



## **CARROTS AND STICKS IN A PERFECT STORM: CAN SCHENGEN SURVIVE THE CRISIS?**

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

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*Abstract: Polarising politics, terrorism and Euroscepticism have combined to create a political landscape that is toxic for asylum-seekers and refugees. The “perfect storm” in which the European Union is trying to push proposals that would see Member States take in mandatory quotas, subject to extraordinarily high sanctions upon refusal, renders the latter an extremely unrealistic proposal. It also appears to indicate that the Commission need to consider proposals which are more nuanced, balanced, and offer Member States more of the “carrot” and less of the “stick”. A mechanism is suggested in response that allows Member States to contribute financially through both existing and extra-budgetary contributions, but receive “rebates” to incentivise responsibility. In conjunction with a number of other proposals, this could offer a more sustainable solution for Schengen. The paper offers thoughts on the accompanying and perhaps even more vital need to change perceptions and discourses and to find a peaceful resolution to the fighting in Syria.*

“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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“Time is short and we have to act soon if we want to save the free movement of persons and prevent a disintegration of Schengen, one of the founding pillars of the European Union.”<sup>1</sup>

### 1.1. Introduction

The stakes for Europe’s Schengen zone have been higher over the last year than perhaps ever before. The refugee crisis poses a problem which requires not only a comprehensive and coordinated approach, but one that is multi-pronged and delicately balanced. A number of Schengen’s internal borders have already been secured,<sup>2</sup> and if this elusive and immensely difficult task cannot be fulfilled in a sustainable fashion, it appears ever more likely that Europe’s borderless zone will be consigned to history as an idea that was theoretically and symbolically attractive, but practically unworkable.<sup>3</sup>

If one were to provide an oversimplified, “go to” catchphrase, assigned to the task of addressing the woes of Europe’s refugee crisis, it would perhaps be “collective

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<sup>1</sup> Angelino Alfano and Thomas de Mazière, ‘Joint letter by Ministers Alfano and de Mazière and a German-Italian non-paper on “Save Schengen/Beyond Dublin”’, 3 <accessible at <http://data.consilium.europa.eu/doc/document/ST-6797-2016-INIT/en/pdf>>.

<sup>2</sup> European Commission, ‘Temporary Reintroduction of Border Control’ (See section on ‘Current Temporarily Reintroduced Border Controls’ <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm)> accessed 30 May 2016.

<sup>3</sup> One risk in particular is that a failure to tackle the crisis sustainably leads to a situation in which Macedonia’s border with Greece is secured heavily, effectively rendering Greece the refugee camp of Europe.

responsibility”, or “solidarity”. At first glance, these are phrases representing the best of the values that the European Union was built upon. And a collective spirit must undoubtedly be part of any substantive and lasting solution to the crisis threatening to tear Europe apart and to compromise Schengen irreversibly. The important debate is not therefore, whether this would be a good approach, but what this approach looks like in practice. It is partly this disagreement which is manifesting in ever more odious tactics and populist policies in Europe’s impending ‘race to the bottom’, including most recently Denmark’s adopted law allowing the seizing of refugees’ non-sentimental valuables in order to finance their asylum processes and potential resettlement.<sup>4</sup>

A great deal can be inferred from policies such as these. Partly their rationale lies in the projection of the host state as less desirable for refugees and asylum-seekers, but it also perhaps betrays the targeting of economic migrants as less “acceptable” amidst the crisis, thus demonstrating the need to develop more coherent policies to make distinctions in practice. Visible economic migration in combination with the scale of arrivals over the last year, inevitably generates fear and drives nationalist policies. Any solution therefore needs to make this distinction clear without dismissing the rights of economic migrants.

A “race to the bottom” has been inspired by the Dublin asylum regulation,<sup>5</sup> which requires the country of first reception to process asylum-seekers. It does not appear to be fit for purpose given the current situation in Europe.<sup>6</sup> The Dublin system is currently allowing northern European states to shirk their fair share of the responsibility, while others

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<sup>4</sup> David Crouch and Patrick Kingsley, ‘Danish parliament approves plan to seize assets from refugees’ (*Guardian*, 26 January 2016) <<http://www.theguardian.com/world/2016/jan/26/danish-parliament-approves-plan-to-seize-assets-from-refugees>>.

<sup>5</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] <<http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32013R0604>>.

<sup>6</sup> European Commission, ‘Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast)’ COM(2016) 270, May 4, 2016 <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin\\_reform\\_proposal\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf)> see page 98 which states “The Dublin system was not designed as an instrument for solidarity and sharing of responsibility. The migration crisis exposed this deficiency, which calls for inclusion of a corrective allocation system in the proposal.”

increasingly bear numbers of refugees that are clearly unsustainable without a more thought-out form of responsibility sharing.<sup>7</sup> As such, in the context of the “perfect storm” that is the current political landscape, the incentivisation of a resolution is needed.

This paper will therefore elaborate upon an idea for the incentivisation of responsibility-sharing. The most obvious and perhaps crude form of incentivisation, is the idea of remuneration for those refugees that Member States resettle, operating within the framework of a responsibility-sharing mechanism. Several authors have, for a number of years now, suggested different forms of refugee quota systems. Some, more recently, have built in the idea of making such quotas “tradeable” so that those countries who are happy to contribute financially, but less happy to host refugees in their countries, can still contribute to the sharing of responsibility in a concrete way.<sup>8</sup> Whilst this could be a promising approach, it still has the effect of appearing to sanction states who do not take their mandatory quotas, and does not take account fully of the political landscape. The initiative proposed here is a “spin” on this idea, tempered to, and proposed in the context of the European Commission’s May 4<sup>th</sup> proposals. It gives Member States more flexibility to opt out after having paid a contribution to the mechanism, but also offers them the incentivisation that would allow them to obtain a proportionate rebate of their initial contributions. As well as aiming to establish a mechanism that is theoretically workable, we must also consider the potentially more difficult question of how to establish an environment in which such a mechanism would be accepted by Member States. Such an incentivisation scheme would of course be one small piece of the puzzle, in aiming to “save Schengen” and address the refugee crisis as a whole.

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<sup>7</sup> Before the EU’s deal with Turkey, more than 100,000 refugees and asylum seekers had arrived in Greece by February; triple the amount in the first half of 2015. Julian Borger, ‘Refugee arrivals in Greece exceed 100,000 in less than two months’ (*Guardian*, 23 February 2016) <<http://www.theguardian.com/world/2016/feb/23/number-of-refugee-arrivals-in-greece-passes-100000-in-less-than-two-months>>

<sup>8</sup> Schuck was the first to apply the idea of tradable quotas to the global asylum system: Peter H. Schuck, ‘Refugee Burden Sharing: A Modest Proposal’ *Yale Law Faculty Scholarship Series* (1997) Accessible at <[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2691&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=2691&context=fss_papers)>; See also a more recent attempt to apply a tradable refugee quota system to the Syrian Crisis and the European Agenda: Jesús Fernández-Huertas Moraga and Hillel Rapoport, ‘Tradable Refugee-admission Quotas (TRAQs), the Syrian Crisis and the new European Agenda on consideration Migration’ *IZA Journal of European Labour Studies* (2015) 4:23 <<http://ftp.iza.org/dp9418.pdf>> For an analysis of the moral considerations inherent in such an approach, see: Jaakko Kuosminen, ‘What (If Anything) Is Wrong with Trading Refugee Quotas?’ *Res Publica* (2013) 19:103-119 <<http://ftp.iza.org/dp9418.pdf>>

All the while, this coordinated European effort will only have any long term hope of success if the Syrian civil war comes to an end. Whilst it is acknowledged that the Syrian crisis does not have a monopoly on the production of asylum-seekers and refugees, especially given that Kenya currently houses the world's largest refugee camp, and that large numbers continue to flee from African countries such as Somalia and Eritrea,<sup>9</sup> in truth, it remains the greatest crisis of its kind since the Second World War.<sup>10</sup> The paper will before closing, tentatively consider the crisis in the context of the recent collapse of the ceasefire agreement and the present chances of bringing lasting peace to the country. The paper will also briefly consider a potentially controversial usage of the responsibility to protect in respect of refugee protection.

