

## A FAIR COOPERATION SCHEME IN A DE FACTO UNCOOPERATIVE INSTITUTION?

### The EU and the Current Refugee Crisis

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#### **Abstract**

The article explains the current uncooperativeness in the CEAS, both to the disadvantage of asylum-seekers as well as the Southern European States. These two shortcomings can be realistically solved if the Southern States provide an immediate permanent residency to refugees. This solution is far from ideal, but could be a short term solution until the revision of the Dublin System in 2016 establishing a 'single refugee status valid in the entire EU'.

#### **Introduction**

The United Nations Refugee Agency (UNHCR) reports that this year the number of refugees and displaced persons has reached 60 million worldwide and that one of the reasons behind the spike is the brutal war in Syria, which has so far lasted for over four years<sup>1</sup>. Academic and political circles in Europe are currently concerned with addressing what everyone seems to unanimously recognize as a 'refugee crisis', though interchangeably call it a 'migration crisis' as well. Efforts are focused on two main inquiries, both urgent and important. The first one is what should a "burden-sharing" model look like? Specifically, how many refugees should each state accept within its jurisdictional territory and based on which criteria (e.g. country's GDP, population density, culture, etc.)? The second main question is what type of cooperation should take place between European states? And, for that matter, between *all* states who

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<sup>1</sup> <http://www.unhcr.org/558193896.html>

shoulder the international responsibility for fostering an efficient, fair and sustainable refugee system for refugees and host societies alike.

Unlike these inquiries, we depart from the *realist* premise that states do not *de facto* cooperate currently. Refugees – after exhausting the capacities of countries in the region, such as Turkey, currently hosting over two million Syrians – started taking dangerous roads towards Europe. More journeys towards Europe are also due to some states, like Germany and Sweden, offering incentives to migrate there. These combined dynamics result in Southern European states, e.g. Italy, Greece and Hungary, becoming gateways into Europe, and are therefore unevenly burdened, when compared to other states. Their border control, general absorption, and capacity to provide temporary protection are strained due to the general lack of European coordinated action.

While other Western European states can afford delays to reach consent on solutions and their implementation, southern states suffer directly from the lack of European coordinated action. What should the Southern European states do, given that the other European states refuse to cooperate? In order to answer this question we will *first* give a brief history of refugee protection in Europe. *Second*, we will critically assess the nature of the Common European Asylum System (CEAS). These two steps will demonstrate that Southern European states need to offer asylum-seekers a permanent residence permit right after recognizing their status as refugees.

### **A historical perspective**

The Syrian refugee crisis is not the first or only refugee crisis Europe has experienced. In 1951, the Geneva Refugee Convention came into place precisely to address the post Second World War refugee crisis. It established basic definitions such as: who qualifies as a genuine refugee; what triggers a particular type of protection for those recognized as such; what legal obligations states have to refugees. There is a wide discrepancy between states' *legal* commitment resulting from their acceptance of the human rights regime as well as the Geneva Convention and their *political* conduct. In other words, while the convention has remained legally-binding since then, its interpretation varies according to different states, and so the actions

that states undertake to fulfill their obligations also varies. What compels states' political conduct into acting more or less cooperatively on the refugee crisis?

Looking at the period after WWII (late 1940s- mid-1960s), when Europe was able to find mechanisms of intra-European cooperation, Matthew Gibney finds that this was largely due to a convergence of political values and interest that states held.<sup>2</sup> Western European states shared values that opposed communism and admitting refugees matched their foreign policy agenda. Furthermore, flourishing Western economies were in need of unskilled labor, and the "iron curtain" enacted a tight control on Eastern citizen's capacity to exit their country and move to Western ones. Estimates indicated that the refugee number was contained and would not be higher than what states needed.

In comparison with this scenario, there are a number of features that distinguish the previous crisis from the current one, which commentators rightly define it as "the biggest refugee crisis Europe has faced since World War II".<sup>3</sup> The number of refugees is much higher in the present crisis. Refugees are arriving at a faster pace, despite of being limited to crossing mostly through neighboring countries, such as Turkey, Lebanon and Jordan. Europe, although more 'united' than decades back under the European institutions auspices, seems to be less able to share the political values and interest that will bring about cooperation to help those undertaking perilous trips towards Europe to escape war and persecution.

The level of disagreement between European countries might differ significantly in terms of the stance each country takes towards the Syrian war that is generating the outflow of refugees in the first place, or towards geo-political interest in the region. At whatever level those differences might arise, they surface at the negotiation

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<sup>2</sup> Gibney M. J. (2007) 'Forced Migration, Engineered Regionalism and Justice between States', in *New Regionalism and Asylum Seekers*, (eds.) S. Kneebone and F. Rawlings-Sanaei.

