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Moving Beyond Security vs. the Duty to Protect: European Asylum and Border Management Policies under Test

by Sharon Weinblum



ABSTRACT

Is there an intrinsic tension between the safety and the protection of migrants' and asylum seekers' rights on the one hand, and the control of European states over their borders, on the other? This paper argues that reaching both objectives is not impossible; on the contrary. Yet, it claims that neither European border management policies characterised by securitisation and containment nor asylum policies based on the responsibility principle, have so far succeeded in effectively reconciling them. It further asserts that in order to do so, a shift in paradigm and a change in the tools employed by European states are needed.

European Union | Migration | Refugees | Border management

keywords

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Introduction

During the last two years, the arrival in Europe of around 1.2 million asylum seekers and migrants,¹ and the dramatic death toll witnessed in the Mediterranean,² have been met with two seemingly irreconcilable claims. On the one hand, several European political leaders, non-governmental organisations (NGOs) and international organisations have reiterated the demand that European states act in accordance with their values and do everything in their power to save lives.³ On the other hand, alarmist warnings that the migration flows allegedly threaten the security of Europe have been growing. By presenting the issue in these binary terms, the public debate has conveyed the impression that more protection for migrants and asylum seekers would necessarily lead to less security, sovereignty and safety for European countries. But is there automatically a tension between the

¹ In 2014, around 200,000 migrants and asylum seekers reached Greece and Italy (see IOM, *Mediterranean Migrants Arrive in Italy, Greece – More Deaths Reported*, 14 July 2015, <https://www.iom.int/node/66547>) and in 2015 around 1 million arrived to Europe by sea (see IOM, *Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015*: IOM, 22 December 2015, <https://www.iom.int/node/70049>). Most migrants who reached Greece irregularly through the Mediterranean were from Syria (56 percent), Afghanistan (24 percent), Iraq (10 percent), Pakistan (3 percent) and Somalia (1 percent) while in Italy, most migrants crossing the sea were from Eritrea (26 percent), Nigeria (14 percent), Somalia (8 percent), Sudan (6 percent) and Syria (5 percent). Since some of these migrants have qualified for asylum while others have been considered economic migrants, the current crisis can be qualified as a migrant and refugee crisis (see IOM, *Mediterranean Migrants Arrive in Italy, Greece*, cit.; UNHCR, *Mediterranean Sea Arrivals: Greece* (Screenshot)-31 Dec 2015 and Italy (Screenshot)-31 Dec 2015, <http://data.unhcr.org/mediterranean/regional.php>).

² The IOM estimates that there were 3,279 casualties in 2014 and 3,770 in 2015. See IOM Missing Migrants Project website: <http://missingmigrants.iom.int>.

³ Conclusions of the European Council, 24-25 October 2013 (EUCO 169/13), http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139197.pdf.

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Paper produced within the framework of the New-Med Research Network, February 2016.

safety and rights of migrants and asylum seekers on the one hand, and the ability of states to control and protect their borders on the other? To what extent have border management and asylum policies in Europe been successful in striking a balance between these aims, in particular in the European Union (EU), which most migrants and asylum seekers are seeking to reach?

Scrutinising European and EU policies that have been elaborated in the framework of the current migrant and refugee crisis, this paper argues that reconciling both objectives is not impossible; on the contrary. Yet, it claims that for European border management and asylum policies to reach any of these targets, a shift in paradigm and in the tools employed is needed. The first part of the paper focuses on border management policies. It displays how the containment and security prism employed in this field has been detrimental to the safety of migrants and asylum seekers but also, and more paradoxically, to the ability of European states to properly regulate migration flows. The second part of the paper turns to the Common European Asylum System (CEAS) of the EU. It claims that the principle of responsibility that underpins the system has proven problematic on two accounts: it has limited the ability to offer effective protection to asylum seekers on the one hand, and has been counter-productive at the level of border and migration management, on the other. The last part of the paper offers policy proposals for changes that would allow the combination of migration control and border protection with the safety and protection of those attempting to reach European shores.

1. Border management through the containment paradigm: a flawed and fruitless approach?

In April 2015, in the midst of the crisis, European Council President Donald Tusk declared "We cannot accept that hundreds of people die when they try to cross the sea to Europe,"⁴ and demanded that EU member states take action. In spite of this call, most policies adopted during the crisis by the EU and European states alike have been driven by a containment approach, which is based on the idea that irregular migrations could and should be blocked, rather than on an attempt to save lives. This was mostly visible in three areas of border and migration management: sea border management, land border management and the externalisation of border management.

