

## How to reconcile the EU border paradox? The concurrence of refugee reception and deterrence

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by *Christof Roos & Giacomo Orsini*

### The EU co-operation crisis

The refugee movements in the summer of 2015 pose a particular challenge to EU external border control and the refugee reception capacities of Member States, particularly those at the EU external border. At the same time, EU borders at land and sea in Northern Africa and at the shores of the Mediterranean have been under the strain of unregulated crossings and refugee migration for more than two decades already. Between the end of the 1990s and 2011, more than 150,000 migrants reached the tiny Italian island of Lampedusa (Cuttitta, 2012). Greece, Cyprus, Malta and Spain also received thousands of refugees and migrants. Yet, many more crossings are just not recorded since undocumented border crossing is, by definition, a practice hard to detect.

While many states in the southern and eastern European neighbourhood have become insecure in recent years, the European border and asylum system revealed one of its key shortcomings, it allows for burden shirking. Burden shirking means that some Member States enjoy the opportunities of cooperation, a borderless single market as well as effective refugee protection, but do not share its costs proportionately (Thielemann and El-Enany, 2010). The EU Dublin regulation (Regulation 604/ 2013) demands the country of first entry to deal with the reception and claim for refugee status of the asylum seeker. This rule supposedly shifts the burden in border control and refugee reception to southern European countries. At the same time, some Member States in Northwestern Europe such as Germany, Sweden, and Austria effectively host disproportionately more refugees than southern or eastern Member States. Due to their comparatively high refugee protection standards, above average recognition rate, and efficient

**T**he refugee crisis that unfolded in Europe in the summer of 2015 questions the effectiveness of European border and refugee policies. The breakdown of the Dublin and Schengen rules due to chaotic situations at the borders in the Balkans marks a critical juncture for the EU. We consider this breakdown as a consequence of a long-lasting co-operation crisis among EU Member States. The most recent Council decision responds to this co-operation crisis (Council Decision 12098/15). This Policy Brief analyses EU policy and politics and argues that plans for refugee relocation and reception centres as well as the use of qualified majority voting in the Council can unfold a dynamic that helps to solve the co-operation crisis. However, underlying the problems of co-operation and effectiveness is the EU's border paradox: while EU border policy works towards refugee deterrence, EU asylum policy aims at refugee protection. The EU's approach in regulating borders and asylum can be understood in terms of 'organised hypocrisy' (Brunsson, 1993). Reconciling the paradox calls for overcoming such hypocrisy.

administrations they are preferred destinations for refugees. In contrast, some Member States in the East and West of the EU hardly host any refugees. Burden sharing mechanisms in terms of refugee relocation

among Member States, true financial burden sharing, or actual shared responsibility for controlling the external EU border have not been set up accordingly. The European Asylum Support Office with its 'Asylum Assistance Teams' as well as 'Rapid Interventions' led by the European Border agency Frontex have not yet been developed towards fully functional supranational executive agencies. EU agencies can assist and support, however, they cannot take over responsibilities for border control and refugee protection. These deficiencies in the functioning of the system have allowed for free riding of some Member States and has contributed to a co-operation crisis in EU border and asylum politics. Political will and infrastructure that could have dealt with the relatively high increase in refugee migration has been missing. If anything policy on burden sharing would only be voluntary and remain stalled in a pilot mode (European Commission 2011, 835).

### The 'Juncker plan' and recent initiatives to establish burden sharing

The adoption of burden sharing mechanisms as decided upon in the Council decision of 22 September 2015 (Council Decision 12098/15) might address the problem of burden shirking among EU Member States. Member States in the East and West of the EU will be obliged to take part in a relocation system that assigns refugees according to GDP, population size, unemployment rate, and number of refugees already resident in the respective Member State. In total 120,000 refugees will be relocated within the Union, most of them from Greece (50,400) and Italy (15,600). In comparison to actual arrivals (more than 700,000 unauthorized border crossings were recorded along the EU external border between January and August 2015) and planned relocations among Member States (120,000) the plan of Commission President Jean-Claude Juncker will soon have to be revised. The fact that Hungary opposed the plan although it initially meant to benefit from the relocation scheme by sending 54,000 refugees to other Member States indicates the enormous sensitivity that binding quotas have on national sovereignty (Robinson, 2015). In addition to the relocation procedure, measures such as the establishment of 'hot spots' for refugee reception and assessment of status in 'frontline' states as well as

