PROJECT "NEW DECISION-MAKERS, NEW CHALLENGES"

# BORDER CONTROL AND THE RIGHT OF ASYLUM: WHERE IS THE EU HEADING?

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## SUMMARY

Ending at the end of the year, the Stockholm Programme 2009-2014 closes a period of three five-year programmes (Tampere 1999-2004 and The Hague 2004-2009) defining EU's strategic orientations in the field of justice, liberty and security, including asylum and immigration.

While the 26-27 June 2014 European Council will set the new strategic guidelines for the period 2014-2020, what is at stake in the field of border control and asylum?

The objective of the migration policy is to effectively regulate the entry, stay and integration of third-country nationals in the member states. At the same time, all of these states are signatories to the 1951 Geneva Convention and to the 1967 Protocol on Refugees. To what extent do these commitments in relation to asylum dovetail with each member state's sovereign right to decide who gets to enter and to settle on its territory?

**1. State of play: the EU is mobilised on border control and the right of asylum**
Europe's migration policy, which has developed to strengthen external border controls, to organise solidarity between transit and destination countries, and to promote migrants' fundamental rights faces a tremendous upswing of migrants' flux since 2013.

**2. An unstable balance and shortcomings**
The existing mechanism for border controls is based on common regulations and on solidarity mechanisms. Yet border controls suffer from a lack of solidarity among Member states which threatens the free movement of people. And they sometimes make it more difficult for individuals to have access to asylum procedures.
The common European asylum system (CEAS) adopted in June 2013 is designed to offer both effective and fair treatment to asylum seekers and a high level of protection. In organising solidarity among member states, primarily via the European Asylum Support Office, it also seeks to spread its message throughout the world. Yet the CEAS is not as fair, as solidarity-based or as exemplary as it aspires to be, primarily on account of interferences of border controls.

**3. Assessment of existing proposals for the post-Stockholm programme and recommendations:**
Considering the limits of intra-European solidarity, the Task Force for the Mediterranean and the European Commission have focused essentially on an increased externalisation of the European immigration and asylum policy.

However, in order to request solidarity from third countries in the treatment of migrants and to be credible in its drive to promote asylum and immigration systems which respect migrants' fundamental rights, the EU must develop a more political and comprehensive approach to migration, which will have a cost and which needs to be based on the EU's and the third countries' mutual interests.

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# INTRODUCTION

T he dramatic circumstances in which 366 people lost their lives off Lampedusa in October 2013 tragically illustrates the European Union's difficulties in controlling its external borders while simultaneously guaranteeing migrants' safety and respect for their fundamental rights. How is this issue going to be addressed in the post-Stockholm working programme which the European Council is scheduled to adopt in June 2014 and which, like its predecessor, will be setting Europe's priorities in the field of freedom, security and justice from 2014 to 2020?

The goal of Europe's migration policy is to effectively regulate the entry of third-country nationals into the member states, and to then define the terms of their sojourn and of their social integration[1]. In times of heavy unemployment, border control is a crucial aspect of this policy.

At the same time, all of the European Union's member states are signatories to the Geneva Convention of 1951 and to the 1967 Protocol on Refugees[2], while Article 19 in the European Union Charter of Fundamental Rights is designed to protect anyone against transfer to a country in which he or she would be in danger of inhumane or degrading treatment[3].

**"WHAT BALANCE BETWEEN INTERNATIONAL COMMITMENTS IN RELATION TO ASYLUM AND EACH MEMBER STATE'S SOVEREIGN RIGHT?"**

To what extent do these commitments in relation to asylum dovetail with each member state's sovereign right to decide who gets to enter and to settle on its soil, given that refugee flows, which change in accordance with crises outside the EU, lie very much outside member states' control?

After reviewing the major phases of the development of this policy, we will assess recent evolutions in illegal immigration and applications for asylum, which have a very different impact on different member states (§1). We will then analyse the unstable balance of the measures implemented hitherto for border control and for the right of asylum (§2). And lastly, looking ahead to the post-Stockholm programme for 2014-2020, we will discuss potential and desirable developments in Europe's migration and asylum policy, particularly in the light of proposals put forward by the Task Force for the Mediterranean in December 2013 and those submitted by the European Commission in March 2014 (§3). The challenge facing the post-Stockholm programme will be to reconcile the increased outsourcing of Europe's migration policy with safeguards for the right of asylum. To meet this challenge, the Union is going to have to display generosity and innovation, and to heed what third countries have to say.

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1. Tomas Hammar, "Introduction", in Tomas Hammar, *European Immigration Policy: a Comparative Study*, Cambridge University Press, 1985, p. 1-13.
2. Article 1A of the Geneva Convention dated 28 July 1951 on refugee status; came into force on 22 April 1954.
3. European Union Charter of Fundamental Rights, (2010/C 83/02).

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# 1. State of play: a European Union mobilised on border control and the right of asylum

## 1.1. Migration policy is not covered in the Treaty of Rome

The countries of Europe were open to immigration to support post-war reconstruction followed by the boom of the "thirty glorious years" thereafter. Protection of refugees, for its part, was initially governed, within a UN framework, by the Geneva Convention of 1951 and by the New York Protocol of 1967.

## 1.2. Managing the borders: main objective of the European migration policy

**"STRENGTHEN CONTROL OF THE EXTERNAL BORDERS IN AN ENDEAVOUR TO CONTAIN THE RISK OF TRAFFICKING"**

In the wake of the oil crisis of 1973, member states evinced a desire to curb immigration. Yet in the era of globalised information and means of transport, migrant pressure was not abating and authoritarian regimes, especially in Southeast Asia and in Chile helped to make Community Europe the preferred destination for asylum seekers in the 1980s[4].

During discussions on the Single European Act, in an endeavour to contain the risk of trafficking within Europe's deregulated area it was decided to strengthen control of the external borders of the member states that signed the first – intergovernmental – achievement, which was the Schengen agreement in 1985.

## 1.3. Variable migrant pressure and the need for solidarity among member states

By the turn of the century economic immigration was ongoing due to the shortage of workers in those industries where labour was poorly paid, tough and impossible to relocate. Moreover, family reunification and the right of asylum became two preferred modes of entry into the Community area. The collapse of the Soviet area, followed by the implosion of the former Yugoslavia in 1990-1991 led to an influx of some 4.6 million immigrants into the Community. In 1992, Germany recorded 438,000 applications for asylum! To reduce inequality in the EU countries' relative powers of attraction, based in particular on differences in reception conditions for asylum seekers, Germany managed to ensure that the Treaty of Maastricht in 1992 included the Communitarisation of visa policy and the introduction, in the third intergovernmental pillar, of a policy governing asylum and other aspects of border control and of the struggle against illegal immigration.

## 1.4. Safeguarding migrants' fundamental human rights

At the turn of the 20th century border management was still an issue. Candidates for membership in central and eastern Europe became countries of immigration, of emigration and of transit towards member states such as Germany[5]. Transnational immigration networks (in Russia or in Kosovo) formed in reaction to the EU's effort to manage its borders and demanded a common European response. After 11 September 2001, the need not to overlook any trail in the struggle against terrorism justified increased border monitoring.

Yet the EU's affirmation as a promoter of fundamental rights has also benefited immigrants. These issues were initially addressed in the framework of the Council of Europe, with the adoption on 4 November 1950

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4. Bülent Kaya, *Une Europe en évolution. Les flux migratoires au XXe siècle*, SFM - Swiss Forum for Migration and Population Studies, Council of Europe Publishing, 2002.
5. In the Czech Republic the number of foreigners rose from 34,600 to 186,700 from 1987 to 1996. Cf. John Salt, *Évolution actuelle des migrations internationales en Europe*, Council of Europe, 1997.