Before continuing, this paper will firstly consider a theoretical human rights-focused perspective, in order to clearly establish what is widely known, but consistently ignored on the national, regional and international levels; that we are utterly failing in protecting the fundamental rights of the millions who have limited prospects of living a dignified, capable and autonomous life of their own choosing, and to whom we owe an indisputable moral responsibility.

## **1.2. A theoretical human rights perspective on the refugee crisis**

Briefly considering a theoretical view is deemed to be necessary here, as it may help us to delineate the limits of assistance to migrants, and establish a useful basis upon which to reshape the discourse and create a more receptive political environment. It will allow us to restore focus on vulnerability, and provide a greater link to moral justification in the eyes of popular opinion, at a time where our collective capacity to empathise appears to have reached its limit. It is claimed here, as has been submitted by Ferracioli who is perhaps inspired by

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<sup>9</sup> The latest data on asylum seekers in the EU28, disaggregated by nationality/citizenship as well as other criteria, can be found at, Eurostat, 'Asylum Statistics' <[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)>.

<sup>10</sup> European Commission, Humanitarian Aid and Civil Protection, 'Syria Crisis: ECHO Factsheet' 1 <[http://ec.europa.eu/echo/files/aid/countries/factsheets/syria\\_en.pdf](http://ec.europa.eu/echo/files/aid/countries/factsheets/syria_en.pdf)>.

David Miller,<sup>11</sup> that refugees ought to be defined as those persons “who cannot secure their most fundamental human rights without migration.”<sup>12</sup>

I have previously expressed the idea that human rights are “claims to protection against harms threatening the dignity of persons (often arising through the threat or denial of some developmental function or capability), generated by interests that arise in us as human beings”.<sup>13</sup> Depending upon what is theoretically established at their core, human rights can be interpreted and extrapolated out in a number of different directions. Even at the most uncontroversial base level however, it ought to be agreeable that human rights, if they are to have any value at all, must act as a bare minimum set of protections to society’s most vulnerable. As Dworkin has stated, “It makes sense to say that a man has fundamental rights against the government, in the strong sense (...) if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect (...) It does not make sense otherwise.”<sup>14</sup>

An asylum seeker fleeing war or persecution is unable to exercise her fundamental rights without the ability to migrate. Her capacity for autonomy and self-development is severely constrained and harms her in a way that will undermine the most basic of her rights. An economic migrant, whilst he ought to possess the right to migrate to pursue self-development in accordance with his own autonomous choice should, in the present situation, ultimately find that a state’s attempt to restrict his coming will constitute a legitimate and proportionate interference, given that the extraordinary situation the continent is currently facing in attempting to provide protection for the world’s most vulnerable. A demonstrated understanding of this approach, could – based upon an understanding of popular gripes about

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<sup>11</sup> David Miller, ‘Immigration: The Case for Limits’ in Andrew I. Cohen and Christopher H. Wellman (eds.), *Contemporary Debates in Applied Ethics* (Malden, Mass.: Blackwell, 2005) 202.

<sup>12</sup> Luara Ferracioli, ‘The Appeal and Danger of a New Refugee Convention’ *Social Theory and Practice*, Vol. 40, No. 1 (January 2014) 123, 124.

<sup>13</sup> Patrick Harris, ‘Prisoners: Disenfranchised with Dignity? Searching the Legal and the Theoretical to Find the Cure for Europe’s Ailing Right to Vote’ in Benedek et al. (eds) *European Yearbook on Human Rights 2015* (Intersentia, 2015) 535.

<sup>14</sup> Ronald Dworkin, *Taking Rights Seriously* (Massachusetts, 1977) 199. This of course, throws up the issue of understanding dignity. If the putative foundational concept of human rights is, as I have previously recognised, amorphous and vague, then interpretations of what can reasonably be inferred as necessary in the protection of dignity can (without adding further qualifications) only realistically be constrained by separate interpretations of the importance of the hypothesised right itself. This is of course, circular and unhelpful. This issue can partially be tackled by linking dignity to more practicable manifestations such as fundamental capabilities, autonomy and the capacity for self-development.

“influxes of migrants” and policies such as the Danish confiscation law – help to reshape the discourse towards assistance of the most vulnerable and lay the political ground for collective responsibility sharing.

## **2. The Current Situation at the European and National Levels**

Politics is polarising. Worldwide, the middle ground appears to be vanishing in an abyss of dialectical rhetoric, forcing narratives and counter narratives to greater points of extreme.<sup>15</sup> We are living in the age of “forced” immigration and the issue of the decade is driving a wedge into the political abyss, widening it further. In the United States, the same sense of victimhood and desire for a different kind of politics that appealingly attempts to shut out “the other” amidst fears of mass immigration further stoked by the explosion of asymmetric conflicts, and terrorism, has largely given rise to the unpredictable success of Donald Trump. It has arguably also given rise to a counter narrative in Bernie Sanders, who despite not clinching his Party’s nomination, has had an unpredictably successful rise to prominence. The two could not be much further apart; politically and yet this is not anomalous. In the United Kingdom, the unexpected return of the Conservative Party to majority rule, and further gains made by the right wing UK Independence Party amidst near certainty over another four years of coalition government, the counter-narrative to which, was the once again, surprising election of Left-wing democratic socialist, Jeremy Corbyn as leader of the opposition Labour Party, who have in recent times, held Centre-Left ground. In Austria, the Presidential elections have just returned the result of Alexander van der Bellen, officially an independent candidate, but a former leader of the Green Party, as President, narrowly defeating far-right candidate Norbert Hofer, who had gained popularity through his anti-EU and anti-immigration position amid rising fears over growing number of asylum-seekers.

Rising nationalism is now perhaps the norm. Germany has the ‘Alternative for Germany’, France has Marine le Pen’s Front National, favourite to win the first round of the French elections next year, the Netherlands have Geert Wilders, the United Kingdom has the

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<sup>15</sup> For an interesting perspective on dialectical theory in the politics of refugees, see Harald Bauder, ‘Understanding Europe’s Refugee Crisis: A Dialectical Approach’ *Geopolitics, History, and International Relations* (2016) 8(2): 64–75.

UK Independence Party, arguably now part of mainstream politics, as well as the impending referendum on membership of the European Union, with an exceptionally popular “Leave” campaign, fuelled largely by issues with mass immigration and ideas of regaining control of borders, national identities and sovereignty. Even omitting a number of others, it is quite clear that Europe is lurching “to the right”, but at times accompanied by an arguable trend of counter narratives emerging from outside of the mainstream in a form of “see-saw” politics. Is it political disillusionment manifesting in a “desire for difference” that is rendering the middle ground irrelevant?

Why is it necessary then, to discuss political contexts in more than a passing sense? Here I have done so in order to express the opinion that whichever way one views it, Schengen is in trouble. The situation as laid out above, however, is particularly troublesome because following it to its logical conclusion indicates that there may be a serious lack potential for, or of political will to find, a balanced solution to the refugee crisis, especially one that may be able to save Schengen. If our politics really is one of extremes, then there may now only be extreme solutions. The European Union could attempt to force mandatory quotas of asylum-seekers on Member States, which would presumably cause mass anti-EU sentiment, revolt, and might, somewhat ironically, doom Schengen in any case.<sup>16</sup> Europe could also continue on without negotiating any workable, concrete joint asylum procedure to tackle the problem. This is arguably also an extreme position constituting an essential dereliction of duty. This extreme is currently winning out amidst a severe lack of political will to discuss greater responsibility sharing.