The first area in which containment took precedence over the protection of migrants and asylum seekers was in the management of the sea border, which witnessed an accelerated level of securitisation.⁵ In October 2014, while the

⁴ See the video: "Tusk: The situation in the Mediterranean cannot continue", in *EurActiv*, 20 April 2015, <http://eurac.tv/p9V>.

⁵ The notion of securitisation was coined by Ole Waever and designates the process by which an issue is labelled a security issue or addressed as such. See C.A.S.E. collective, "Critical Approaches to Security in Europe. A Networked Manifesto", in *Security Dialogue*, Vol. 37, No. 4 (December

death toll in the Mediterranean was unprecedentedly high,⁶ the Italian rescue operation Mare Nostrum was replaced by a Frontex operation, Operation Triton.⁷ Not only was the operation granted a much more limited budget and a narrower geographical area of operation than Mare Nostrum,⁸ but this change also marked the shift from rescue to border protection.⁹ As Frontex underlined when presenting the objectives of the operation: "While saving lives is an absolute priority [in] all maritime operations coordinated by Frontex, the focus of Joint Operation Triton will be primarily border management."¹⁰ In the Greek seas, where Frontex operation Poseidon operated from 2007, the increasing number of people drowning was accompanied by a budget reduction.¹¹ One would have to wait for the Special Meeting of the European Council of April 2015 to see the budget of both operations increased and their area of operation extended.¹² Nevertheless, the objectives of these operations remained unchanged: border control and prevention of irregular border crossing. The June 2015 EU decision to launch Operation Sophia in the

2006), p. 443-487, http://test.icds.ee/fileadmin/failid/case_collective_2006.pdf. A series of authors have shed light on this process in the field of migration, including at the EU level (Jef Huysmans, "The European Union and the Securitization of Migration", in *Journal of Common Market Studies*, Vol. 38, No. 5 (December 2000), p. 751-777, <http://dx.doi.org/10.1111/1468-5965.00263>). They have shown that although not necessarily consciously conceived as such by European decision makers (Andrew W. Neal, "Securitization and Risk at the EU Border: The Origins of FRONTEX", in *Journal of Common Market Studies*, Vol. 47, No. 2, March 2009, p. 333-356), EU external borders in particular have been managed through practices, tools and actors (including the Frontex agency founded in 2004) which have contributed to securitising migration flows, i.e., to manage them through security means. See Sarah Léonard, "EU border security and migration into the European Union: FRONTEX and securitisation through practices", in *European Security*, Vol. 19, No. 2 (June 2010), p. 231-254, <http://dx.doi.org/10.1080/09662839.2010.526937>; Sergio Carrera and Leonhard den Hertog, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean", in *CEPS Papers*, No. 79 (January 2015), <https://www.ceps.eu/node/9985>.

⁶ In 2014, there were more than five times the number of casualties in the Mediterranean than in 2013, when the figure was around 600. See IOM Missing Migrants Project website (<http://missingmigrants.iom.int>) and UNHCR, *European action needed to stop rising refugee and migrant deaths at sea*, 24 July 2014, <http://www.unhcr.org/53d0cbb26.html>.

⁷ See the video: Council of the European Union, *Justice and Home Affairs Council - Press Conference*, 9 October 2014, <http://video.consilium.europa.eu/en/webcast/b30462fc-fc62-40ce-9d8d-0e6e60557067>.

⁸ Amnesty International, *Lives Adrift. Refugees and Migrants in Peril in the Mediterranean*, September 2014, <https://www.amnesty.org/en/documents/EUR05/006/2014/en/>.

⁹ See ECRE, "ECRE & UNHCR concerned over ending of Mare Nostrum without European rescue initiative to replace it", in *ECRE Weekly Bulletin*, 29 October 2014, <http://ecre.org/component/content/article/70-weekly-bulletin-articles/864>; and Amnesty International statement, *A Safer Sea: The Impact of Increased Search and Rescue Operations in the Central Mediterranean*, 8 July 2015, <https://www.amnesty.org/en/documents/eur03/2059/2015/en/>.

¹⁰ Frontex, *Frontex launches call for participation of the EU Member States in Joint Operation Triton*, 26 September 2014, <http://frontex.europa.eu/news/frontex-launches-call-for-participation-of-the-eu-member-states-in-joint-operation-triton-b9nupQ>.