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of the European Convention for the Protection of Human Rights and Fundamental Freedoms, of which the European Court of Human Rights is the guardian. Yet following the work done by the CJEC and in the context of Community Europe's successive enlargements to include countries joining the club of democracies, pressure to build references to fundamental rights into the European treaties grew. Mentioned in the preamble to the European Single Act, fundamental rights were introduced into Article 6 § 2 TEU in the Treaty of Maastricht and were then given further safeguards in Article 6 § 1 TEU in the Treaty of Amsterdam in 1997[6]. Attached to the Treaty of Lisbon in 2007, the Charter of Fundamental Rights of the European Union of the year 2000 also includes a set of specific rights for migrants (the right of asylum and of protection against inhuman or degrading treatment, see Articles 18 and 19)[7].

Thus, having gradually become Communitarised since the Treaty of Amsterdam, the European Union's migration policy in the spheres of border control and the right of asylum, which is a shared area of responsibility in the EU (Article 4 TFEU), is now, under the Treaty of Lisbon, governed by ordinary legislative procedure (Articles 77 to 79 TFEU).

## 1.5. The trend in migrant pressure and in applications for asylum

From 2008 to 2012, the number of illegal immigrants entering the European Union dropped from 159,881 to 72,437, revealing the dissuasive impact of the monitoring system; yet illegal entry has risen by 48% since the start of 2013, reaching the figure of 107,000[8].

**GRAPH 1** ► **Detections of illegal border-crossing**
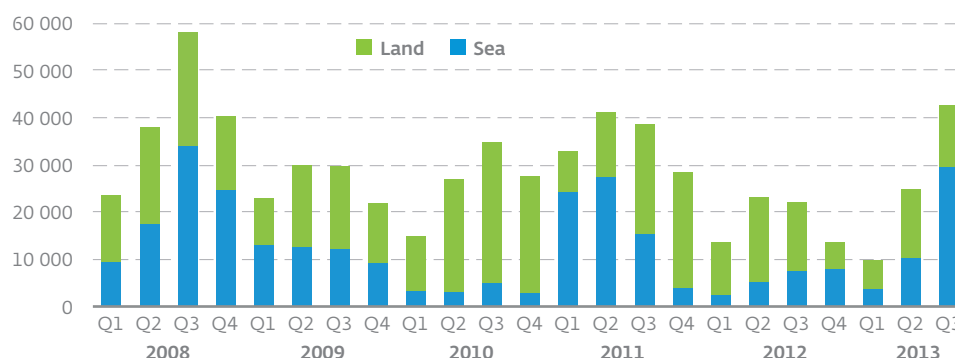


Source: Frontex, "FRAN Quaterly Q3", July-September 2013.

Illegal entry by air, by land and, more especially, by sea basically concerns Syrians, Eritreans, Afghanis and Albanians. In 2013, illegal entry via Sicily shot up by 288%[9], which raises the issue of solidarity among member states.

Moreover, more than 85,000 individuals without regular sojourn permits were picked up in the European Union in the third quarter of 2013, many of them (the "overstayers") simply staying on in the EU after their visas had expired. This figure, the highest level since the end of 2011, is at odds with the drop noticed since

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6. Article 6 §1 in the TEU states: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". Article 7 in the TEU states, for its part, that "the European Council, meeting at the head of state and government level and acting by unanimity on a proposal by one-third of the Member States or by the European Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article F, § 1, after inviting the Member State in question to submit its observations".

7. Article 18: "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 establishing the European Community." Article 19: "1. Collective expulsions are prohibited; 2. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment."

8. Frontex, *Frontex Annual Risk Analysis* (FRAN), 2014. Also: European Commission, "Report from the Commission to the European Parliament and the Council, Fourth bi-annual report on the functioning of the Schengen area 1 May - 31 October 2013", COM(2013) 832 final, 28 November 2013.

9. Frontex, *Frontex Annual Risk Analysis* (FRAN), 2014.

2008. Illegal immigration in the EU, about which too little is known, accounts for fewer than 2 million to 4.5 million people[10].

GRAPH 2 ▶ Detection of illegal stayers
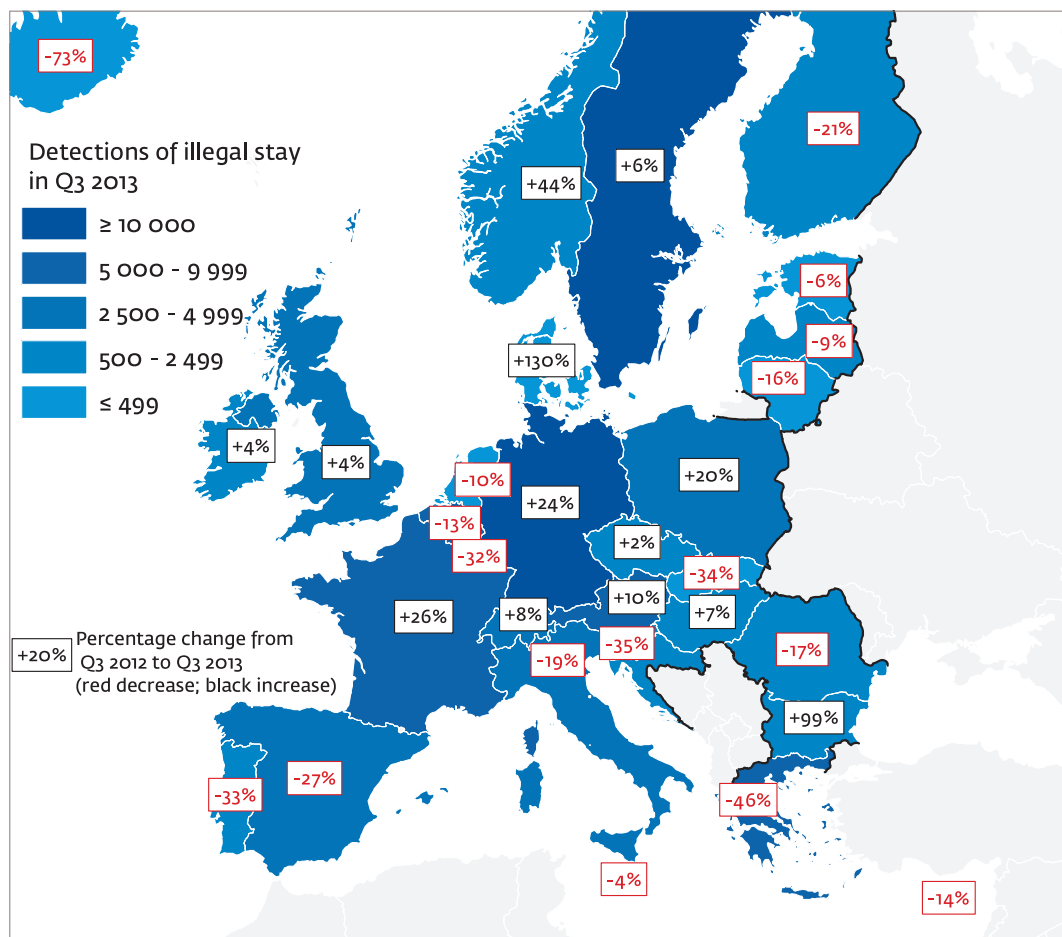


Source: Frontex, "FRAN Quaterly Q3", July-September 2013.

