a satisfactory manner. If this challenge is not won, “the international

⁸¹ Palacio (n 2).

⁸² Joschka Fischer, ‘Reinventing Europe’ (3 May 2016) <<https://www.project-syndicate.org/commentary/reinventing-europe-after-brexit-referendum-by-joschka-fischer-2016-05>> accessed 30 May 2016.



fight about the availability and distribution of these precious goods will become still more a vicious struggle”⁸³.

As we know, “the founding fathers of the European Union were of the opinion that the abolishment of control at the common borders of its Member States was a necessary condition for the free movement of persons, goods, services and capital in (...) its territory”⁸⁴. Free movement is still a fundamental principle for Europe, which is not threatened by migration. It is the way that Europe responds to migration, and to the plight of hundreds of thousands of people in need of protection, that will be the real test of European values and ideals, and its fundamental principle of freedom of movement.

⁸³ Fijnaut (n 42) 314.

⁸⁴ *Ibid.*



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