¹¹ From a budget of 11,588,926 euros in 2011, it went down to 6,626,661 euros in 2014. See Frontex, *Archives of Operations: Greece*, <http://frontex.europa.eu/operations/archive-of-operations/?year=&type=Sea&host=Greece>.

¹² See European Commission, *Managing migration better in all aspects: A European Agenda on Migration*, 13 May 2015, http://europa.eu/rapid/press-release_IP-15-4956_en.htm. Consequently, the budget of Operation Triton reached an expenditure similar to that of the defunct Operation Mare Nostrum while Operation Poseidon's budget exceeded its 2011 budget for the first time.

Mediterranean was conceived through this similar prism. While formally launched in order to put an end to human trafficking thereby "ending the human tragedy that we see in the Mediterranean Sea,"¹³ Operation Sophia was conceived as a military operation whose main prerogatives included the searching, seizing and diversion of vessels suspected of belonging to traffickers. Similarly, NATO's recent offer to assist in the fight against irregular migrations and human traffickers in the Aegean Sea further tips the balance in favour of containment, potentially to the detriment of a rescue-oriented approach.¹⁴

Alongside the sea border, the land border has also been the object of intensified securitisation and containment practices, which have included the erection of new fences and the deployment of military forces to monitor and block migration flows. Such practices have a long history in Europe. Under EU pressures and partly with its funding, in the 1990s Spain built and later reinforced two fences between the Ceuta and Melilla and Morocco,¹⁵ a move followed by Greece in 2012 with the implementation of Operation Shield which included the construction of a barbed-wire fence at the border with Turkey.¹⁶ The current crisis has pushed further in this direction, with new fences being erected between Bulgaria and Turkey (in 2014), between Estonia and Russia, Macedonia and Greece and Hungary and Serbia (in 2015).¹⁷ In addition to these new barriers between European and non-European countries and EU and non-EU ones, walls have also recently been built between EU member states themselves (between Hungary and Croatia and between Slovenia and Croatia), while border controls have been reintroduced in the Schengen area by countries such as Germany, Austria and Denmark.

Whether at the land border or at sea, the emphasis on containment, security and military means appears ill suited to protecting migrants and asylum seekers. Operation Sophia is particularly revealing in this regard as targeting smugglers' vessels loaded with migrants and asylum seekers (yet very often abandoned by the smugglers themselves) could in fact increase the risks at sea for those migrants and asylum seekers.¹⁸ Moreover, this military and security approach has proved to be

¹³ Speech of General Patrick de Rousiers at George Marshall Centre's Senior Executive Seminar on 21st century converging threats, Garmisch, 18 September 2015, http://eeas.europa.eu/csdp/structures-instruments-agencies/eumc/documents/20150918-g-marshall-centre-speech_en.pdf.

¹⁴ In February 2016, the NATO Secretary General announced that NATO would collaborate with Greek and Turkish authorities in order to stem the flow of migrants in the Aegean Sea and to fight human traffickers. See NATO, *Press conference by NATO Secretary General Jens Stoltenberg following the meeting of the North Atlantic Council at the level of Defence Ministers*, 11 February 2016, http://www.nato.int/cps/en/natohq/opinions_127972.htm.

¹⁵ SOS Racismo, *Informe anual 1999 sobre el racismo en el estado español*, Barcelona, Icaria, 1999, p. 75.

¹⁶ On the use of fences in Europe, see Elisabeth Vallet (ed.), *Borders, Fences and Walls. State of Insecurity?*, Farham and Burlington, Ashgate, 2014.

¹⁷ Turkey, too, has started building a wall at its border with Syria in 2015.

¹⁸ See ECRE, "EU starts the 'active phase' of a critical operation against human smugglers", in *ECRE Weekly Bulletin*, 2 October 2015, <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1207>.

ineffective.¹⁹ As underlined by several scholars and experts, containment measures do not succeed in blocking migration flows, but rather tend to divert them. By doing so, they push migrants towards more perilous routes and to the crossing of borders clandestinely, in some cases after resorting to smugglers and traffickers,²⁰ which the EU and other European institutions are seeking to combat.²¹

The last area in which the containment paradigm revealed itself during the crisis was in the externalisation of migration and border management. First defined as a European policy at the end of the 1990s,²² the externalisation of migration management has been a core tenet of many European decisions and projects. This policy has involved two components: cooperation with third-party countries in order to prevent irregular migrants from leaving their territories and reaching Europe on the one hand, and readmission of irregular migrants and failed asylum seekers (both nationals and aliens) to these partner countries on the other. Such cooperation has led to agreements between European states and the EU with countries such as Libya (2008), Turkey (2013), Morocco (2013) and Tunisia (2014).²³ Faced with the migrant and refugee crisis, the EU has been determined to bolster its cooperation with Turkey by granting it funds to assist refugees and boosting the dialogue about visa liberalisation for Turkish nationals. In return, Turkey has been expected to work harder on stemming the flow of migrants leaving Turkey to enter Europe and to fully enforce the Readmission Agreement signed in 2013.²⁴

¹⁹ Duncan Breen, "Abuses at Europe's Borders", in *Forced Migration Review*, No. 51, (January 2016), p. 21, <http://www.fmreview.org/destination-europe/breen>.