And lastly, the number of applications for asylum in European Union member countries has shot up since 2011. It has risen from 302,000 in 2011 to 435,000 in 2013, with a 32% increase over 2012[11]. In 2013, Syrians accounted for 9.4% of all asylum seekers, ahead of the Russians (6.7%) and the Afghanis (6.5%). In 2013 fully 70% of applications for asylum focused on Germany, France, Sweden, the United Kingdom and Italy alone[12].

Yet the European Union took in only 2.3% of all Syrian refugees in 2013.

10. According to the estimates for 2008 produced in the context of the CLANDESTINO project funded by the EU. Clandestino, *Undocumented Migration: Counting the Uncountable. Data and Trends Across Europe*, CLANDESTINO Project, Final Report, 23 November 2009
11. UNHCR, *Asylum Trends 2013*, March 2014.
12. Eurostat, "Large increase to almost 435,000 asylum applicants registered in the EU28 in 2013", *News release*, 46/2014, 24 March 2014.

**GRAPH 3** ► Asylum claims submitted in 10 major receiving countries, 2013
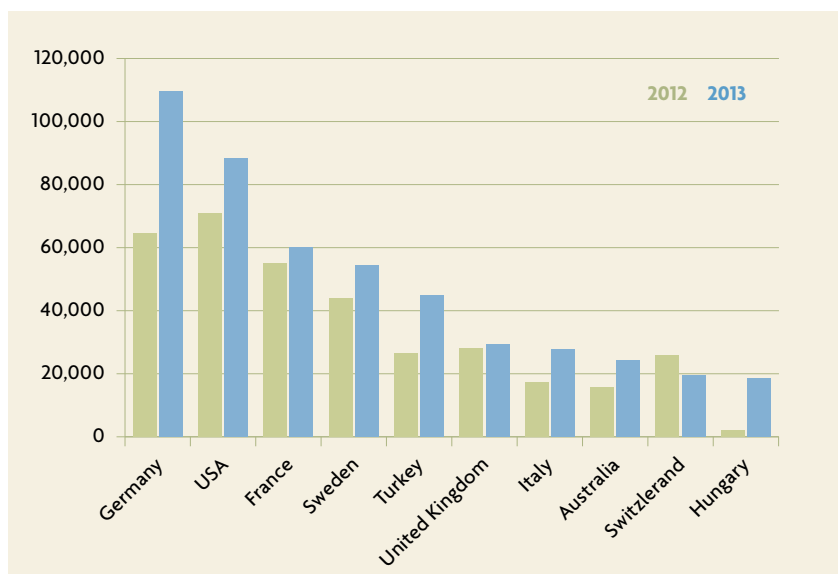


Source: UNHCR, _Asylum Trends_, March 2014.

**TABLE 1** ► Flows of Syrian refugees into Syria's neighbouring countries and Europe (2011-13)

| Destination / year | 2011 | 2012 | 2013 | 03.15.2011 - 12.31.2013 |
|---|---|---|---|---|
| Lebanon, Jordan, Turkey, Iraq, Egypt (1) | 15,455 | 491,651 | 1,799,882 | 2,301,533 |
| EU 28 Member States (2) | 6,450 | 20,810 | 42,480 | 69,740 |
| Syrians smuggled by sea to Greece and Italy (3) | 947 | 8,509 | 18,972 | 28,428 |
| EU 28 / Total % | 29.4 | 4.1 | 2.3 | 2.9 |
| Smuggled by sea / asylum claims % | 14.7 | 40.9 | 44.7 | 40.8 |

_1) UNHCR, Syria Regional Refugee Response,_ http://data.unhcr.org/syrianrefugees/regional.php. _At the time of writing (10 Feb 2014), the total number of registered Syrian refugees in the five countries was 2,430,100._

_2) EUROSTAT, Asylum and new asylum applicants by citizenship, age and sex. Monthly data,_ http://epp.eurostat.ec.europa.eu/portal/page/portal/population/data/database.

_3) Italian Ministry of Interior and Greece Police records._

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# 2. An unstable balance and shortcomings

Lying at the heart of Europe's migration policy, external border controls benefit from highly developed mechanisms. The European right of asylum, a more recent development, made major progress in 2013 with the adoption of the Common European Asylum System (CEAS). Let us take a look at these mechanisms' records to date.

## 2.1. Border control: progress and limits

### 2.1.1. A highly complex European mechanism

- *A set of rules defines the conditions for entry and punishes non-compliance.*

> **HARMONISE THE POWER OF ATTRACTION THAT MEMBER STATES HOLD IN MIGRANTS' EYES"**

The Schengen Border code, dated 2006[13], sets common modalities and terms for controlling the Union's internal and external borders. The visa code, dated 2009[14], contains the list of countries whose nationals are or are not required to apply for a visa, and it seeks to harmonise conditions governing the issue of visas. These regulations help to harmonise the power of attraction that member states hold in migrants' eyes.

To impart credibility to their border control policy, member states also devised common regulations for punishing carriers, those who help with the entry, transit or sojourn of illegal migrants, human traffickers and anyone employing illegal migrants (see directive dated 2009). To complete this mechanism, the "Return Directive" of 2008 stipulates the minimum common standards and procedures governing the return of third-country nationals illegally dwelling in the Union.

- *Moreover, a number of operational solidarity mechanisms have been adopted in an effort to improve migrant flow management.*

Gathering data on individuals seeking to emigrate to Europe is an initial strategic issue. The Schengen Information System (SIS) was set up when the Schengen agreement was first adopted. Renewed in April 2013 (SIS-II), it permits member states to share information on individuals who have been refused entry into the Schengen area, whether on grounds of public order, of safety and national security, or after being expelled on grounds of illegal sojourn.

The Visa Information System (VIS) set up after 2004 permits member states to trace visa applications, particularly in an effort to counter "visa shopping".

The European Border Surveillance System (EUROSUR), which became operational in December 2013, permits member states and the FRONTEX Agency to exchange operational information in an effort to reduce illegal entry into the EU and to prevent cross-border crime.

And lastly, a "Smart Border Package", which has been a topic of discussion since February 2013, aims to use modern technology to simplify border control and to increase its efficiency[15].

The aim of the Dublin Regulation is to designate the member state responsible for handling a given application for asylum. Yet in assigning responsibility to the member state most heavily involved in a migrant's arrival,

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13. Regulation (EC) n° 562/2006 of the European Parliament and of the Council, dated 15 March 2006, establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).
14. Regulation (EC) n° 810/2009 of the European Parliament and of the Council, dated 13 July 2009 establishing a Community Code on visas (visa code).
15. A reliable and rapid registration system would simplify control of individuals travelling frequently within the European Union, while an entry/exit system would make it possible, in particular, to find visitors staying on EU soil after their visas have expired (overstayers).

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for instance if the member state has granted a migrant a visa, it also aims to involve that member state in the management of the EU's external borders. Taking asylum seekers' finger prints in the EURODAC system makes them traceable and helps to counter "asylum shopping", as it allows to organise the transfer of multi-asylum seekers to the country responsible for their first application.

> **" TAKING ASYLUM SEEKERS' FINGER PRINTS IN THE EURODAC SYSTEM MAKES THEM TRACEABLE AND HELPS TO COUNTER 'ASYLUM SHOPPING'"**

Coordinated operational border control actions are also staged: set up in 2005, the FRONTEX agency, whose budget rose from 19.2 M€ in 2006 to 85.7 M€ in 2013, helps member states to monitor common external sea, land or air borders. Where visa applications are concerned, European mutualisation agreements should allow member states with only a modest diplomatic network to benefit from the equipment and staff of member states whose diplomatic network is more substantial.