financial assistance to refugee receiving Member States were agreed upon (Council Decision 12098/15). Whether this plan has the scope and potential to avoid chaotic situations at European borders and re-establish free movement in the EU can only be guessed at. A relocation scheme and the establishment of hot spots mean to cede sovereignty over the decision of foreigners' access to the territory to the EU level. Even Italy and Greece claiming for EU solidarity on the issue are wary of the sovereignty infringing consequences of the Juncker plan (Robinson, 2015). Still, the one-off relocation procedure can be an important first step towards true and permanent co-operation in a EU asylum system that is undermined by burden shirking.

Considering the consequences of true burden sharing for sovereignty, not only the Juncker plan itself marks a critical juncture in EU asylum and border policy but also the decision making process leading to its adoption. It is remarkable that a majority of Member States adopted the plan against opposition from four Eastern European Member States. Romania, the Czech Republic, Hungary, and Slovakia opposed refugee relocation claiming infringement on their sovereignty and wish to maintain cultural and religious homogeneity in their respective countries. By overruling the opposing countries with a qualified majority vote (QMV) (55% of MS in the Council, representing 65% of the EU population) the Council broke with its long established norm of deciding by consensus (Trauner and Ripoll, 2015). Enforcing the treaty rules also bears the chance of re-establishing the EU's capacity to act on the crisis. QMV had been an option in Council decision making on refugee issues since 2004, still Member States refrained from overruling each other on the sovereignty sensitive issue of refugee admission (Zaun, 2015). Thus the Home Affairs ministers' Council meeting on 22 September 2015 can be considered a critical juncture in EU decision-making on refugee reception. More decisions not based on member state consensus can be expected. Although promising more efficient policy making, the frequent use of QMV might have the effect of decreasing the policies' overall legitimacy. Decisions taken consensually have the backing of all Member States. In sovereignty-sensitive issues the overruled minority has more room and opportunity to exploit anti-EU positions and possibly evade implementation. The deepening of frictions among national

governments, explicit dissent with the Council decision, and reluctance in implementing the relocation mechanism, can already be observed.

### The EU border paradox: Refugee deterrence and reception

Policy measures and a new approach to decision making can address some of the regulatory deficiencies in EU border and refugee policies. However, the recent crisis also revealed that core political conflicts related to borders and migration can hardly be resolved by more EU co-operation. At the core of the EU's divisive response to the refugee crisis do not only lie regulatory construction errors but also the paradoxes of bordering itself. In practice, the EU and its Member States' commitment to the international legal framework for refugee protection and their actual border control policies are in many ways antagonistic to each other. While the Geneva refugee convention promotes a universal right to protection and freedom from state persecution to each individual, borders delimit the rights of communities to self-determination. Borders are institutions that legitimize closure and international refugee law justifies claims for entry.

In theory, claims for entry could be assessed at the border without contradicting refugees' rights for making such claims. However, different from nation state borders EU border policy in particular is characterized by an in-built antagonism between refugee deterrence on the one hand and their reception on the other. This means that some EU border control instruments have the function of limiting asylum seekers' ability to execute their right for assessment of refugee status (Moreno Lax, 2008). Since the refugee convention applies territorially the EU's refugee deterrence efforts were spatially extended way beyond its external border. By means of readmission agreements with third countries and migrants' countries of origin, ever more strict requirements for visa, and capacity building on third country's border control capacities, migrants and refugees alike were kept away from reaching EU territory. Taken together the measures decreased and slowed down movements. They functioned in terms of filtering movements with the effect of channelling them into routes such as the Balkan, the Mediterranean and North Africa route. Perpetual pressure on certain borders would lead to

a permanent emergency situation at certain sections of the external EU borders (Guild and Bigo, 2010).