An alternative is therefore needed to combat such a race to the bottom and begin to reverse it. In other words, as well as establishing a well-negotiated, and coordinated strategy for Member States to accept “collective responsibility” and to receive and process a

proportionate and reasonable number of refugees and asylum-seekers, there is a simultaneous need to incentivise such a process. Establishing and enforcing quotas alone is likely to drive anti migration sentiment and ramp up populist rhetoric. Indeed the September 2015 relocation

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<sup>16</sup> There was a rather negative reaction when the Commission’s relocation initiative comprised of mandatory quotas was pushed through in September 2015, with some noting its potential to perpetuate anti-EU sentiment. Swidlicki P, ‘Watershed moment for the EU as refugee quotas forced through’ (*Open Europe*, 22 September 2015) <<http://openeurope.org.uk/today/blog/watershed-moment-for-the-eu-as-refugee-quotas-forced-through/>>.



scheme proposed by the Commission and pushed through the Council and Parliament has fallen flat.<sup>17</sup> Yet the Commission has tenaciously refused to acknowledge that there is no political will for mandatory quotas.

On the 12<sup>th</sup> of May of this year, the Council of the European Union set out a recommendation in implementing Decision 8835/16<sup>18</sup> for the establishment of “temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk. Such a move is envisioned in “exceptional circumstances under Article 26 of the Schengen Borders Code.<sup>19</sup> It further states that this period “may be prolonged, no more than three times, for a further period of up to six months if the exceptional circumstances persist.”<sup>20</sup>

The recommendation of the Council was ultimately deemed necessary after the evaluation and monitoring mechanism contained within EU Regulation 1053/2013<sup>21</sup> noted serious deficiencies relating to Greece’s external border control constituting a “serious threat to public policy or internal security within the area without internal border control.”<sup>22</sup> Following the initial assessment in February which had contained recommendations to address deficiencies in external border management, under which Articles 23-25 can be used, the Commission further recommended in May, the reintroduction of border controls as per

Article 29. Such a measure appears to be intended as a short-term sacrifice of Schengen, in order to attempt to save the once borderless area, going forward. It has become a wounded animal, beating a retreat to lick its wounds, in the hope of living to fight another day. The

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<sup>17</sup> Maïa de la Baume, ‘Why the EU’s refugee relocation policy is a flop’ (*Politico*, 6 January 2016) <<http://www.politico.eu/article/why-eu-refugee-relocation-policy-has-been-a-flop-frontex-easo-med/>>.

<sup>18</sup> Council Implementing Decision (8835/16) setting out a Recommendation for temporary internal border control in exceptional circumstances putting the overall functioning of the Schengen area at risk, 12 May 2016, accessible at <<http://data.consilium.europa.eu/doc/document/ST-8835-2016-INIT/en/pdf>>.

<sup>19</sup> 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) <<http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1414687415278&uri=CELEX:02006R0562-20131126>>.

<sup>20</sup> *ibid.*, Articles 23(4) and 26(1).

<sup>21</sup> 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 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:295:0027:0037:EN:PDF>>

<sup>22</sup> Council Implementing Decision (5985/16) 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, 12 February 2016 <<http://data.consilium.europa.eu/doc/document/ST-5985-2016-INIT/en/pdf>>

possibility of prolongation for up to two years certainly raises realistic concerns that this could be the end of Schengen as we know it. A continuance of the status quo, war in Syria and the perfect storm of political considerations lending rise to populism, nationalism and anti-migration and Eurosceptic rhetoric, undoing what has been set up as “temporary”, may be harder than the two-year limit, matter-of-factly envisions.

Is this then, the de facto end of Schengen? Given that, at the start of May, the Commission recommended the maintenance of internal border controls in Austria, Denmark, Germany, Norway and Sweden<sup>23</sup> the situation does not look promising. It looks even more concerning when one considers that the European Commission has penned a “Roadmap back to Schengen”<sup>24</sup> in an explicit admission that we are (perhaps hopelessly) off course. The impression now is that it was always “fairweather” project, and that is not a promising precedent to set.<sup>25</sup>

So, can we save Schengen? As noted at the outset of this paper, solidarity and collective responsibility have been called upon for quite some time, and this was no different when the Council of the European Union noted in its February Implementing Decision on Greece that, “It is necessary that all Member States show solidarity and collectively take responsibility to address the situation and ensure the continued functioning of the Schengen area.”<sup>26</sup>

It is promising that the Visegrad Group countries (Czech Republic, Hungary, Poland and Slovakia) who have generally been more averse to EU action on refugees and more willing to establish fences or border security) in December 2015 reaffirmed their “determination to preserve Schengen so that European citizens and business continue to fully

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<sup>23</sup> European Commission, Press Release, ‘Back to Schengen: Commission takes next steps towards lifting of temporary internal border controls’ 4 May 2016 <[http://europa.eu/rapid/press-release\\_IP-16-1627\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1627_en.htm)>

<sup>24</sup> European Commission, ‘Communication from the Commission to the European Parliament, the European Council and the Council: Back to Schengen – A Roadmap’ COM(2016) 120, 4 March 2016 <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/docs/communication-back-to-schengen-roadmap_en.pdf)>.

<sup>25</sup> Stefan Lehne, ‘How the Refugee Crisis Will Reshape the EU’ (*Carnegie Europe*, February 4 2016) <<http://carnegieeurope.eu/2016/02/04/how-refugee-crisis-will-reshape-eu/itj7>>.

<sup>26</sup> (n 22) 3.

enjoy its benefits”, noting also that it “remains a key practical and symbolic achievement of European Integration.”<sup>27</sup>

But with no sign of peace in Syria, and the threatened closure of the world’s largest refugee camp,<sup>28</sup> is a return to a “normal” Schengen a realistic possibility? And if so, how do we get there? In the “Roadmap” “Back to Schengen” published by the Commission on the 4<sup>th</sup> of March 2016, a number of measures are envisioned. Priority is given to the provision of immediate support to Greece, stopping the “wave-through approach”<sup>29</sup>, applying a more joined-up approach to internal border controls, which is exceptional and proportionate, and securing Schengen’s external borders through the implementation in the near future, of a European Border and Coast Guard, to be operational at the latest by August 2016. Pertinently, the roadmap notes that “if the overall situation allows, the target date for bringing an end to the exceptional safeguard measures taken” shall be December 2016.<sup>30</sup> These all seem to be sensible suggestions, but they do not seem to point to a sustainable solution either for Schengen, or for the refugee crisis as a whole. What is good for the crisis and for refugees personally, and what is good for Schengen, may not at all times be synonymous. But it is naïve to think that by securing external borders numbers of arrivals will become more manageable. If war persists, so will refugees. As Anker, Fitzpatrick and Shacknove state, “the international community must recognize that the flight of refugees is a chronic problem which will persist and recur. Gross human rights violations and conflict will continue to impel population displacement until these root causes are adequately addressed in a manner that protects the fundamental rights of victims”.<sup>31</sup>

On the 18<sup>th</sup> of March 2016, the European Council and Turkey announced an agreement,<sup>32</sup> the details of which have been widely reported upon.<sup>33</sup> Many have questioned

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<sup>27</sup> Visegrad Group, ‘Joint Statement of the Visegrad Group Countries’, 3 December 2015, <<http://www.visegradgroup.eu/calendar/2015/joint-statement-of-the-151204>> (accessed 31 May 2016).

<sup>28</sup> Washington Post, ‘Closing the world’s largest refugee camp in Kenya could fan the flames of terrorism’ May 26 2016) <[https://www.washingtonpost.com/opinions/closing-the-worlds-largest-refugee-camp-in-kenya-could-fan-the-flames-of-terrorism/2016/05/26/a5f56ca2-221e-11e6-8690-f14ca9de2972\\_story.html](https://www.washingtonpost.com/opinions/closing-the-worlds-largest-refugee-camp-in-kenya-could-fan-the-flames-of-terrorism/2016/05/26/a5f56ca2-221e-11e6-8690-f14ca9de2972_story.html)>.

<sup>29</sup> This entails allowing to pass through, those who have not submitted applications for asylum in that country, and who wish to transit to another Member State.

<sup>30</sup> (n 23).