To balance the cost of taking migrants in among the countries of Europe, financial support has also been envisaged: for the period stretching from 2007 to 2013, the Fund for the Union's external borders (1.82 Bn€), and the European Return Fund (676 M€) played that role. In 2013 Italy received an allocation of 92 million euro and Malta an allocation of 23 million euro from the external border, refugee and return funds. For the period stretching from 2014 to 2020, the Asylum, Migration and Integration Fund, worth a total of 3.1 billion euro, will be devoted in particular to supporting return strategies. And above all, the Internal Security Fund will devote 2.8 billion euro to managing external borders and visas.

- *And lastly, the final border management instrument, readmission agreements with third countries (Article 79 §3 TFEU), is designed to facilitate and to accelerate the return and transit of individuals in a situation of illegality.*

Signing new agreements is laborious because in order to agree to readmitting their nationals, third countries seek to obtain both financial aid and visas. Since 1999, fully eighteen agreements have been negotiated with countries such as Russia, Ukraine, Pakistan, Sri Lanka and the Balkan countries, and in December 2013 also with Turkey.

### 2.1.2. The limit of border control, and difficulties in accessing asylum procedures

- *Border impermeability: a Sisyphus-style myth?*

In a situation in which the number of international migrants in the world rose from 154 million to 231 million between 1990 and 2013[16], it appears particularly difficult to totally manage the EU's sea, land and air borders: migrant routes change and innovation in the forged ID industry follows that of border controls. And finally, the usefulness of border control in the struggle against international terrorism, which is one of the reasons used to justify it, is very much open to question because recent terrorist attacks (from Khaled Kelkal in 1995 to Mohammed Merah in 2012) have not been perpetrated in any way by illegally resident third-country nationals.

- *Europeans in search of solidarity*

Whatever the common regulations in the spheres of border control or asylum, member states ultimately still have the final word in deciding whether or not to authorise a migrant's entry or sojourn, and they differ in the policies that they pursue in this regard. Moreover, not all member states subscribe to the European migration policy, because the United Kingdom, Ireland and Denmark have opt-out clauses in connection with it. This absence of a shared vision, which translates, for instance, into rates for the granting of international protection at first instance varying from 0.9% in Greece to 90.1% in Malta in 2012[17], leads to differences in European countries' attractiveness in migrants' eyes.

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16. United Nations, OECD, *World Migration in Figures*, joint contribution by UN-DESA and the OECD to the United Nations High-Level Dialogue on Migration and Development, 3-4 October 2013.
17. Eurostat, "EU Member States granted protection to more than 100,000 asylum seekers in 2012", News release, 96/2013, 18 June 2013.

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Also, readmission agreements are difficult both to negotiate and to implement: third countries are less demanding than the EU when it comes to border monitoring, because they benefit from migrant workers' remittances and also because they have to bear some financial costs associated with readmission. Thus the agreements signed with Morocco, Algeria and China are finding it hard to get off the ground because the countries consider the incentives offered by the EU to be insufficient. The agreements signed with Ukraine, the Russian Federation and Turkey, on the other hand, were only successfully completed thanks to a relaxation in the system of visas issued by the UE[18].

To make these agreements more attractive, the European Union now attempts to build them into "mobility partnerships" which concern the "global approach to migration and mobility" and which simultaneously address the issues of legal immigration, the struggle against illegal immigration and the links between migration and development.

Readmission agreements are also limited in their effectiveness: while 20.1% of individuals detained in the EU in 2009 were from a country that had signed a readmission agreement, they only accounted for 40% of individuals actually readmitted that year, because third countries are reluctant to readmit individuals not of their nationality[19].

In particular, these agreements have sometimes been signed with countries whose asylum system does not function properly (Ukraine has attempted to send recognised HCR refugees back to Russia) or which have a reputation for being areas of persecution (Pakistan and Sri Lanka, for instance).

**" MEMBER STATES ARE NOT ALWAYS CONSISTENT IN THEIR APPLICATION OF THE COMMON REGULATIONS"**

Moreover, member states are not always loyal in their application of the common regulations: some countries (Greece, Italy and Malta) do not always record asylum seekers' finger prints in the EURODAC system in order to allow them to leave their soil and to seek asylum in another member state. When Italy felt during the Arab spring uprisings in 2011 that the EU was not showing sufficient solidarity in view of the influx of 28,000 migrants, it granted those migrants six-month humanitarian sojourn permits allowing them to move freely throughout the Schengen area. In retaliation, France and Denmark reintroduced border control on the EU's internal borders.[20]

This lack of European solidarity in the field of European migration has been resolved by infringing the cardinal principle of European construction that is the free movement of people within the Schengen area. The reform of the Schengen area's governance adopted in October 2013[21] extended the criteria governing the reinstatement of internal border controls to cases of serious and persistent shortcomings on a member state's part in monitoring the Schengen area's external borders.

- *Difficulties in rescue at sea and access to asylum procedures*

If applied restrictively, the European regulations governing the issue of visas often force individuals seeking international protection to enter the EU illegally. But given that carriers fear penalties or fear being refused entry to ports after taking illegal migrants on board, they may well refuse to shoulder that responsibility. So migrants are forced to look for smugglers, who then exploit them in financial terms and too often endanger their lives on fragile boats.

18. European Commission, "Cecilia Malmström signs the Readmission Agreement and launches the Visa Liberalisation Dialogue with Turkey", IP/13/1259, 16 December 2013. European Commission, "Evaluation of EU Readmission Agreements", COM(2011) 76 final, 23 February 2011.
19. European Commission, "Evaluation of EU Readmission Agreements", COM(2011) 76 final, 23 February 2011.
20. Yves Pascouau, "Schengen and solidarity: the fragile balance between mutual trust and mistrust", *Policy Paper N°55*, Notre Europe – Jacques Delors Institute, July 2012. See also: Sergio Carrera, Elspeth Guild, Massimo Merlin, Joanna Parkin, "Race against Solidarity. The Schengen Regime and the Franco-Italian Affair", *Liberty and Security in Europe Paper*, CEPS, April 2011.
21. Regulation (EU) 1051/2013 of the European Parliament and of the Council dated 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances. Commentary: Yves Pascouau, "The Schengen Governance Package: The subtle balance between Community method and intergovernmental approach", *Note du Cerfa n°106*, IFRI, December 2013.

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However, the member states have not yet assigned the European Union competence in the sphere of rescue at sea, which rests on two international conventions: the Convention for the Safety of Life at Sea known as "SOLAS", and the Convention on Maritime Search and Rescue known as "SAR", which came into force in 1980 and in 1985 respectively.

> **BUILDING A SEA RESCUE OBJECTIVE MIGHT BE INTERPRETED AS AN OPEN INVITATION TO DELIBERATELY PLACE MIGRANTS IN A SITUATION OF DISTRESS"**

Yet the assignation of competences to the EU over rescue at sea was certainly raised both during discussions on reforming the regulations governing the FRONTEX Agency in 2011 and when the regulation on the European Border Surveillance System (EUROSUR) was adopted in October 2013. Member states pushed through the notion that these operational mechanisms' primary aim is first and foremost to counter illegal immigration, and that building a sea rescue objective into them might be interpreted by unscrupulous human traffickers as an open invitation to deliberately place migrants in a situation of distress in order to force FRONTEX or a member state to rescue them.

So the EU expects to protect migrants from the perils of the deep by preventing them from crossing the Schengen area's external borders and, if possible, from boarding dangerous boats.

What access to asylum procedures at sea?