The 2015 refugee crisis leads to a re-assessment of the EU border paradox. The system of deterring refugees away from EU territory by assistance of countries neighbouring the EU became dysfunctional. Social unrest in Turkey and Lebanon as well as civil wars in Libya and Syria massively counteract the strategy of externalizing border control. The crisis in the Balkans should not only be seen as an effect of a quantitative increase in movements and the concurrent tightening of Hungarian – and then Croatian and Slovenian – border controls; but also as the outcome of a breakdown of the EU's external migration control efforts.

The management of the border by Balkan countries vis-à-vis the increase of the number of refugees crossing Europe's external borders there, brought to light the contradictions of the EU border as it is designed and managed by the EU and its Member States. The response of the Hungarian government to the refugees is an example of how the EU policy antagonism produces contradictions. The country did not live up to its EU obligations for refugee reception and registration. Thousands of Syrian refugees claiming a status were refused entry, maltreated and tormented with water cannons (Weaver and Siddique, 2015). At the same time, the Hungarian government tried to enforce control at the EU external border. According to the Schengen Borders code it was not allowed to tolerate undocumented crossings. The Hungarian incident can be compared to Spanish border policy. The country built a six-meter fence surrounding its exclaves Ceuta and Melilla in North Africa. Spain efficiently shifts the burden of refugee reception to neighbouring Morocco. Clearly, there the commitment to international refugee protection clashes with an interest in refugee deterrence. In contrast to Spain or Hungary, the governments of Germany and Sweden openly question the Dublin system and urge for burden sharing and better refugee reception in all Member States. The antagonistic goals of EU border control and refugee protection become more and more obvious: select access and limitation of migration and refugee movements, on the one hand, and refugee protection and reception on the other. This leads to divisiveness and organised hypocrisy in the EU's response to

the refugee crisis.

### Reconciling the border paradox?

Theoretically, effective refugee protection can be combined with a border policy that aims at control of cross-border movements. The condition for both policies not to run into conflict with each other necessitated a border that does not aim to deter refugees from entering EU territory. However, elements in EU border policy pursue this aim. The EU border needed to be reduced to its function in controlling access and assessing claims for status. This would mean that the border would be transformed to function not only as a place of crossing but also as a place of temporary stay for assessment of migrants' and refugees' status. After the assessment of status, relocation within the EU would be an option to reduce tensions in countries situated at the border. The Council's adoption of hot spots for refugee reception in Italy and Greece corresponds to this logic.

However, as long as refugee deterrence policies are implemented the border paradox can hardly be reconciled. Mechanisms such as strict requirements for visa and an enhancement of border control capacities in third countries will compromise or even inhibit asylum seekers' claims to protection. The combination of two strategies can be proposed as a viable alternative that corresponds to the liberal norms the EU claims to adhere to. Humanitarian corridors or visa for refugees' safe arrival in Europe could be established, and in addition or as an alternative protection efforts in safe havens close to conflict areas could be stepped up. Prioritization of one or the other instrument could correspond to Member States' reception capacity and political opportunity. Such arrangements would not necessarily create a pull factor: as the world

distribution of refugee populations demonstrates, those escaping from a warzone tend to remain close to their countries – relatives and families. Thus, refugee protection would be secured and (ideally) deterrence was less of a necessity.

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### About the authors



Christof Roos is a Research Professor at IES working on EU migration, border, and free movement politics. His most recent publication discusses the tension between liberal and communitarian norms in border and migration policy: Roos, Christof & Laube, Lena. 2015. *Liberal Cosmopolitan Norms and the Border: Local Actors' Critique of the Governance of Global Processes*, *Ethnicities*, Vol.15,3, p. 341-361.



Giacomo Orsini is a lecturer on international migration at the Université Libre de Bruxelles, a PhD candidate of the Department of Sociology of the University of Essex and a visiting researcher at the IES. With a focus on the most empirical outcomes of European integration, he has conducted much fieldwork research e.g. the European external border in Melilla, Malta, Lampedusa and Fuerteventura.

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[www.ies.be](http://www.ies.be)

Pleinlaan 5

B-1050 Brussels

T +32 2 614 80 01

[ies@vub.ac.be](mailto:ies@vub.ac.be)