²⁰ On the impact of restricting entries to Europe on the exposure of Syrian refugees to traffickers in Turkey, see Claire Healy, *Targeting Vulnerabilities. The Impact of the Syrian War and Refugee Situation on Trafficking in Persons*, Vienna, ICMPD, December 2015, https://www.icmpd.org/fileadmin/ICMPD-Website/Anti-Trafficking/Targeting_Vulnerabilities_EN__SOFT_.pdf; and "IOM describes Hungary's border fence as a 'subsidy to the smugglers'", in *EurActiv*, 28 August 2015, <http://eurac.tv/j6i>. Frontex 2015 reports (FRAN Quarterly Q2 and Q3) also reveals a peak in the use of "facilitators" during the year 2015.

²¹ Besides the recent call of the EU to fight human traffickers, the OSCE has long been at the forefront of this struggle. See for instance OSCE, *OSCE Action Plan to combat trafficking in Human Beings* (PC.DEC/557/Rev.1), 7 July 2005, <http://www.osce.org/pc/15944>.

²² Anna Triandafyllidou and Angeliki Dimitriadi, "Governing Irregular Migration and Asylum at the Borders of Europe: Between Efficiency and Protection", in *Imagining Europe Papers*, No. 6 (May 2014), <http://www.iai.it/en/node/1894>.

²³ See Sarah Wolff, "The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey", in *European Journal of Migration and Law*, Vol. 16, No. 1 (2014), p. 69-95, https://sarahwolffeu.files.wordpress.com/2013/04/emil_016_01_69-96-euras-sw.pdf; Anna Triandafyllidou, "Multi-levelling and Externalizing Migration and Asylum: Lessons from the Southern European Islands", in *Island Studies Journal*, Vol. 9, No. 1 (May 2014), p. 7-22, <http://www.islandstudies.ca/sites/islandstudies.ca/files/ISJ-9-1-Triandafyllidou.pdf>.

²⁴ See European Council, *Meeting of heads of state or government with Turkey - EU-Turkey statement*, 29 November 2015, <http://www.consilium.europa.eu/en/press/press-releases/2015/11/29-eu-turkey-meeting-statement>; and Council of the European Union, *Refugee facility for Turkey: Member states agree on details of financing*, 3 February 2016, <http://www.consilium.europa.eu/en/press/press-releases/2016/02/03-refugee-facility-for-turkey>.

Just like border securitisation, the externalisation of border management has failed to fully reconcile the defence of European borders, the protection of migrants' rights and the duty to enable asylum seekers to demand protection in Europe. Indeed, whereas agreements like this usually include clauses concerning the respect of international conventions,²⁵ NGOs have detected frequent human rights abuses of returned or blocked migrants, including poor conditions of reception, physical abuses and arbitrary detention.²⁶ In the case of the recent EU-Turkey cooperation, for instance, 1,300 migrants and asylum seekers were reported to have been arrested and detained by Turkish authorities just a few days after the new deal was signed.²⁷ Moreover, although these types of cooperation officially target irregular migrants and asylum seekers whose requests have been rejected, many cases of asylum seeker pushbacks have been observed, whether by Italian (to Libya), Spanish (to Morocco), Bulgarian or Greek forces (to Turkey,²⁸ including after the revival of the EU-Turkey agreement),²⁹ hence putting European countries in breach of their international and EU obligations. In this respect, the Dutch proposal to return both migrants and asylum seekers to Turkey,³⁰ and the call to add Turkey to the list of safe countries,³¹ could lead to similar worrying practices.

Besides, border externalisation has often been revealed as counterproductive, for two reasons. First, as in the case of border securitisation, those who are determined to leave their countries to reach Europe resort to smugglers. Second, many countries involved in such partnerships are in fact themselves refugee-producing countries. The case of the Khartoum process, which was launched in 2014 with the aim of tracking traffickers and smugglers, fully reveals this paradox, as partners in it include countries such as Eritrea or Sudan, where the regime in place is itself a

²⁵ Including the Geneva Convention and its Additional Protocols, the Covenant on Civil and Political Rights and the Convention Against Torture.