An advisory opinion published by the United Nations High Commission for Refugees (HCR) in 2007[22] states that the principle of non-refoulement applies "wherever a state exercises jurisdiction, including (...) on the high seas (...)". Article 92 in the Convention of Montego Bay on the law of the sea, dated 1982, stipulates that "ships sail under the flag of one state only and, save in exceptional cases (...) subject to its [that state's] exclusive jurisdiction on the high seas." Yet some member states (see below) take their cue from the United States to invoke the principle of the territorial application of international conventions (see Article 29 in the Vienna convention on treaty law dated 1969[23]) in order to avoid feeling bound by the principle of non-refoulement when their coast guards intercept asylum seekers on the high seas[24].

So, the EU's border control instruments are as developed as they are open to further perfection. What about the instruments that govern asylum?

## 2.2. Assets and limitations of the common European asylum system

The Common European Asylum System (CEAS), adopted in June 2013 at the end of negotiations which began in 2004, marks a major step forward because it aims to provide asylum seekers with a single procedure and protected persons with a standard status.

### 2.2.1. Progress in the common European asylum system

• *A more effective and fairer system for asylum seekers?*

The Dublin Regulation of 2013[25], designed to identify the member state responsible for handling a given application for asylum in order to prevent multiple applications, is an attempt to respond to the numerous criticisms levelled at its previous version:

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**22.** UNHCR, "Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, www.unhcr.org.

**23.** "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

**24.** Forum Réfugiés, *L'asile en France et en Europe. État des lieux 2010. Xe Rapport annuel*, La Nouvelle imprimerie Laballery, 2010. Also: Sara Casella Colombeau, Marie Charles, Olivier Clochard et Claire Rodier, *Agence FRONTEX : quelles garanties pour les droits de l'homme? Étude sur l'Agence européenne aux frontières extérieures en vue de la refonte de son mandat*, November 2010.

**25.** Regulation (EU) No 604/2013 of the European Parliament and of the Council, dated 26 June 2013 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).

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In some ways it strengthens migrants' fundamental rights: the information at their disposal regarding the regulations determining the state responsible has been strengthened, in particular during the one-to-one interviews.

The simplification of family reunification and the defence of the best interests of unaccompanied minors help to attenuate the responsibility of the member state through which the asylum seeker has entered the EU.

Above all, the European Court of Human Rights and the Court of the European Union had found against the transfer of asylum seekers to Greece[26]. This, because Greece, which accounted for 90% of illegal entries into the Schengen area in the second half of 2010, was suffering from such serious systemic lapses in its treatment of asylum seekers that those lapses were equated with inhuman or degrading treatment. Thus the new Dublin Regulation provides for an early warning mechanism to prompt those countries whose asylum system is overwhelmed to adopt preventive action plans or crisis management plans and to benefit from European solidarity.

**A PROCEDURAL 'DIRECTIVE' MADE IT POSSIBLE IN 2013 TO GO FROM 'MINIMAL' TO 'COMMON' STANDARDS"**

A "procedural" directive"[27] made it possible in 2013 to go from "minimal" to "common" standards designed to curtail an asylum seeker's period of uncertainty and also the cost to member states of hosting asylum seekers, as well as their temptation to move on from one member state to another.

It also promotes better respect for asylum seekers' fundamental rights (keeping them informed throughout the procedure, allowing them to record the interview, offering them the support of paid legal counsel from the first instance and fast-track procedures for vulnerable individuals).

The new "reception" directive, establishing common standards for taking in asylum seekers in member states, is designed to ensure that those seekers enjoy a decent and equivalent standard of living in all member states so as to limit their secondary movement.

Here again, asylum seekers' rights have been strengthened (better information, especially during detention, and reception tailored to meet the requirements of the vulnerable). Also, the time frame for asylum seekers' access to employment has been cut from twelve to nine months. In France, in particular, this directive is going to require the construction of 4,000 shelters over two years.

The new "qualification" directive dated December 2011 helps to specify standards for identifying individuals in need of protection and for improving their rights. When we see that in 2012 fully 93% of Afghani asylum seekers were protected in Italy, as opposed to only 17% in Poland, it becomes clear that there is a huge need for national practices to be approximated.

26. HUDOC, 21 January 2011, Case of M.S.S. v. Belgium and Greece, application No. 30 689/09. Also: EUCJ, 21 December 2011, NS c/Secretary of State of the Home Department and M.E. ea c/Refugee Applications Commissioner Minister for Justice, Equality and Law Reform joint affairs C-411/10 and C-493/10.
27. Directive 2013/32/EU of the European Parliament and of the Council, dated 26 June 2013 on common procedures for granting and withdrawing international protection (recast).

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**BOX 1 ▶ Refugee status, subsidiary protection and humanitarian status: what is the difference?**

"Refugee status" or "conventional status" is protection granted under Article 2 (e) of Directive 2011/95/EU, in compliance with Article 1 in the Geneva Convention dated 28 July 1951 relating to refugee status, as modified by the Protocol of New York dated 31 January 1967.

Article 2 (c) in this directive defines a "refugee" as any third-country national who, because he or she reasonably fears persecution on the grounds of his or her race, religion, nationality, political views or membership of a given social group, is outside the country whose nationality he or she holds and who cannot or, on account of this fear, does not wish to seek the protection of that country. This definition also encompasses stateless persons.

The notion of subsidiary protection was coined within the framework of the EU and it is defined in Article 2 (f) of Directive 2011/95/EU. An individual may enjoy this protection if he or she fails to meet the criteria for being considered a conventional refugee, but at the same time there are serious and verified reasons to believe that he or she would be in grave danger, in his or her country of origin or of habitual residence (for stateless persons), of suffering grievous harm and would be unable to benefit from that country's protection. Subsidiary protection introduces and develops in Community law the content of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and the content of Article 1 of that convention's 6th Additional Protocol relating to the abolition of the death penalty.

Humanitarian status describes the protection granted on the strength of a national law to a person who fails to meet the conditions for enjoying conventional or subsidiary protection, but who still benefits from protection against expulsion by virtue of international human rights obligations. This status may be granted to the seriously ill or to unaccompanied minors.

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The "qualification" directive also strengthens the rights of protected persons (with specific provisions for vulnerable individuals, including adults legally responsible for an unmarried minor protected by the definition of the family, approximating rights granted to conventional refugees with those enjoyed by recipients of subsidiary protection with regard to family unity, to access to the employment market and to health care).

- *More effective and fairer towards asylum seekers, the Common European Asylum System also aspires to promote strong solidarity among member states.*

As long ago as 2001, a directive on temporary protection ruled that member states should share reception of the massive influxes of asylum seekers on a voluntary basis. Asylum seekers are issued a one-year renewable sojourn permit which does not affect their right to international protection.

In addition to this, there is the solidarity funding in the European Refugee Fund (614 M€ for the period stretching from 2007 to 2014), and then the Asylum, Immigration and Integration Fund (3.1 Bn€ for the period stretching from 2014 to 2020) which fund resettlement and relocation actions in particular[28]. The harmonisation of reception conditions in the various countries of the EU is designed to dissuade secondary movement on the part of asylum seekers.

Finally, the European Asylum Support Office (EASO), inaugurated in Malta in June 2011, promotes cooperation among member states (support for transfer actions, the dispatch of support teams to a member state in difficulty, the harmonisation of methods for analysing applications for asylum).

- *And lastly, the common European asylum system aims to spread throughout the world.*

Thus countries seeking membership of the EU have to subscribe to the CEAS as part of the Community acquis. By the same token, regional protection programmes, particularly in Ukraine, Moldova, Belarus and the countries bordering on Syria, are designed to strengthen their asylum systems.