<sup>31</sup> Anker, Fitzpatrick and Shacknove, ‘Response: Crisis and Cure: A Reply to Hathaway/Neve and Schuck’ *11 Harvard Human Rights Journal* (1998) 295, 309.

<sup>32</sup> European Council, ‘EU-Turkey statement, 18 March 2016’ <<http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/>>.

<sup>33</sup> Patrick Kingsley, ‘Refugee crisis: What does the EU’s deal with Turkey mean?’ (*Guardian*, 18 March 2016) <<http://www.theguardian.com/world/2016/mar/18/eu-deal-turkey-migrants-refugees-q-and-a>>; BBC News,

its potential efficacy and legality however, with one author seeming to indicate that unless policymakers and governments can implement the deal by excessively expediting and shirking due procedure, such a deal may become little more than a bluff designed to deter in description alone.<sup>34</sup> Indeed, given that the deal, by definition involves mass expulsions, it is extremely unlikely that there will be capacity enough to afford due process to each asylum seeker.<sup>35</sup> Furthermore, questions still remain as to whether Turkey is in fact, a safe destination country, given that the EU has conveniently and hastily decided it to be so, despite serious possibilities of shortcomings in terms of rights protection for refugees in Turkey.<sup>36</sup> The deal is therefore at risk of being in contravention of international law in two respects. The deal does manage to render the crossing of the Aegean Sea from Turkey to Greece relatively pointless for asylum-seekers, who will be returned to the former upon arrival. As such, it will contribute significantly to cutting out illegal smuggling across this channel. It will also, if it works effectively, undoubtedly reduce numbers of arrivals into Schengen. Indeed it has apparently already begun to do so, leading to a “sharp decrease in the number of irregular migrants and asylum-seekers crossing from Turkey into Greece”.<sup>37</sup> But it would be naïve to think that refugees will not begin to use other routes which bypass Greece. As Elizabeth Collett has stated, “Cessation of the en masse smuggling route across the Aegean may also push up prices for other paths, diminishing demand, while increasing danger.”<sup>38</sup> The deal is however, it is fair to say, a necessary element in the protection of

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‘Migrant crisis: EU-Turkey deal comes into effect’ 20 March 2016 <<http://www.bbc.co.uk/news/world-europe-35854413>>.

<sup>34</sup> Elizabeth Collett, ‘The Paradox of the EU-Turkey Refugee Deal’ (*Migration Policy Institute*, March 2016) <<http://www.migrationpolicy.org/news/paradox-eu-turkey-refugee-deal>>.

<sup>35</sup> According to the Guardian, “the most senior Greek asylum official, Maria Stavropoulou, said (...) that she would need a 20-fold increase in personnel to handle expected claims.”: Damien Gayle, ‘EU-Turkey refugee plan could be illegal, says UN official’ (*Guardian*, 2 April 2016) <<http://www.theguardian.com/world/2016/apr/02/eu-turkey-refugee-plan-could-be-illegal-says-un-official>>.

<sup>36</sup> William Spindler and Jonathan Clayton, ‘UNHCR expresses concern over EU-Turkey Plan’ (UNHCR, 11 March 2016) <<http://www.unhcr.org/news/latest/2016/3/56dee1546/unhcr-expresses-concern-eu-turkey-plan.html>>.

<sup>37</sup> European Commission, ‘Communication from the Commission to the European Parliament, the European Council and the Council: First Report on the progress made in the implementation of the EU-Turkey Statement’ COM(2016) 231, 20 April 2016 <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report\\_implementation\\_eu-turkey\\_agreement\\_nr\\_01\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160420/report_implementation_eu-turkey_agreement_nr_01_en.pdf)>.

<sup>38</sup> (n 34).

Schengen at this time. Interestingly though, it strikes across the dual issue of saving Schengen, vs. “solving” the refugee crisis at large. As Collett states: “The idea of returns coupled with large-scale resettlement is (...) charmingly simple. But policymakers have viewed the EU-Turkey deal through the lens of the last six months, (...) rather than the longer scope of the last (and next) five years. The complex and ever-shifting dynamics of migration flows, coupled with the well-documented limitations of existing protection capacity in a broad range of countries (not only Greece and Turkey) suggest the next crisis for the European Union will not be far behind.”<sup>39</sup> Indeed, the deal was quite clearly about “stemming the tide”; an almost immediate reestablishment of greater control over the numbers entering the Schengen zone. But what it does not do, is point the way forward to a sustainable solution. It was the deal intended to save Schengen from collapse.

The deal to re-stabilise Schengen in the longer term, and to aim to deal with the refugee crisis as a whole, is yet to come. As Emmanouilidis notes, the deal is “key (...) in managing the most immediate effects of the crisis but will have to be accompanied by other measures to cope effectively with the crisis’ humanitarian and political consequences.”<sup>40</sup> Whilst the deal is a necessary element of a more comprehensive solution, it is still at best, insufficient to save Schengen in the long term, and at worst, illegal, immoral and illogical. Quite clearly a more proactive response is needed, and one that puts rights and people closer to the centre.

### **3. Future Development - Suggestion for a responsibility sharing mechanism**

On the 4<sup>th</sup> of May of this year, the European Commission presented proposals for a way forward.<sup>41</sup> The proposals presented are intended to complement, and improve the effectiveness of the Dublin system, rather than replacing it altogether, introducing a so-called “fairness mechanism”<sup>42</sup> which will act to relocate asylum applications made in a country,

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<sup>39</sup> *ibid.*

<sup>40</sup> Janis A. Emmanouilidis, ‘Elements of a complex but still incomplete puzzle: an assessment of the EU(-Turkey) summit’ (*European Policy Centre*, 21 March 2016) <[http://www.epc.eu/documents/uploads/pub\\_6417\\_post-summit\\_analysis\\_-\\_21\\_march\\_2016.pdf](http://www.epc.eu/documents/uploads/pub_6417_post-summit_analysis_-_21_march_2016.pdf)>.

<sup>41</sup> European Commission, Press Release, ‘Towards a sustainable and fair Common European Asylum System’ 4 May 2016 <[http://europa.eu/rapid/press-release\\_IP-16-1620\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1620_en.htm)>.

<sup>42</sup> European Commission, ‘The Reform of the Dublin System’ <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/the\\_reform\\_of\\_the\\_dublin\\_system\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/20160504/the_reform_of_the_dublin_system_en.pdf)>.

after that country has exceeded 150% of its “reference share” as determined by a relative weighting between Member States, taking a 50-50 share of population size and total GDP. Once new arrivals seeking asylum falls below 150% once again, the fairness mechanism ends.

Most interestingly, and controversially, a form of sanction is included which states that “if a Member State decides not to accept the allocation of applications from a Member State under pressure, a solidarity contribution of €250,000 per applicant should be made to the Member State which takes on the responsibility in their place.”<sup>43</sup> The May 4<sup>th</sup> proposals also include the transformation of the European Asylum and Support Office into a European Agency for Asylum – a venture which has been needed for some time – in order to ensure a uniform approach with greater capacity and technical assistance provided to Member States. Its increased mandate<sup>44</sup> will be supported with increased personnel and funding.<sup>45</sup> The Agency would provide greater assistance and support to Member States, as well as playing a greater role in coordinating them, and analysing situations regarding safe third countries, or countries of origin. The “Eurodac” system is also proposed to be expanded, to allow Member States to store more personal data, including of children, and ensure easier access for all Member States.<sup>46</sup> The proposals aim to strongly discourage secondary movements and so-called “asylum shopping” which the EU clearly views as a serious threat to Schengen given its continued focus upon this issue.<sup>47</sup> If asylum-seekers do not remain in the state responsible for their processing under Dublin, their process will be expedited and their rights will be limited, possibly with a view to affecting their returns. EU law expert Steve Peers has stated, “let’s put it plainly: asylum-seeker who flout the Dublin rules will be left to starve in the streets – even children, torture victims and other vulnerable people. And fast-tracking their asylum application implicitly aims at returning them to their country of origin.”<sup>48</sup> If accepted

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<sup>43</sup> *ibid.*, 4.