<sup>3</sup> [http://www.huffingtonpost.com/entry/alexander-betts-refugees-wwii\\_55f30f7ce4b077ca094edaec](http://www.huffingtonpost.com/entry/alexander-betts-refugees-wwii_55f30f7ce4b077ca094edaec).

table in European Parliament, where some states vote against admitting refugees, while others vote in favor of quotas that each country should accept. Differences also surface in the different attitudes states are already putting into practice, while European coordination is still lacking.

When it comes to policies for refugees' settlement and re-settlement, currently, European states act unilaterally and *ad hoc*, e.g. Hungary raises fences along its borders and fails to stop the inflow of people; Germany accommodates the largest number of refugees from Syria, but not from other countries; Poland, if it will admit any, prefers only Christians; and other countries, like the Czech Republic, want none. While Europe cannot find a model of distribution of the 'burden,' uncooperativeness reigns between the EU states, and thus some Southern European countries like Greece, Italy and Hungary suffer more strain from this lack of European decision, as they are located geographically closer to the region from which refugees outflow. From the perspective of southern EU countries, they suffer a "double harm": First, non-cooperative states offer incentives, which motivates Syrian refugees to take to the road, which lands them in Greece not because they want to settle there but simply to place themselves within the EU borders. In other words, the ultimate aim is to reach Northern Europe. Greece constitutes the first step for achieving that aim. As a result, Greece might rightly argue: you (the EU) generate the incentives and I have to pay the price. According to the UNHCR report, in the first half of 2015 Italy and Greece saw respectively 67.500 and 68.000 arrivals, yet receives only 28.500 and 5.115 asylum-applications.<sup>4</sup> Secondly, the border control task is unfairly distributed, given that, according to Frontex data, more than 75% of all EU irregular border crossings happens in the Southern European states.

### **Uncooperative nature of the Common European Asylum System (CEAS)**

The analysis of the CEAS requires a thorough analysis of its 'cornerstone', namely the Dublin System. According to the European Commission (EC), the Dublin system aims at quickly determining

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<sup>4</sup> <http://www.unhcr.org/5592bd059.pdf>, p.16

the European state responsible for refugee protection but does *not* establish a European distribution scheme.<sup>5</sup> By declaring the state of entrance responsible, it banishes further secondary movements within the Schengen zone. If secondary movements happen, then the person will be transferred back to the first state (Dublin transfers). Given its 25 years of existence and three stages, the Dublin Convention (1990), the Dublin II Regulation (2003) and the Dublin III Regulation (2013), it is clear that the system *functions* as a 'distributive' scheme. Certainly, the issues of distribution and protection are related. As we witnessed recently, if states do not encourage fair distribution, then some countries' asylum systems will be unfairly charged to provide decent protection to refugees.

We follow the view that Dublin needs to be (re-)revised, because it establishes an unfair legal order of burden-sharing among the EU Members and prevents efficient refugee protection. The main reason behind this is that the Dublin system assumes different EU states' asylum systems provide equal quality of reception and accommodation. This is not true and it prevents reflection on an ideally fair scheme of distribution. Moreover, the mandatory visa requirements imposed on EU member states and carrier sanctions on air companies prevent safe and affordable travel to the EU for asylum-seekers. Together with the Dublin system, these regulations made it such that Southern European countries like Greece, Spain, Italy and Hungary are almost the only ones to feel the weight of the refugee issue. While explaining the necessities of the principle of *non-refoulement*, the cornerstone of the Geneva Convention, the UNHCR explains that impeding refugees' entrance also constitutes a legal breach.<sup>6</sup> Seen in this light, the northern states avoided a legal breach by ensuring that refugees can enter the south, while contributing almost nothing to their protection. We can identify such a double aim in the way the Netherlands and France excluded their overseas territories from the Dublin System (see Article 19 in Dublin I, Article 26 in Dublin II and Article 43 in Dublin III). In so doing, they avoided becoming a 'frontline' state. *The Dublin system, carrier regulations and*

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<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0301&from=EN>, p.10.

<sup>6</sup> <http://www.unhcr.org/4ec262df9.html>

sanctions as well as the *mandatory visa policies* taken together have two important consequences:

1. The economically less well-off Southern European states are obliged by their northern 'partners' to discharge the refugee protection for the entire EU;
2. It created a *Fortress Europe* (almost) only accessible through dangerous illegal networks of smugglers.

The idea of *Fortress Europe*—established by the Dublin System, mandatory visa regulations and the carrier sanctions—not only aims at strengthening *external* borders but also restricts *internal* movements. In other words, entering the Schengen zone is burdensome for those fleeing from war, political oppression, inhuman treatment, violence and rape; secondary movements inside the EU are made nearly impossible; attempting to cross between EU states is illegal for refugees even after residing for a very long time within the EU, if not *forever*. Once asylum-seekers are inside Schengen, they may make only one application. If the application is rejected, then this rejection is recognized throughout the EU, whereas an approval (i.e. granting asylum to the applicant or recognizing his or her legal status as a refugee) is valid in that single Member state only, the one where the candidate applied.