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28. Resettlement is the process whereby third-country nationals or stateless persons recognised as refugees are moved from a third country and settled in a member state in which they are authorised to dwell. Relocation is the process whereby individuals who enjoy conventional or subsidiary protection are moved from the member state which has granted them international protection to another member state where they will enjoy the same degree of protection.

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### 2.2.2. Yet the common European asylum system is not as fair, as solidarity-based or as exemplary as it aspires to be.

• *Not so fair a system for asylum seekers*

The new Dublin Regulation's early warning mechanism lays the emphasis on prevention and on European solidarity when a member state's asylum system is overwhelmed, without mentioning the suspension of transfer rules. In the event of an ongoing problem, it falls once again to the European courts (ECJ and ECHR) to prohibit transfers, with a time frame that is damaging for asylum seekers. Moreover, appealing against a transfer decision may not automatically lead to its suspension. Similarly, the new EURODAC rules regulate but do not rule out access on the part of member states' repressive services or of EUROPOL to the central EURODAC database, when in fact "no evidence (supports) the contention that individuals suspected of terrorism or of other serious crimes are likely to be among those individuals seeking asylum in one of the European Union's member states"[29].

> **THE NEW 'PROCEDURAL' DIRECTIVE DOES NOT QUESTION THE SAFE COUNTRY OF ORIGIN CONCEPT"**

The new "procedural" directive does not question the safe country of origin concept which allows member states to assume that asylum applications from such countries are groundless. Thus applications from those countries get fast-track treatment but enjoy fewer guarantees. During the negotiations for the CEAS, the European Parliament was unable to push through the idea of abolishing national lists in favour of a common list. So national lists drafted on the basis of diplomatic or migration-related considerations still exist (Belgium has seven safe countries on its list, while France has seventeen)[30].

Moreover, unaccompanied minors are not completely exempt from asylum procedures at the border because France and Germany are afraid of sending out a negative signal to children traffickers.

And finally, the new directive responds only in part to a number of decisions reached by the European Court of Human Rights and by the European Court of Justice questioning the fact that appeals against certain rejections of asylum applications do not entail suspension of the measure[31]: in cases where an appeal fails to lead to the suspension of expulsion procedure[32], it is up to a court to decide whether an individual can stay in the country during his or her appeal.

Where access to asylum procedures at sea are concerned, instances of refoulement when migrants have been intercepted on the high seas have led to changes in the European rules.

In May 2009, Italian coast guards sent Somali and Eritrean migrants back to Libya on the strength of a bilateral accord with that country. Two people died in Libya, and given that some of the migrants were acknowledged as refugees by the HCR office in Tripoli, Italy was found guilty of failure to comply with the principle of non-refoulement by the European Court of Human Rights (ECHD) in the case of Hirsa Jamaa and others vs. Italy in February 2012.

Drawing a lesson from this case, a new regulation adopted in the spring of 2014, in the context of FRONTEX operations at sea, has clarified the rules governing interception on the high seas, which may include sea rescue operations even in the absence of a call for help; the rescued individuals' need for international protection will be assessed prima facie; if it is decided to land them in a third country, which must be a safe country, they

**29.** Sénat, "Résolution européenne sur la proposition de règlement du Parlement européen et du Conseil relative à la modification du système EURODAC pour les demandes de comparaison avec les données d'EURODAC présentées par les services répressifs des États membres et Europol (E 7388), adoptée le 31 juillet 2012".

**30.** On 4 March 2013, the State Council removed Bangladesh for its list of safe countries of origin. See Forum Réfugiés, "Liste des pays d'origine sûrs : un outil inadapté", 10 December 2013.

**31.** HUDOC, 26 April 2007, Gebremedhin c/France, application No. 25 389/05. See also HUDOC, 2 February 2012, I.M. c/France, application No. 9152/09. Also EUCJ, 28 July 2011, Samba Diouf, aff. C-69/10

**32.** Cf. Clearly groundless, unacceptable application previously abandoned or submitted by a person who has transited through a safe European third country.

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will be informed of the fact and may oppose it[33]. These new (binding) rules, based on EU jurisdiction in the field of integrated border management rather than on any new authority over rescue at sea, should be welcomed.

Yet NGOs are concerned over the summary nature of the prima facie assessment; and by the same token, the opportunities offered to the European players in the FRONTEX operation to prevent a boat carrying illegal immigrants from having access to a member state's territorial waters could be compared to collective expulsions without access to asylum procedures.

The new "reception" directive, for its part, has been criticised[34] because it expands the grounds for placing migrants in administrative detention without specifying the maximum length of that detention, and it does not make the judiciary's surveillance compulsory. If there is no other alternative, it is even possible for asylum seekers to be detained in penal establishments. Asylum seekers can be refused free legal aid if their appeal is considered unlikely to be successful. And lastly, Community safeguards can be relaxed at border posts or in transit areas.

The new "qualification" directive maintains the notion of "internal asylum" which makes it possible to consider that an asylum seeker has no need of international protection as long as there is nothing to fear in some part of his or her country of origin. Yet the fate of the enclave of Srebrenica, in Bosnia-Herzegovina, in July 1995 despite its having previously been declared a safe area by the United Nations justifies a certain amount of scepticism in this regard.

**"APPROXIMATION OF CONVENTIONAL PROTECTION AND SUBSIDIARY PROTECTION: THE DURATION OF THE SOJOURN PERMIT DELIVERED IS STILL SHORTER"** Also, the new directive fails to complete the approximation of conventional protection and subsidiary protection: the duration of the sojourn permit delivered is still shorter in the event of subsidiary protection, being for one year rather than for the three years allowed in the event of conventional protection; access to social welfare may be restricted to essential services for those with subsidiary protection; and finally, those with subsidiary protection have to comply with more binding conditions governing their financial resources, lodging and length of stay in order to be able to enjoy family reunification. So even though the fears expressed by individuals enjoying only subsidiary protection are no less serious but simply based on different reasons from those harboured by conventional refugees, the status that they benefit from continues to be more precarious. Yet fully fourteen member states out of twenty-seven granted more subsidiary than conventional protection in 2012.

• *Solidarity among member states is still limited*

After the tragedy of Lampedusa in October 2013, Italy, Malta and Greece, in particular, called for another revision of the Dublin Regulation for apportioning asylum seekers, because they felt that the new draft did not allow them to ease their congested asylum systems. Sure enough, the number of transfers between member states account for no more than 1.7% of asylum applications in France on account of the cost and administrative complexity of the system. In January 2014 the HCR called for the suspension of transfers to Bulgaria, where the asylum system is saturated. Yet the European Council in October 2013 refused to review the Dublin Regulation on the grounds that in 2012 Italy had granted "only" 15,700 asylum applications and Malta only 2,000, as opposed to 77,500 in Germany and to 60,500 in France[35]. France and Germany feared that if the

**33.** European Commission, "Proposal for a regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Members States of the European Union ", COM (2013) 197 final, 12 April 2013 and EU Council, "New rules for the surveillance of the EU external sea borders", 6463/14, 20 February 2014.
**34.** Forum Réfugiés, "Régime d'asile européen commun: fin du processus de révision des textes".
**35.** Eurostat, "Asylum in the EU27: The number of asylum applicants registered in the EU27 rose to more than 330,000 in 2012", *News release*, 48/2013, 22 March 2013.

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current rules for apportioning asylum seekers were changed, it might prompt the peripheral countries to shirk their responsibility for monitoring the EU's external borders[36].