²⁶ Anna Triandafyllidou and Angeliki Dimitriadi, "Governing Irregular Migration and Asylum at the Borders of Europe", cit.

²⁷ See ECRE statement, *ECRE fears human rights being left behind in the rush to an EU Turkey deal*, 1 December 2015, <http://www.ecre.org/component/content/article/70-weekly-bulletin-articles/1298>.

²⁸ See ECRE *Comments to the Commission Communication on the Global Approach to Migration and Mobility COM (2011) 743 final*, 23 April 2012, <http://www.ecre.org/topics/areas-of-work/protection-in-third-countries/277.html>; Human Rights Watch, *Pushed Back, Pushed Around. Italy's Forced Return of Boat Migrants and Asylum Seekers, Libya's Mistreatment of Migrants and Asylum Seekers*, 21 September 2009, <https://www.hrw.org/node/255973>; and ECRE *Weekly Bulletin*, 20 December 2013, <http://ecre.org/component/downloads/downloads/834.html>.

²⁹ Human Rights Watch, *Bulgaria: Pushbacks, Abuse at Borders*, 20 January 2016, <https://www.hrw.org/node/285453>.

³⁰ Peter Teffer, "Dutch want migrant swap deal with Turkey", in *EUobserver*, 28 January 2016, <https://euobserver.com/migration/132032>.

³¹ Alongside the Netherlands, Germany has declared it was open to the idea that Turkey would be considered a safe country for asylum seekers. On the impact of the safe countries list on the examination of asylum requests, see Cathryn Costello and Emily Hancox, "The Recast Asylum Procedures Directive 2013/32/EU: Caught between the Stereotypes of the Abusive Asylum Seeker and the Vulnerable Refugee", in *Oxford Legal Studies Research Papers*, No. 33/2015, <http://ssrn.com/abstract=2609897>.

major push factor.³² In such cases, these policies may turn out to be self-defeating³³ and also raise questions about the concessions to their values and foreign policies that European countries are ready to make in order to contain irregular migrations.³⁴

2. The Common European Asylum System: A counterproductive "responsibility principle"?

In addition to the light it has shed on flaws in border management policies, the migrant and refugee crisis has also made evident "the limits of the EU's Dublin Regulation,"³⁵ which is at the core of the CEAS.³⁶ The Dublin system was being criticised even before the crisis, in particular the principle of a designated "responsible" country.³⁷ Starting from the assumption that it would diminish multiple asylum demands, the Dublin Regulation aimed to define criteria for identifying the country responsible for the registration and the treatment of asylum seekers. Among these criteria, being the country through which the asylum seeker has arrived is at the top of the list.³⁸ Accordingly, asylum seekers lodging a request in a country that turns out not to be their first country of arrival can be returned to

³² Human Rights Watch has for instance documented how large scale and systematic abuses of human rights by the Eritrean regime pushes Eritreans (currently one of the first five nationalities of asylum seekers in Europe) to leave their country. See Human Rights Watch, *The Mediterranean Migration Crisis. Why People Flee, What the EU Should Do*, June 2015, <https://www.hrw.org/node/278378>.

³³ Anna Triandafyllidou and Angeliki Dimitriadi, "Governing Irregular Migration and Asylum at the Borders of Europe", cit.

³⁴ On this question, it is noteworthy that the President of Sudan, which was represented at the EU Valletta Summit by its Minister of Foreign Affairs, is subject to an arrest warrant issued by International Criminal Court.

³⁵ OSCE Parliamentary Assembly, *Resolution on Calling for Urgent Solutions to the Tragedy of Deaths in the Mediterranean*, adopted at the 24th Annual Session, Helsinki, 9 July 2015, <https://www.oscepa.org/meetings/annual-sessions/188-24th-annual-session-helsinki-2015>.

³⁶ The system is made up of a series of regulations and directives aimed at harmonising policies in the EU: the Reception Conditions Directive, the Asylum Procedures Directive, the Qualification Directive, the Dublin III Regulation (2013) and the Eurodac Regulation defining the functioning of the Eurodac database (2013). The Dublin Regulation applies to all member states except Denmark as well as to Norway, Iceland, Liechtenstein and Switzerland. The European Asylum Support Office (EASO) has been created in 2010 as the main agency in charge of promoting cooperation on asylum among member states.