<sup>44</sup> The Agency will be responsible for operating the “reference key” upon which the fairness mechanism operates, promoting and coordinating a more joined up approach for assessment of asylum applications between Member States, as well as ensuring consistent “operational standards”. (n 6) 2, 22.

<sup>45</sup> Peers claims that the planned increase personnel will be from 150 to around 500: Steve Peers, ‘The Organisation of EU asylum law: the latest EU asylum proposals’ (*EU Law Analysis*, 6 May 2016) <<http://eulawanalysis.blogspot.co.uk/2016/05/the-organisation-of-eu-asylum-law.html>>.

<sup>46</sup> (n 6) section 11.

<sup>47</sup> *ibid.*, 3, 27, 97.

<sup>48</sup> (n 44).

and implemented as planned, the fairness mechanism will of course take strain off those receiving countries which are overburdened, particularly Italy and Greece at Europe's external borders. In a vacuum (and perhaps in a dream world) the mechanism which accompanies the proposals is a satisfying one, would ensure greater collective responsibility sharing, and illuminate a path towards dealing with the crisis in at least the medium term. A quota system, accompanied by an extraordinary amount of human and financial resources, and sufficient processing capacity at the external borders in order to expedite the assessment of asylum applications could, in theory, create a solution that is sustainable and if built in the correct way, ensuring individual assessment, due process, non-refoulement and accounting for asylum-seekers as people with families, preferences and skills, has the potential to put a realistic balance of rights and pragmatism at the centre.

Even with the Turkey deal in place (if it holds), the maths simply does not add up. As alluded to at the outset of this paper, accepting collective responsibility across Member States needs to take place as a pre-requisite to a sustainable solution. While war and persecution persists, refugees will come. We can seal off Europe, seal off Greece, deposit asylum-seekers in other continents en masse, or we can open the gates in a sensible and thought-through manner. If it is to be the latter, then it can only be done via a mechanism that can support reasonable numbers of asylum-seekers in each Member State in a sustainable fashion.

Back to the reality then, that the Commission's May 4<sup>th</sup> proposals, whilst on their face, satisfyingly simply, seem absurdly unrealistic. It is worth remembering again that in September 2015, the EU Commission announced a mandatory initiative to relocate 160,000 asylum-seekers. Hungary's allocation was 1,294<sup>49</sup> and its refusal combined with the surrounding political furore led to the proposed holding of a referendum on the issue in the country.<sup>50</sup> Slovakia also refused and has been attempting to take the EU to the Court of Justice of the European Union ever since.<sup>51</sup> Such a proposal seems then to fly in the face of these warning signs. The audacious attempt to require "solidarity contributions" of €250,000

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<sup>49</sup> European Commission, 'Refugee Crisis – Q&A on Emergency Relocation' 22 September 2015 <[http://europa.eu/rapid/press-release\\_MEMO-15-5698\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5698_en.htm)>.

<sup>50</sup> Leo Cendrowicz, 'Refugee Crisis: Hungary to hold referendum on migration quotas' (*The Independent*, 24 February 2016) <<http://www.independent.co.uk/news/world/europe/refugee-crisis-hungary-to-hold-referendum-on-migration-quotas-a6894156.html>>.

<sup>51</sup> Reuters, 'Slovakia files lawsuit against EU quotas to redistribute migrants' 2 December 2015 <<http://www.reuters.com/article/us-europe-migrants-slovakia-idUSKBN0TL11K20151202>>.

for every refugee towards whom a Member State shirks its responsibility appears to consist largely of a deterrent and punitive effect. Even in the unlikely event that the proposal were to pass through the Parliament and achieve a qualified majority in the Council in its current form, there would surely be a mutiny, particularly (but probably not uniquely) from countries who have already shunned the idea of mandatory quotas. To then introduce, on the back of this failure, quotas plus apparent sanctions seems ludicrous, not least because there are limited possibilities to spin it positively to unconvinced countries. Those states who are happy to take their share of refugees, and who are already “over-capacity” in accordance with the proposed reference key could be in line to receive significant windfalls, but any form of incentive is missing for the sceptical. Not only does this not seem to appreciate the lack of political will and the rising populism in such countries, it is likely to exacerbate it. Hungarian Foreign Minister Peter Szijjarto has stated, “the quota concept is a dead-end street and I would like to ask the Commission not to run into this dead-end street anymore.”<sup>52</sup> Hruschka has called the proposed mechanism “administratively unworkable and politically illusory”<sup>53</sup> and Peers has described it thus: “This is a fantasy on top of a fantasy. Member States have already shown that they are unwilling to apply the relocation Decisions of last September (...) That idea will not suddenly appear more attractive to Member States by doubling down on it, and suggesting a contribution set at an obviously absurd and disproportionate level, which the Commission does not even try to justify.”<sup>54</sup>

Such proposals seem to betray the fact that certain pragmatism is lacking in the Commission, an appreciation of the fact that putting proposals on the table in this form may cause more harm than good, as well as a more nuanced understanding of the political environments in those Member States who are opposed. Once again, it is not the development of a practical proposal for a way forward that is the biggest issue, but the toxic political environment. In this context, the EU needs to give Member States more of the carrot, and less of the stick.

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<sup>52</sup> James McAuley, ‘Central European countries resist new E.U. refugee quota proposal’ (*The Washington Post*, 4 May 2016) <[https://www.washingtonpost.com/world/europe/central-european-countries-resist-new-eu-refugee-quota-proposal/2016/05/04/5be5a32c-120e-11e6-a9b5-bf703a5a7191\\_story.html](https://www.washingtonpost.com/world/europe/central-european-countries-resist-new-eu-refugee-quota-proposal/2016/05/04/5be5a32c-120e-11e6-a9b5-bf703a5a7191_story.html)>.

<sup>53</sup> Dr. Constantin Hruschka, ‘Dublin is dead! Long live Dublin! The 4 May 2016 proposal of the European Commission’ (*ELSJ*, 20 May 2016) <<http://www.gdr-elsj.eu/2016/05/20/asile/dublin-is-dead-long-live-dublin-the-4-may-2016-proposal-of-the-european-commission/>>.

<sup>54</sup> (n 44).



It is likely that the proposed mechanism would constitute a mere starting point for negotiations. What then, can be proposed as a more palatable alternative? The ICMPD, commenting upon the proposals, have noted that “recent events and policy responses in the area of migration have tellingly demonstrated that the 28 Member States appear to be further apart from each other than ever before and this lack of solidarity is a stark reality.”<sup>55</sup> Through this paper, I have suggested that an amalgamation of factors and events over the last few years giving rise to the current political context in Europe has created a “Perfect Storm” when it comes to the subject of asylum and refugees. As such, in order to achieve meaningful reform, we are in a position in which states need to be provided with incentives in order to be called to meaningful action that will bring about reform of the European Asylum System. The Commission’s 4<sup>th</sup> of May proposals fail to recognize this. As Goodwin-Gill has recognised, “We can only expect States to accept further obligations if they are linked to a gain. States need a *quid pro quo* for none of them today will be moved by humanitarianism alone.”<sup>56</sup>

The Commission’s proposals make the mistake of only containing incentives for those who are already fairly ideologically committed to such an approach. If any money changes hands, it will be at the expense of an unwilling country. This only acts as an incentive if the unwilling country transforms itself into a fully willing country, prepared to take, not only refugees of its own, but other country’s refugees, so as to benefit from that country’s solidarity contribution. This will surely not happen in the current political context, leaving a number of countries facing large fines.

A mechanism needs to be developed therefore, which provides financial assistance to Member States for asylum-seekers they do take. Whilst this is a sad state of affairs, given that there seems an immoral quality to receiving payment for performance of something that many would consider a moral obligation, it is an unfortunate reflection of the political reality. However, a mechanism using current EU funds to pay for every asylum seeker taken by each Member State would almost certainly be financially unworkable. Not to mention the fact that it would send a bad signal on two fronts; firstly that the spirit of solidarity underlying the Union was effectively dead, and secondly it would show tremendous weakness on the side of

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<sup>55</sup> Martin Wagner, ‘Reforming Europe’s common asylum system – will Member States back it?’ (ICMPD, 13 April 2016) <<http://www.icmpd.org/news-centre/news-detail/reforming-europes-common-asylum-system-will-member-states-back-it/>>.