**❝❝ MEMBER STATES HAVE NEVER PROVEN CAPABLE OF FORGING THE QUALIFIED MAJORITY REQUIRED TO IMPLEMENT THE DIRECTIVE ON TEMPORARY PROTECTION❞**

A source of even greater concern, despite the Arab springs and the clash in Syria, is that the member states have never proven capable of forging the qualified majority required to implement the directive on temporary protection, which is designed to apportion exceptional flows of asylum seekers among the member states. The relocation of individuals enjoying protection in one member state to another is anecdotal (350 in 2012[37]). Above all, the lack of solidarity may be perceived in the fact that the European rules do not provide for the automatic recognition of a decision to grant international protection.

- *An asylum system that is difficult to export*

The European Union's regional protection programmes cannot force third countries (Belarus, Ukraine) to adopt asylum systems reflecting European standards. By the same token, the HCR has voiced concern over the fact that these programmes are not really partnership-based and that they lack funding. Thus their ability to disseminate the European vision of fundamental rights remains limited.

So if we are to allow the mechanisms governing border control and the right of asylum to progress yet further, it would be necessary first and foremost to boost solidarity among the member states. The shortcomings in this area do not always allow the mechanisms to be equal to Europe's aspiration to the fair treatment of migrants in general and of asylum seekers and refugees in particular.

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36. The debate on a revision of the Dublin system is ongoing: While the Migration Policy Centre suggests strengthening solidarity among the member states, either by sharing the number of asylum seekers or by sharing the costs involved, the European Union Agency for Fundamental Rights is calling for a reassessment of the Dublin system, which is wrongly based on the hypothesis that opportunities for protection are equal throughout the European Union. Cf. European University Institute, "Suggestions from the Migration Policy Centre for a Post-Stockholm programme on Mobility and Migration", January, 2014. Also: European Union Agency for Fundamental Rights, "What to expect after Stockholm: fundamental rights in the future of the European Union's Justice and Home Affairs", December 2013.
37. Parliamentary Assembly of the Council of Europe, "Resettlement of refugees: promoting greater solidarity", *Document 13001, Referral 3894*, dated 1 October 2012.

# 3. The challenge of the post-Stockholm programme: how to reconcile the increased outsourcing of Europe's migration policy with the safeguarding of the right of asylum?

The tragedy of Lampedusa has helped to impart a fresh thrust to debates on two aspects of European migration policy, namely border control and the right of asylum. A Task Force for the Mediterranean, chaired by the European Commission and including the member states, the European External Action Service (EEAS) and EU agencies, was commissioned to submit concrete proposals capable of being rapidly implemented. Also, with a view to the post-Stockholm programme which the European Council is due to adopt in June 2014 and which will delineate, in particular, a new European action programme between now and 2020 in the sphere of immigration, the Commission launched a public consultation process and published a communication[38]. The European Council meetings in October and December 2013 steered the debates and laid emphasis on the prevention of illegal immigration, on border protection and on solidarity.

The upshot of these contributions is that the realisation of the difficulties involved in bolstering solidarity among member states has prompted the Task Force, in particular, to assign priority to the outsourcing of Europe's migration policy, a development which can have a positive impact on asylum seekers and refugees only on certain conditions.

## 3.1. The Union is short on solidarity

To strengthen European solidarity towards those member states most heavily impacted by migrant flows (Italy and Malta in particular), the Task Force suggests support from the EASO, from FRONTEX, or from the European Civil Protection Mechanism, and stronger crisis planning and management. Financial solidarity is also envisaged (30 M€ for Italy and 20 M€ for the other member states).

Yet, fairly logically, both the Commission and the Task Force stress that solidarity towards those member states must go hand in hand with their full responsibility (in a context of compliance with such common regulations as EURODAC).

To promote a better distribution of exceptional migrant flows among member states, the Commission proposes to address the solidarity mechanism, unlike the Task Force which does not evoke the directive on temporary protection (even though it is designed to implement that very distribution). Yet it is to be regretted that neither the Task Force nor the Commission call for a new revision of the Dublin Regulation introducing a new mechanism for distributing asylum seekers based on the prosperity of the host country or on the ratio of asylum seekers in its population[39].

**❝❝ THE COMMISSION SUGGESTS PURSUING THE MUTUAL RECOGNITION OF INTERNATIONAL PROTECTION DECISIONS❞**

Where the distribution of protected individuals among member states is concerned, the Task Force simply suggests that the EU should support the relocation of protected individuals among the member states, without calling member states' goodwill into play in this sphere. Decidedly more ambitious, the Commission for its part suggests[40] pursuing the mutual recognition of international protection decisions, which would be a powerful factor for consolidating the CEAS. On a broader level, efforts must be made to strengthen

38. European Commission, "An open and secure Europe: Making it happen", *Communication*, COM(2014) 154, 11.03.2014. See also: Yves Pascouau, "The future of the area of freedom, security and justice. Addressing mobility, protection and effectiveness in the long run", *Discussion Paper*, European Policy Centre, January 2014.
39. Yet the HCR drafts annual tables classifying host countries on the basis of the number of asylum seekers per pro-capita dollar of their GDP and per 1,000 inhabitants.
40. Also: European Council on Refugees and Exiles (ECRE), "ECRE Submission to the European Commission Consultation on the Future of Home Affairs Policies. An Open and Safe Europe- What Next?", January 2014.

coordination among member states in order to facilitate the free movement of legal migrants within the European Union and to allow them to settle and to work in a different EU member state from the member state through which they entered the EU.

It is doubtless to be regretted that only a small amount of space is allotted to measures of solidarity among member states in connection with migrant reception. The emphasis is laid on the struggle against human trafficking and on strengthening border surveillance.

## 3.2. Prevention and protection against illegal immigration

### 3.2.1. Border surveillance: a persistent paradigm for rescuing migrants

The Task Force and the Commission both suggest boosting FRONTEX's operations in the Mediterranean and along the EU's southeastern borders, working in conjunction with the European Maritime Safety Agency and the European Union's Satellite Centre. The deployment of EUROSUR will also make it possible to extend FRONTEX's Sea Horse Network cooperation programme based on cooperation with third countries to Libya, then to Morocco and to Egypt, in an effort to detect illegal immigrants in their ports of departure, and to prevent them from setting out on their perilous journeys. Information campaigns informing of the risks associated with illegal immigration are also planned.

While for those who do manage to set sail all the same, the Task Force suggests reminding ships of their international duty to rescue people at sea, while at the same time reassuring them that they will not be punished and that they will be able to rapidly put ashore such individuals who they had taken on board.

### 3.2.2. Stepping up the struggle against migrant trafficking and organised crime.

To this end, the Task Force suggests strengthening cooperation both among the EU agencies (EUROPOL, FRONTEX, EASO, Interpol) and with member states, in particular through the exchange of personal data. Also, the EU will continue to strengthen the capabilities of third countries affected by human trafficking and by organised crime, especially in Africa. The Euromed police and WAPIS (West African Police Information System) programmes conducted by Interpol should be strengthened. At the same time, the debate on resorting to common foreign and defence policy instruments is ongoing. And lastly, the European Union could strengthen European texts sanctioning the facilitation of unauthorised entry, transit and residence.

Yet it is going to be necessary to ensure that the exchange of personal data does not lead to breaches of migrants' fundamental rights and that stepping up the struggle against human trafficking does not limit these individuals' access to European asylum procedures. Furthermore, resorting to common security and defence policy instruments, which smacks of a war on migrants, is of questionable effectiveness. Thinking to dissuade human traffickers after the tragedy of Lampedusa, Italy has deployed a massive military operation codenamed "Mare Nostrum" off the shores of Sicily, with the result that Italian Navy's ships have now become the target of rubber dinghies overloaded with illegal migrants who need to be rescued in order to avert another tragedy[41]. The fact of the matter is that a less restrictive visa policy would be the most effective way of combating the smugglers' networks.