³⁷ On the impact of this principle, see Minos Mouzourakis, "'We Need to Talk about Dublin' Responsibility under the Dublin System as a blockage to asylum burden-sharing in the European Union", in *Refugee Studies Centre Working Papers*, No. 105 (December 2014), <http://www.rsc.ox.ac.uk/publications/we-need-to-talk-about-dublin>; and Sergio Carrera and Elspeth Guild, "Can the new refugee relocation system work? Perils in the Dublin logic and flawed reception conditions in the EU", in *CEPS Policy Briefs*, No. 334 (October 2015), <https://www.ceps.eu/node/10985>.

³⁸ While the first criterion mentioned by the Regulation is the existence of family ties in an EU country, in practice the criterion of the first state of entry is applied in most cases. See Elspeth Guild et al., *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures for Persons Seeking International Protection*, Brussels, European Parliament, October 2014, p. 84, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282014%29509989.

the latter. In this second part of the paper, I claim that besides the inequity that the system places on frontline countries, putting the burden on the first state of entry has damaged both the ability of the EU to effectively protect asylum seekers and also its ability to control migration flows at its borders. Furthermore, I argue that the new mechanisms developed during the crisis have failed in surmounting these shortcomings.

With respect to the treatment of asylum seekers, the first country principle has generated several problematic practices. Among these, NGOs have documented cases in which asylum seekers' rights have been infringed during the responsible state determination process as well as during the transfer of asylum seekers to the responsible country. These have included excessive use of detention, difficulties in appealing against transfers, delays in the examination of the claims and neglect of asylum seekers' interests in determining the responsible country for their request.³⁹ Moreover, with the responsibility of the first country to register and process asylum requests and the consequent pressure on countries at the external border of the EU, reception infrastructures have often been insufficient or have failed to reach EU standards. Reception conditions in Greece⁴⁰ in particular have been criticised on many occasions, and have led the European Court of Human Rights and the European Court of Justice (CJEU) to condemn countries which had returned asylum seekers to Greece.⁴¹

The Dublin system has also proved to be challenging and counterproductive with respect to the ability of European states to manage their borders. As the figures show, most asylum seekers who can do so avoid being processed in the first EU country they enter and continue to another country, selected on the grounds of several factors. These include existing social networks, reception conditions, refugee recognition rate or the economic situation of the country that is chosen. For instance, even though, most Syrian asylum seekers enter Europe via Greece or to a lesser extent Italy, it was in Germany, Sweden, Hungary and Austria that the vast majority of their asylum requests were lodged in 2015.⁴² In order to bypass

³⁹ On the effects of the first country principle on the asylum seekers' rights, see ECRE report, *Dublin II Regulation. Lives on Hold. European Comparative Report*, February 2013, <http://ecre.org/component/content/article/56-ecre-actions/317>; and Elspeth Guild et al., *New Approaches, Alternative Avenues and Means of Access to Asylum Procedures ...*, cit.

⁴⁰ See, for instance, Médecins Sans Frontière, *Invisible Suffering*, April 2014, <http://www.msf.org/node/39751>.

⁴¹ European Court of Human Rights (ECtHR), Judgment in case *M.S.S. v. Belgium and Greece*, 21 January 2011, <http://hudoc.echr.coe.int/eng?i=001-103050>; and Court of Justice of the European Union (CJEU), Judgment in joined cases *N.S. (C 411/10) v. Secretary of State for the Home Department* and *M.E. (C 493/10) and others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*, 21 December 2011, <http://curia.europa.eu/juris/liste.jsf?num=C-411/10>.

⁴² See latest Eurostat *Asylum Quarterly Reports* (2015 Q2 and 2015 Q3), available at <http://ec.europa.eu/eurostat/web/asylum-and-managed-migration/publications>. The number of Syrian asylum seekers introducing their asylum requests to Hungary sharply increased during the third quarter of 2015 (from around 8,000 during the second quarter to more than 50,000 during the third quarter), possibly due to the introduction of border controls between Austria and Hungary, and

registration in the first country of entry, it has been reported that asylum seekers have resorted to smugglers, burnt their fingerprints or obtained fake identity papers.⁴³ By doing so, they put their safety at risk, as well as affecting the ability of European countries to monitor and regulate migration flows on their own territory.