The European Long Term Residence (LTR) Directive regulates refugees' freedom of movement.<sup>7</sup> According to the LTR, refugees are required to live in the State continuously for at least 5 years; demonstrate sufficient resources; be integrated and have health insurance in order to become eligible for a secondary movement. This can be considered as the second internal boundary inside of Schengen that limits freedom of movement. As such, it is in tension with Article 31(2) of the Geneva Convention, which forbids states to limit the freedom of movement of the refugees. Joseph Carens considered citizenship in Western countries to be 'the modern

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[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU\(2015\)519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf), pp. 39-52.

equivalent of feudal privilege.<sup>8</sup> This famous allegory not only still holds true, but the CEAS has strengthened it further, since it organized the European borders according to the *medieval fortification* logic of several sets of walls: external as well as internal ones.

The EU's recent reactions to the crisis situation merit a brief discussion. The relocation scheme is elaborate but the following points are relevant here for a critical assessment:

1. Relocation measures are required as a matter of European *solidarity*;
2. Relocation is foreseen for a certain percentage of the refugees from Hungary, Greece and Italy, yet it always leaves *more than the half* in the south;

**1<sup>st</sup> Point:** It is wrong, even strange, to qualify the scheme as a matter of solidarity. Solidarity means doing more than one's fair share when others are unable to discharge their duty. However, we know that the CEAS is unfairly charging the Southern States, and that Southern States have less capacity than their northern counterparts to start. Therefore, as a *realistic* step, the relocation scheme should reflect an adjustment towards fairness rather than falsely presenting itself as a mechanism of solidarity. Recall that a fair CEAS is a binding obligation of the EU set forth in Article 80 of the Lisbon Treaty.

**2<sup>nd</sup> Point:** The two proposals for relocation concern a transfer of 160.000 persons in total from Greece, Italy and Hungary. The total estimated number (not checked by Frontex) of irregular arrivals in 2014 to these countries amounts to 472.000.<sup>9</sup> In other words, only 33% of the refugees are to be relocated to other European countries. Certainly, if the deal is that the remaining 77% stays in these 3 countries whereas more than 20 members would receive the remaining 33%, this cannot be qualified as a fair deal. Of course we cannot be sure whether these proportions hold, due to (1) Germany and Sweden's generous offers of acceptance; (2) the fact that some

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<sup>8</sup> Carens, J.H.. 1987. "Aliens and Citizens: The Case for Open Borders". *The Review of Politics* 49 (2). Cambridge University Press, p. 252. Available at <http://www.jstor.org/stable/1407506>.

<sup>9</sup> [http://europa.eu/rapid/press-release MEMO-15-5597\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-5597_en.htm)

continued their journey 'illegally'; (3) the risk of different borders double-counting refugees; and (5) some refugees' being legally relocated based on other criteria that Dublin establishes e.g. family reunification. Lastly, assignments to Greece are problematic, because the European Court of Human Rights forbade Dublin transfers to Greece in implementation of the *M.S.S. vs. Belgium and Greece decision* due to the degrading reception conditions.<sup>10</sup>

## Conclusion

To sum up, we have explained how realistic policies and state interests serve as the true basis for how Europe currently and historically offers refugee protection. Given the unfair burden-sharing in the EU, the Southern member states are faced with a moral dilemma, and two political decisions: (I) impede refugees from entering their country by refusing boats to approach their shores or by building fences, with the danger of directly causing death (e.g. refugees drowning at sea); (II) register those refugees, and provide them with immediate permanent residency in order to enable refugees to fully take advantage of the regime of free movement within European borders and to move where they would like to go. Solution (II) shows lack of cooperativeness with other EU countries, and it is neither desirable, nor sustainable in the long term. In the short run, however, (II) is a better solution over (I) given that the latter condemns the Southern European states to shoulder a disproportionate burden. It is also permitted by the Long Term Residence Directive, which does not exclude the right of member states to apply more favorable national provisions to enable people to become long term residents if it desires so (Art. 17). Moreover, by taking direct action against unfairness in such a way, the Southern European states might generate incentives for cooperation among their Northern partners in the long term. Such an incentive might even become more beneficial for the deepening of EU integration by influencing the revision of the Dublin system in 2016 towards an ideal direction, namely a 'single refugee status valid in the whole EU' coupled with 'distribution keys'.

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<sup>10</sup>[https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/case-mss-v-belgium-and-greece-application-no-3069609\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/case-mss-v-belgium-and-greece-application-no-3069609_en).