<sup>56</sup> (n 12) 40.

the Commission to negotiate from a starting position of a quasi-sanction-based mechanism, to a full incentive based one. A balanced approach is therefore needed which could offer something to the EU, to sceptical states, and to asylum-seekers alike. One that both gives and takes away. As Pitella has stated, “Let’s start by penalising non cooperation and rewarding those who cooperate. Europe is a family that shares the same values and obligations. It is not an a la carte menu from which you pick and choose the bits you like.”<sup>57</sup>

I therefore propose the establishment of a European Solidarity Fund for Refugees, administered by the new EU Asylum Agency (already envisioned to be established in the existing proposals). This fund would be paid into significantly by the EU, financed both by the “central budget” and by negotiated and reasonable increases in existing EU budgetary contributions from Member States (something which may already be on the table).<sup>58</sup> Member States (especially those more averse to quotas) could also be encouraged to contribute on an extra-budgetary basis, acting in a spirit of humanitarianism and solidarity and conscious of the fact that this would be a question of buying into a mechanism that could help to resolve the crisis, assist the most vulnerable, and re-establish a balance to Schengen. Funding could also be sought from UNHCR and perhaps even the private sector, once the proposals had passed the negotiation stage, and manifested reasonably high levels of “buy in” and prospects of successfully alleviating the pressure on Schengen and resettling Syrian (and other) asylum seekers.

In creating a mechanism that is centrally (EU) funded, and boosted by humanitarian and solidarity-based contributions from Member States, the EU could then offer incentives to the latter for the refugees that they take. In this sense, Member States are able to claim a “rebate” of part of their budgetary (and in some cases) extra-budgetary contributions by accepting refugees in accordance with their suggested quotas. It is suggested that the

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<sup>57</sup> Politico, ‘How to solve Europe’s migration crisis’ (8 February 2016) <<http://www.politico.eu/article/solve-migration-crisis-europe-schengen/>>.

<sup>58</sup> The European Commission has delayed its consideration of the 2017 draft budget until after the UK referendum on membership of the European Union. It has been indicated that more money will need to be requested and ring-fenced to deal with the crisis, as Kristalina Georgieva, the Commission’s vice-President in charge of budgetary matters stated that, “We have to make sure that our budget for next year absorbs all the commitments made so far to deal with the migration crisis, while at the same time making room for new commitments”. Matthew Holehouse, ‘Britain asked for more cash as migrant crisis strains EU budget’ (*Telegraph*, 4 June 2016) <<http://www.telegraph.co.uk/news/2016/06/04/britain-asked-for-more-cash-as-migrant-crisis-strains-eu-budget/>>.

Commission's existing reference key and quotas be used, but the latter be used as suggestions and not mandatory or subject to fines. Whilst it is acknowledged that the operation of such a mechanism would require vast sums of money well into the billions, it is argued that such a result could be achieved if the EU is able to capitalise on budgetary negotiations to achieve reasonable increases, and invoke a spirit of humanitarianism and solidarity. Given that budgetary matters are due to be discussed imminently, the Commission should use this opportunity to negotiate greater contributions from Member States in exchange for scrapping the idea of disproportionate penalties. These discussions need to be used as a springboard for the establishment of a sustainable and appealing mechanism for Member States. In the event that the UK votes to remain in the European Union on June 23 2016, the Commission should use the outcome as a platform to confidently assert a position of strength and as an opportunity to engender solidarity. However, if the UK votes to leave, the entire crisis may be hugely overshadowed, as will a great deal of the EU's other important work, and the prospects for efficiently "solving" the crisis will be slim indeed.

In theory, the beauty of this mechanism is that states who are strongly opposed to quotas, can contribute to the proposal designed to tackle the crisis, but effectively buy themselves out of their obligation, while retaining the possibility of receiving remuneration to assist them if they choose to take refugees. I further propose a system of staggered payments based upon the proportion of their quotas that Member States take, in order to further incentivise taking greater numbers. Different grades of incentive could be given depending upon whether states are at 0-25%, 25-50%, 50-75% or 75-100% of their proposed quotas.

Whilst the maximum amount of financial assistance per refugee could not realistically constitute more than 25,000 Euros (at the highest band) per refugee in order to make the scheme financially viable, this would still enable Member States to receive tens of millions in rebates from their initial budgetary contributions. Following the 4<sup>th</sup> of May proposals however, the Commission has created a difficult negotiating situation in this regard by using the 250,000 figure and effectively 'putting a price' on the heads of individual refugees. This would involve an uncomfortable admission that the number was set at an almost entirely punitive level. This issue could perhaps be skirted by considering payments to be on a *pro rata* basis, and reviewing the mechanism year-on year, explaining that the 250,000 figure was based on envisioned long term resettlement costs.

A sensible starting position would have to be negotiated, so that significant proportions of the fund were not swallowed up immediately by paying incentives to Germany, Greece and Italy, for example. While this may seem unfair, the point of incentivisation is to create the will to perform from such a moment onwards. Germany, for example, would not be reimbursed for its refugees taken to date, but given that it would count as immediately operating at more than 100% of its proposed quota from the beginning of the incentivisation scheme, it would instantly be eligible for the highest level of rebate from the fund, per refugee it takes above this threshold.

It is also envisaged that in the asylum application stage, the receiving state could conduct a skills, needs and preferences assessment, which could be taken into account when relocating the asylum seeker to the destination country. As part of this matching process, further incentivisation could be created by pairing highly skilled asylum-seekers with Member States' in-demand sectors, establishing small scale EU funded-training programmes for skills in demand, or establishing local partnerships with employers whereby the EU funds 50% of a resettled refugee's salary and the employer the other 50%, during a trial period.

This would incentivise refugees' entry into the labour market, whilst reducing risk for employers. Peers has suggested that similar incentives could be used for asylum-seekers themselves, rather than punishments for attempting to transit to another country. "Sensible parents use carrots as well as sticks. Why not offer asylum-seekers a modest cash bonus in kind if they accept allocation to a Member State under the relocation rules? Or let them have earlier access to work if they stick to the rules? Or simplified and quicker long-term residence status?"<sup>59</sup> Alongside this mechanism, greater harmonisation of asylum procedures<sup>60</sup> towards a common European approach and common European reception centres in each state would mean that the transition from processing in state of first entry, to resettlement, would be more efficient, cost effective and would help to stop the "race to the bottom."

Are acts of humanitarianism and solidarity realistic in the current climate? Countries continue to apportion huge amounts of their development budgets, and achieve promising

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<sup>59</sup> Steve Peers, 'Wisdom and goodness to the vile seem vile': Towards a third phase of the Common European Asylum System?' (*EU Law Analysis*, 6 April 2016) <<http://eulawanalysis.blogspot.co.uk/2016/04/wisdom-and-goodness-to-vile-seem-vile.html>>.