Despite frequent calls being made by southern EU countries,⁴⁴ it took a growing death toll in the Mediterranean, shifting public opinion and a changing reality on the ground for the first country principle to be discussed.⁴⁵ Alongside Angela Merkel's decision to drop the first country principle for Syrian asylum seekers,⁴⁶ the EU established three mechanisms in April and June 2015 that were aimed at mitigating the effects of the existing system. The first was an increase in the funds available to the most affected states. The second was a mechanism aimed at relocating 160,000 asylum seekers from countries on the frontline to other member states. The last, based on a "hotspot approach" consisted of establishing "hotspots" in Greece and Italy in order to speed up the process of registration, identification and screening of asylum seekers (especially those that were to be relocated).

While temporarily adding solidarity to the system, these hotspot and relocation mechanisms have not succeeded in changing the main shortcomings of the existing system. First, the hotspot approach has left most of the burden with frontline Member States. If several European agencies are involved in the registration and screening of asylum seekers,⁴⁷ much of the registration process and the organisation of reception remain the task of these countries. In spite of the increase in allocated funds, these countries have not been able, or disposed, to considerably improve either reception conditions or the efficiency of the registration process.⁴⁸ Second, the relocation mechanism, besides being extremely slow⁴⁹ and very limited in scope,⁵⁰ only targets asylum seekers who are said to be

between Germany and Austria in September 2015.

⁴³ Arezo Malakooti, *Migration Trends Across the Mediterranean: Connecting the Dots*, Altai Consulting for IOM MENA Regional Office, June 2015, p. 111, <https://publications.iom.int/node/41>.

⁴⁴ Eva-Maria Poptcheva, "Transfer of asylum-seekers and fundamental rights", in *EPRS Briefings*, 30 November 2012, <http://wp.me/p2qdgs-1cX>.

⁴⁵ Among which, can be cited the fact that the flow of asylum seekers spread to Northern countries.

⁴⁶ Andrea Dernbach, "Germany suspends Dublin agreement for Syrian refugees", in *EurActiv*, 26 August 2015, <http://www.euractiv.com/?p=877858>.

⁴⁷ European Commission, *The Hotspot Approach to managing exceptional migratory flows*, September 2015, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf.

⁴⁸ Francesco Maiani, "Hotspots and Relocation Schemes: the right therapy for the Common European Asylum System?", in *EU Migration Law Blog*, 8 February 2016, <http://eumigrationlawblog.eu/?p=597>.

⁴⁹ On 10 February 2016, three hotspots were operational out of the 11 planned to be established and only 218 persons had been relocated. See European Commission, *Implementing the European Agenda on Migration: Commission reports on progress in Greece, Italy and the Western Balkans*, 10 February 2016, http://europa.eu/rapid/press-release_IP-16-269_en.htm.

⁵⁰ The 160,000 asylum seekers to be relocated indeed represents only a small fraction of the migrants who arrived in Greece and Italy in recent years (971,000 in 2015 only). IOM, *Irregular*

"in clear need of international protection."⁵¹ In addition to the tension this has caused among asylum seekers in frontline countries, this hierarchy has also had an impact on the treatment of those who are not included in the relocation scheme, as they now endure even longer waiting periods, poorer reception conditions and decreased access to humanitarian assistance.⁵² Third, this emergency burden-sharing system has perpetuated the Dublin tradition according to which asylum seekers do not have a say in the state to which they may be relocated.⁵³ As a consequence of these elements, the risk is high that asylum seekers – both inside and outside the relocation scheme – keep on trying to circumvent the system, thereby endangering themselves, nurturing smuggling networks and preventing European countries from effectively managing migration flows.

3. Recommendations for shifting paradigms and revising policies

The European policy toolkit as regards asylum and border management has been revealed to be problematic on two accounts. First, it has not been fully effective in protecting the rights and lives of migrants and asylum seekers who are attempting to reach Europe. Second, the focus on containment and responsibility has turned out to be ineffective and counterproductive in terms of border protection and migration control.⁵⁴ Therefore, instead of asking how to better "stem the flow," I argue that the containment paradigm as well as the notion of responsible country at the core of the CEAS need to be challenged. The following recommendations provide several avenues that would allow offering protection while preserving EU member states' sovereignty.

Opening more legal routes to Europe. Long promoted by NGOs, the United Nations High Commissioner for Refugees (UNHCR), the International Organisation for Migration (IOM), the Council of Europe and more recently the European Commission itself, opening more legal channels to reach Europe seems more necessary than ever.⁵⁵ This would mean the possibility of introducing asylum

Migrant, Refugee Arrivals in Europe Top One Million in 2015: IOM, 22 December 2015, <https://www.iom.int/node/70049>.