**" THE DECISION AS TO WHETHER AN INDIVIDUAL REQUIRES INTERNATIONAL PROTECTION WOULD BE TAKEN AS CLOSE AS POSSIBLE TO THE CONFLICT ZONE "**

Naturally, intervening as far away as possible from Europe's shores might help to regulate the issue of distributing the burden of taking in migrants among the member states, given that fewer migrants would actually make it onto EU soil.

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41. "Italie : la marine a secouru 1 000 migrants de plus en 24 heures", *Libération*, 20 March 2014.

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Yet in shifting the responsibility for taking in migrants onto the third country's shoulders, is this increased outsourcing of the Union's migration policy not in danger of being implemented to the detriment of those migrants' fundamental rights?

## 3.3. Solidarity and a fair sharing of responsibilities with third countries?

To maintain a high level of protection for the fundamental rights of migrants in general, and of asylum seekers in particular, the Task Force and the Commission suggest strengthening cooperation with third countries.

### 3.3.1. In the sphere of asylum, regional protection programmes should strengthen asylum systems, particularly in countries in the Sahel region and in countries bordering on Syria.

Experience built up with regional protection programmes (Ukraine, Belarus) shows, however, that they are not always implemented in the spirit of protection for the fundamental rights which they are intended to disseminate. Thus in view of the fact that 80% of the world's refugees live in developing countries, the Task Force and the Commission call on member states to devote greater energy to resettlement programmes. Yet these programmes work on a voluntary basis and in 2012 only 4,930 individuals recognised as refugees by the HCR outside Europe were able to benefit from resettlement in a member state[42].

The Task Force and the Commission also propose extending legal access to EU territory for individuals seeking protection, either through the issue of humanitarian visas or through the issue of sojourn permits for seasonal workers, students and researchers, for which the directives were recently finalised. This option is unquestionable reasonable, but it could be extended even beyond the above-mentioned migrant categories.

In parallel, they suggest studying the possibility of granting asylum seekers access to European asylum procedures outside the Union's territory. The decision as to whether an individual requires international protection or not would thus be taken as close as possible to the conflict zone, and the outsourced application of European procedures and criteria would guarantee asylum seekers that the processing of their application would respect their fundamental rights.

Yet it is necessary to ensure that this outsourced processing of asylum applications makes it possible to protect asylum seekers throughout the process, yet without locking them away in enclosed centres; that individuals benefiting from international protection are resettled in a member state (which one, and who should foot the bill?); that third countries are not informed of rejected applications for asylum, which might be interpreted as displays of political opposition; and that the opportunity to apply for asylum in Europe's diplomatic offices overseas does not turn into a "pull factor" for economic migrants...

### 3.3.2. More partnership-based and political relations with third countries

**" FURTHER INTEGRATING INTERNAL AFFAIRS INTO THE UNION'S FOREIGN POLICY"**

A great deal is going to be done to improve EU border control. Yet the Task Force rightly stresses the importance of paying greater heed to the expectations of third countries in order to ensure the effective implementation of this cooperation. The European Commission, for its part, underscores the importance of further integrating internal affairs into the Union's foreign policy and to thus abandon strictly border control concerns in order to adopt a broader political approach to migration issues. Mobility partnerships between the European Union and such countries as Tunisia, Jordan, Egypt, Libya, Algeria and Lebanon, which are designed to combine border control, legal migration and the development of third-country asylum and development systems, constitute a valuable framework in this connection.

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42. Eurostat, "Asylum decisions in the EU27 EU Member States granted protection to more than 100 000 asylum seekers in 2012", *News release*, 96/2013, 18 June 2013. Also, in December 2013, the European Union took in only 12,340 people fleeing the Syrian conflict, in other words 0.54% of the total number of individuals displaced by the clash, and this, basically on humanitarian grounds rather than on the basis of protection governed by convention. See Amnesty International: "An International Failure: The Syrian Refugee Crisis", *Amnesty International Briefing*, 13 December 2013.

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### 3.3.3. Greater synergy between development policy and migration policy

To "address the deeper causes of migrant flows", such as poor governance or the absence of economic prospects, the Task Force calls for a boost to development aid for the migrants' countries of origin and transit.

Since the European Council of 2005[43], the European Union has in fact been attempting to develop a "global approach to migration and mobility" based on a triple win hope: meeting the needs of the European labour market; allowing migrants to enjoy a more stable status; and offering support for the development of their countries of origin. Mobility partnerships constitute the political framework for this global approach. Since 2010 a European immigration portal has provided information regarding the needs of the European labour market. A number of directives (students, highly skilled personnel, seasonal workers) aim to guarantee migrant rights (the recognition of diplomas, support for circular migration). For the period stretching from 2014 to 2020, aid in the field of migration will be supported by 344 million € coming from the Development Cooperation Instrument (DCI). And lastly, there are measures in support of migrant transfer.

# 4. Investing in outsourcing

Yet at a time of heavily shrinking budgets, how is the European Union going to be able to ensure the implementation of its cooperation with third countries?

## 4.1. A phony "good idea": pegging aid to third-country performance in the struggle against illegal immigration

Naturally, European financial support such as that intended to contribute to migrants reintegration (Roma people) in their countries of origin is sometimes seen as an incentive to return for individuals expelled from the EU. Such support could be better dispensed.

Yet the EU does not always find itself in a position of strength towards third countries in these negotiations.

In a state as fragile as Libya, what would be the impact of a suspension of aid on grounds of incompetent border control?

Thus pegging aid to given conditions is a tool to be handled with caution.

## 4.2. Cooperation has a cost

Thus, if the European Union wishes to involve third countries in the struggle against illegal immigration, it will have to pay the price. So the Task Force has suggested that, in addition to the funds for asylum and migration funds (3.1 M€ over the period stretching from 2014 to 2020) and for internal security (2.8 Bn€) funds, and to development aid – future neighbourhood instrument (15.4 Bn€ au total) and EDF (30.2 Bn€ in all), it is necessary to find additional funding from the member states.

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43. European Council in Brussels, "Conclusions", 15 and 16 October 2005.

## 4.3. Mutual interest

It will also be necessary for non-European states to be convinced that their interests are being taken into account. In this connection, migration funding should not be mixed with development aid funds.

*❝ PURSUE THE TASK OF REGULATING MIGRANT FLOWS, WHICH IS LESS COSTLY THAN DEVELOPMENT AID OR THAN BORDER CONTROL ❞*

Moreover, migrants' countries of origin and transit also demand increased opportunities for legal immigration into the EU. Given that development does not lead to an immediate decrease in immigration, it will be necessary to continue to pursue the task of regulating migrant flows, which is less costly than development aid or than border control. As the Commission has suggested, a new visa issue policy based on individual criteria rather than on nationality might be developed. Where highly skilled and posted intra-group migrants are concerned, European regulations in the struggle against the brain drain and in support of circular migration are going to have to be strengthened. And finally, the regulation of migrant transfers should be improved in order to lower costs, to increase their safety and to promote financial innovation leading to development.

## CONCLUSION

So in order to be equal to the values that it promotes, the European Union cannot do with simply strengthening its border controls and outsourcing its migration policy. It will only be able to demand solidarity of third countries in the treatment of migrants and to be credible in its drive to promote asylum and immigration systems which respect migrants' fundamental rights in those countries, if it shows the way by being itself generous with migrants, and by being innovative and responding to those countries expectations.

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