<sup>60</sup> The Commission has in fact proposed to transform the Asylum Procedures and Qualifications Directives into regulations in an attempt to do just this. (n 6).

results in terms of effective fund raising and pledging funds, particularly in aid of the Syrian people.<sup>61</sup> As noted on the European External Action Service website, “the EU and its Member States have mobilised over 5 billion Euros in humanitarian aid as well as stabilisation and development assistance since the conflict began, to those affected by the conflict inside Syria and refugees and host communities in neighbouring countries.”<sup>62</sup> The spirit of this humanitarianism must be called upon again. In order for the proposal to succeed, the European Union, and more accepting governments must lead by example in diverting contributions towards the fund with the clear and stated aim of assisting the world’s most vulnerable. In as much as Syrian refugees will largely be the beneficiaries of the relocation initiative, the Commission should explore the possibility of a link with the EU Regional Trust Fund in Response to the Syrian Crisis.<sup>63</sup>

In general, states continue to be willing to find money for crises, and to demonstrably assist the most vulnerable. Pertinent is the case of the UK. Prime Minister David Cameron stated in September 2015 that the UK should not take any more refugees<sup>64</sup> alongside a generally quota-averse position, indeed with an opt-out and very limited intention to become involved in the September 2015 relocation plan. Yet in apparent response to clear political and popular will over the issue, the government, after initially rejecting calls to do so, announced plans to take 3,000 unaccompanied Syrian refugee children.<sup>65</sup> The measure is not a difficult ‘sell’ to the British public and may highlight the fact that, given the strength of populist and nationalist politics across Europe, popular opinion is the crucial determinant of what governments feel they can do at this time.

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<sup>61</sup> UN News Centre, ‘Record \$10 billion pledged in humanitarian aid for Syria at UN co-hosted conference in London’ (4 February 2016) <<http://www.un.org/apps/news/story.asp?NewsID=53162#.V0yp9JErLIU>>.

<sup>62</sup> European Union External Action, ‘The EU’s relations with Syria’ <[http://eeas.europa.eu/syria/index\\_en.htm](http://eeas.europa.eu/syria/index_en.htm)>.

<sup>63</sup> European Commission, ‘EU Regional Trust Fund in Response to the Syria Crisis’ <[http://ec.europa.eu/enlargement/neighbourhood/countries/syria/madad/index\\_en.htm](http://ec.europa.eu/enlargement/neighbourhood/countries/syria/madad/index_en.htm)>.

<sup>64</sup> Patrick Wintour, ‘Britain should not take more Middle East refugees, says David Cameron’ (*Guardian*, 3 September 2015) <<http://www.theguardian.com/world/2015/sep/02/david-cameron-migration-crisis-will-not-be-solved-by-uk-taking-in-more-refugees>>.

<sup>65</sup> BBC News, ‘David Cameron: UK to resettle child refugees from Europe’ (4 May 2016) <<http://www.bbc.co.uk/news/uk-36200366>>.

#### 4.1. Political objectives and relative strategies at the European and national level.

Whichever path is chosen, the “public relations” element of the crisis must be smarter and better managed, public perceptions must improve and discourses must be more sophisticated. The EU needs, in collaboration with UNHCR, and NGOs to use media to better sensitise the public to the goal of protecting vulnerable, war torn asylum-seekers and refugees. The EU approach for example, in focusing upon the “criminalising aspects of migration” arguably negatively influences the discourse by sending a message that “irregular (...) immigration into the EU must be prevented by more determined means and suggestions have been made to destroy smuggler vessels along the North African coast with fighter jets.”<sup>66</sup> Whilst the situation must be taken seriously, there should be greater consideration of how the “picture is painted” to the European public. Ferracioli in an interesting article considers that a lack of political will impedes the negotiation of an updated and more fit-for-purpose Refugee Convention which provides better protection. She considers that rather than risk agreeing even weaker protections, we should ask how we can better lay the groundwork for a more receptive political environment. We need to ask ourselves the same question in this context. She argues in this respect that “states must first make strategic use of resettlement as a means to improving public attitudes towards refugees. Only then can the international community embark on the road to legal reform.” The rationale behind this is similar to the idea presented earlier, that the concept of “asylum shopping” and the conflation of “migrant” “asylum-seeker” and “refugee” is harmful to public perceptions of refugees and prohibits positive progress. She therefore notes that there are both “motivational and institutional constraints” currently blocking change.<sup>67</sup> The question is how to go about “creating more favourable political conditions so that a more morally desirable regime can be brought about in the future.”<sup>68</sup> This is a question that we need to ask ourselves in this context. Several ways to create improvements in this regard have been suggested. The situation may also benefit from campaigns of the international community at large, the EU, UNHCHR

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<sup>66</sup> Jesper Bjarnesen, ‘Rethinking the Mediterranean crisis: Advice for policy makers facing a humanitarian catastrophe’ 6, (The Nordic Africa Institute, September 2015) <<http://nai.diva-portal.org/smash/get/diva2:858838/FULLTEXT01.pdf>>.

<sup>67</sup> (n 12) 144.

<sup>68</sup> (n 12) 143.

and/or NGOs, to remind states of moral obligations that should be linked to action, in cases where there is a causal link between their policy or action and the creation of refugee flows.<sup>69</sup>

A further issue that needs to be overcome in the discourse is “the implicit perception of refugees as helpless, passive victims who should be interned in camps until they can be sent back (...) The perception of refugees as passive and without a will of their own is reflected in news reporting, in which the opinions and expectations of refugees are rare compared to the voices of politicians, aid workers, and the inhabitants in Europe’s coastal regions. This perspective is comfortable from a European perspective because it enables us to make decisions and form opinions without heeding the voices of the refugees themselves.”<sup>70</sup> Perhaps the European Union’s Fundamental Rights Agency, in conjunction with UNHCR, should launch a campaign giving greater exposure to asylum-seekers’ perspectives, in order to make things a little less comfortable for European citizens and thus Member States, just as we all felt when the Independent published a picture of a drowned Syrian child in September 2015,<sup>71</sup> and which led to a greatly increased public response.<sup>72</sup> These forms of ‘incentivisation’, disturbing as they are, must not be ignored.

#### **4.2. Political objectives and relative strategies at the international level: Syria**

All of this having been said, whilst the Turkey deal (if it continues to hold) establishes a sense of control over the numbers of asylum-seekers coming from Syria, the ongoing war will continue to drive migration towards Europe, and many will attempt to find routes that bypass the Aegean. It is worth remembering also that for every refugee who is resettled from the Greek Islands back to Turkey, the European Union has pledged to resettle one within its borders. Whilst the incentive to make the crossing is lessened, in this way, the numbers entering Europe, are still tied to those fleeing Syria and any future mass movements

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<sup>69</sup> (n 12) 141.

<sup>70</sup> (n 64) 5.

<sup>71</sup> Adam Withnall, ‘If these extraordinarily powerful images of a dead Syrian child washed up on a beach don’t change Europe’s attitude to refugees, what will?’ (*The Independent*, 2 September 2015) <<http://www.independent.co.uk/news/world/europe/if-these-extraordinarily-powerful-images-of-a-dead-syrian-child-washed-up-on-a-beach-don-t-change-10482757.html>>.

<sup>72</sup> Adam Withnall and Matt Dathan, ‘Revealed: the public’ extraordinary response to the Syrian refugee crisis and how it shames David Cameron’ (*The Independent*, 23 September 2015) <<http://www.independent.co.uk/news/uk/home-news/refugee-crisis-the-true-extent-of-the-british-publics-extraordinary-response-revealed-10514341.html>>.

following further instability and fighting in the region, are sure to once again place immense strain on Greece and the Union as a whole.

A sustainable solution will therefore be practically impossible without a peaceful resolution of the Syrian crisis. Despite the effective collapse of peace deals to date, and the continued bombing of rebel strongholds, particularly Aleppo, there are signs that states have become more determined to find a solution, perhaps in the knowledge that the violence continues to breed greater extremism which is hitting “closer to home”. The lessons of the past have taught us that it is easy to fan the flames in the Middle East, and that peace will ultimately not come through aerial strikes. One key to resolution seems to be over the fate of Bashar al-Assad. The United States insist that he must step down to make way for a peace process and democratic elections, whereas Russia are adamant that he must remain as an element of ability in any transition to peace. Russia have also previously vetoed attempts of the UN Security Council to refer the Syrian situation to the International Criminal Court.<sup>73</sup>

Following a cease-fire agreement struck amid a precious sense of optimism at the end of February,<sup>74</sup> which Russia and the United States promised to guarantee and “enforce” themselves, Assad broke the deal by launching a fresh and ferocious assault of airstrikes on Aleppo.<sup>75</sup> Notably and tragically, one of the last paediatricians still in the country was killed, having saved many children in Aleppo, as strikes on hospitals have become normality.<sup>76</sup>

Parties must now gather together once more as a matter of urgency, learning the lessons of this ceasefire breach. The United States must unfortunately be flexible in its demands to see Assad step down immediately, but in putting this on the negotiating table, they must in return urge Russia to gain a semblance of control over Assad’s continued flouting of agreements and shelling of hospitals and rebel strongholds in Aleppo. The latter is of such importance in the context of the war as a whole, that Assad continues to lay siege to

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<sup>73</sup> United Nations, ‘Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution’ (22 May 2014) <<http://www.un.org/press/en/2014/sc11407.doc.htm>>.