⁵¹ European Commission, *Managing the refugee crisis: Immediate operational, budgetary and legal measures under the European Agenda on Migration*, 23 September 2015, http://europa.eu/rapid/press-release_IP-15-5700_en.htm. In practice, those of nationalities having an average European recognition rate superior to 75 percent, i.e., currently Syrians, Iraqis and Eritreans (Art. 3(2) relocation Decisions).

⁵² John Domokos and Patrick Kingsley, "Chaos on Greek islands as refugee registration system favours Syrians", in *The Guardian*, 21 November 2015, <http://gu.com/p/4edvm/stw>.

⁵³ Francesco Maiani, "Hotspots and Relocation Schemes", cit.

⁵⁴ It is this failure to properly manage the migration flow which has legitimised the reintroduction of border controls within the Schengen area, itself damaging the principle of free mobility at the core of the EU and leading European Council President Donald Tusk to evoke a possible "collapse of Schengen". See "Tusk: EU has two months to control the migrant crisis, or go bust", in *EurActiv*, 20 January 2016, <http://www.euractiv.com/?p=889168>.

⁵⁵ See, for instance, Human Rights Watch, *The Mediterranean Migration Crisis*, cit.; and IOM, *IOM*

requests through embassies or EU delegations (especially for the most vulnerable and those from countries at war), making the family unification process easier and faster (including for those granted subsidiary protection), granting humanitarian visas and increasing refugee resettlement. In addition, sanctions against transport companies carrying irregular migrants to Europe should be amended in order to enable those seeking asylum to reach the continent safely.⁵⁶ In addition, as underlined during the EU Summit in Valletta, the prevention of death while migrants are travelling to Europe and the obstruction of the development of traffickers' networks also implies rethinking the legal channels that are available to migrant workers, whether they are skilled or unskilled.⁵⁷ Opening more of these channels would help to diminish the incentives that lead migrants to risk their lives and resort to smugglers.

Revising the Dublin system. Currently part of the European debate,⁵⁸ revision of the Dublin system has become imperative. Among the amendments to this system, the first country principle should be abandoned. In practice, this could imply the decoupling of migrants' registration in the EURODAC database on the one hand and the processing of asylum requests, on the other. In order for the registration not to bear on EU frontline countries, registration should also be decoupled from the responsibility to organise reception and return, and could be processed with the aid of European agencies. Since a few countries will continue to receive more asylum requests than others, a higher degree of solidarity should be introduced into the system. Instead of the hotspot mechanism, increasing the role played by the Asylum, Migration and Integration Fund devoted to solidarity among EU member states would be opportune and more efficient. Additionally, a unique European refugee status should be discussed. As suggested elsewhere, a possibility would be to allow those recognised as refugees to move within the EU after a couple of years under the terms of the Long Term Residence Directive.⁵⁹

Rethinking the externalisation of border and migration management. Border management and readmission agreements should be signed after a careful and realistic assessment of their impact on migrants and asylum seekers' rights. More

Response Plan for the Mediterranean and Beyond, October 2015, <http://www.iom.int/node/68242>.

⁵⁶ These sanctions are provided by article 26 of the Convention implementing the Schengen Agreement (CISA). On the impact of these sanctions, see Elspeth Guild et al., *Enhancing the Common European Asylum System and Alternatives to Dublin*, Brussels, European Parliament, July 2015, http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282015%29519234.

⁵⁷ See European Council, *Valletta Summit on migration*, 11-12 November 2015, <http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/11-12>.

⁵⁸ The European Commissioner in charge of migration affairs, Dimitris Avramopoulos, declared that "the Commission is already working hard to prepare a revision of the Dublin System, a permanent resettlement scheme and a comprehensive package on legal migration and integration." European Commission, *Refugee crisis: Commission reviews 2015 actions and sets 2016 priorities*, 13 January 2016, http://europa.eu/rapid/press-release_IP-16-65_en.htm.

⁵⁹ Elspeth Guild et al., *Enhancing the Common European Asylum System and Alternatives to Dublin*, cit.

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specifically, such partnerships should be implemented only with partner countries whose human rights record and asylum policies come near European standards, including those defined by the CEAS. Concurrently, instead of overemphasising the containment of irregular migrants, European foreign policies should set democratisation and conflict resolution as chief priorities in refugee-producing countries. The results of these policies should be regularly assessed based on these goals.

Updated 28 February 2016

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