<sup>74</sup> Patrick Wintour, ‘US and Russia agree to enforce new Syria ceasefire’ (*Guardian*, 22 February 2016) <<http://www.theguardian.com/world/2016/feb/22/us-and-russia-agree-to-enforce-new-syria-ceasefire>>.

<sup>75</sup> Daniel Boffey, ‘We’ve had massacres all week’: Aleppo on fire again as Assad consigns ceasefire to history’ (*Guardian*, 30 April 2016) <<http://www.theguardian.com/world/2016/apr/30/syria-airstrikes-aleppo-assad-ceasefire-civilians>>.

<sup>76</sup> Agence France-Presse, ‘Aleppo mourns Syrian paediatrician killed in hospital airstrike’ (*Guardian*, 29 April 2016) <<http://www.theguardian.com/world/2016/apr/29/mohammad-wassim-maaz-syrian-paediatrician-al-quds-airstrike>>.



it.<sup>77</sup> The UN Security Council must meet to discuss strategies for Aleppo that firstly, have the potential to stop attacks on hospitals and doctors, and secondly, could bring greater stability to the city. If fighting is to stop for good, it may well have to be with Assad still at the helm, while efforts to hold him accountable would have to wait until peace was achieved. If peace efforts fail, perhaps it would be time to try something different. At the end of 2015, an experienced former international relief adviser mooted United Nations control of Syria as a “mandate territory”.<sup>78</sup> One month previously, a similar idea had been suggested by Kraus,<sup>79</sup> who stated: “Perhaps it’s time to use the UN for its founding purpose: to end the scourge of war. The other 192 UN Member States, including Assad’s allies Russia and Iran, should suspend Syria’s UN membership, which can be done under Article 5 of the UN Charter (...) the territory should be placed under the auspices of the UN’s Trusteeship Council, a moribund UN organ that basically went out of business when the last of the colonial countries achieved independence. Let’s breathe new life into it and use its chamber as intended rather than as just a glorified conference room in the UN’s headquarters.”<sup>80</sup>

He notes that “it could create the space for a political settlement of the conflict. Perhaps it could even be structured in a way that gives Assad a face-saving role in the provisional government and yet defangs his ability to slaughter Syrians. Actions to hold Assad accountable for his crimes against humanity would most likely need to be deferred until a more peaceful and just Syrian state is reestablished.” It is unlikely that Russia and China would agree to such a move, especially given the former’s pro-sovereignty stance.<sup>81</sup> If all else fails however, there is a small possibility that “they could (...) see this as a solution to an intractable and costly problem that enables them to retain influence in the region.”<sup>82</sup>

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<sup>77</sup> Emma Graham-Harrison, ‘Aleppo is such a prize for both sides that its suffering just goes on’ (*Guardian*, 30 April 2016) <<http://www.theguardian.com/world/2016/apr/30/aleppo-strategic-prize-rebels-siege-suffering-ceasefire>>.

<sup>78</sup> James Cusick, ‘Syria civil war: UN taking control of country “could provide solution to conflict”’ (*The Independent*, 6 December 2015) <<http://www.independent.co.uk/news/world/middle-east/syria-civil-war-un-taking-control-of-war-torn-country-could-provide-solution-to-conflict-a6762061.html>>.

<sup>79</sup> Don Kraus, ‘A Radical Win-Win solution for Syria (Citizens for Global Solutions, 5 November 2015) <<http://globalsolutions.org/blog/2015/11/Radical-Win-Win-Solution-Syria#.V02I75ErK00>>.

<sup>80</sup> *ibid.*

<sup>81</sup> Michelle Nichols, ‘Russia pushes U.N. Security Council on Syria sovereignty’ (Reuters, 19 February 2016) <<http://www.reuters.com/article/us-mideast-crisis-russia-syria-un-idUSKCN0VS1Z0>>.

<sup>82</sup> (n 77).

The idea is essentially the ultimate extension of the “sovereignty as responsibility” formula which is at the heart of the responsibility to protect. Whilst controversial, there may also be the potential to use the latter concept to further incentivise taking asylum-seekers and refugees into Europe. Given a state’s failure to protect its populations against atrocity crimes (here it is effectively perpetrating them), the responsibility to protect can fall upon the international community. If the Syrian people can only be fully protected by fleeing the country, this should engender, not only a moral but a legal responsibility to protect them, from the international community at large. As Coen has stated, “An emphasis on R2P as refugee protection also bolsters the non-coercive and non-violent aspects of the human protection norm at a time when significant criticism surrounding the third pillar of the framework regarding forceful intervention threatens to erode its legitimacy and global consensus.”<sup>83</sup>

## 5. Conclusion

In a “perfect storm” of nationalism, EU referendums, terrorism, and in part the erosion of political centre-ground, popular will has become a key determinant of government policy. As such, action on asylum-seekers and refugees, on the scale required to “save” Schengen and lay a sustainable path towards re-stabilisation whilst also fulfilling the EU’s moral and legal obligations, and its human rights commitments to assist asylum-seekers on the scale required to deal with the crisis in the Mediterranean, requires incentives.

Despite the fact that the idea of mandatory relocation quotas has failed to gain traction and has been manifestly rejected by several Member States, the Commission continues to “flog a dead horse”. Whilst it is argued that a relocation initiative must be a necessary but not sufficient element in any resolution of the crisis, one which imposes mandatory quotas, seems destined to fail. Now, the Commission’s response has been to reach for the stick, in tabling a proposal which adds a penalty for states who fail to accept refugees relocated from overburdened Member States. This article has argued that, given the political environment, they would be much better to reach for the carrot.

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<sup>83</sup> Alise Coen, ‘The Responsibility to Protect and the Refugee Crisis’ (*Sustainable Security*, March 9 2016) <<https://sustainablesecurity.org/2016/03/09/the-responsibility-to-protect-and-the-refugee-crisis/>>.

Even if this is not the way forward, it is hoped that this paper has demonstrated the unfortunate need for incentivisation for many Member States, in a time when the political landscape is tending towards inaction. Requesting fresh funds via reasonable and negotiated budgetary increases which may already be on the table, combined with significant central EU contribution from existing funds, shows good faith from the Commission and from Member States. Adding rebates allows EU countries to determine for themselves to what extent they wish to participate, all the while being incentivised to do so. Meanwhile, the EU must improve its public relations, seizing any opportunity of new proposals to shift the discourse, displaying to the sceptical European public, that the proposals ultimately aim to help the vulnerable, the persecuted and the war-fleeing. A more coherent public relations strategy and collaboration with NGOs could help in this aim.

Whilst the EU should be prepared to write cheques, Member States should be prepared to take action. They would do well to consider, that “now more than ever a global response is needed, not just one reflecting the overreaction of twenty-eight states that are still among the wealthiest on the planet. Those fleeing armed conflict and other human rights violations will not simply stop coming just because politicians try to outdo themselves with empty rhetoric while failing to fulfil international obligations they would prefer to impose on other, less well-off states.”<sup>84</sup>

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<sup>84</sup> Geoff Gilbert, ‘Why Europe Does Not Have a Refugee Crisis’ *International Journal of Refugee Law*, 2015, Vol. 27, No. 4 531, 534. <<http://www.ohchr.org/Documents/Issues/Migration/StudyMigrants/CivilSociety/GeoffGilbert.pdf>>.



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