

Chapter 12: Managing the Refugee Crisis: a divided Europe?

Sarah Wolff, Queen Mary University of London

Pre-Print, accepted for publication 15 February 2019

Wolff, S (forthcoming) 'Managing the Refugee Crisis: a divided Europe?' In: R.Coman, A. Crespy and V. Schmidt (eds) (forthcoming) *Governance and Politics in the Post-Crisis European Union*, Cambridge: Cambridge University Press

This chapter considers the so-called 'refugee crisis' of 2015 and its impact from a policy and institutional perspective. In spite of Europe being historically a continent of refuge and mobility, the 2015 crisis has heightened the tensions around the 'liberal state paradox' (Hollifield, 2006). While being normatively committed to the Geneva Convention and to protect migrants and refugees' rights, Europe has opted for a status quo with restrictive policy reforms in favor of more security, confirming a general trend in the construction of the Area of Freedom, Security and Justice since the mid-2000s. Migration and refugee policies are experiencing conflicting trends of liberalization, politicization, de-politicisation and securitization, which are more acute with the growing influence of populism and anti-immigrant movements.

12.1. Introduction

Signed by 152 countries on 19 December 2018 the Global Compact for Safe, Orderly and Regular Migration (GCM) is the first meaningful attempt to organize global migration governance and to diminish the negative consequences of restrictive migration policies by calling explicitly for the creation of humanitarian visas, improving migration statistics, and encouraging stakeholders and in particular states to respect migrant's rights. It also makes international cooperation between countries of origin, transit and destination a central pillar of a global strategy.

Surprisingly, while the compact stipulates that states are sovereign in determining their migration policies, several EU member states, under the leadership of conservative governments like Poland, populist governments like Italy, authoritarian Viktor Orban, or Austrian extreme-right chancellor Sebastian Kurz have decided to abstain or to withdraw from the agreement. They argue that this new international non-binding agreement is creating a right to migration, in breach of their national sovereignty. Populism has managed to hijack an important instrument of multilateral cooperation, and through an active social media campaign online, led even to the resignation of liberal Belgian Prime Minister Charles Michel, under the pressure of nationalist Flemish party in coalition.

Although President Jean-Claude Juncker has criticized EU countries who withdraw from the pact, it is a major blow for European unity over migration and asylum policy, showing once more the deep lines of ruptures amongst EU member states. It is within this context that this chapter reflects upon the policy context and institutional level playing field of the so-called 'migration crisis'. Starting in section 12.2 with a historical overview, I argue that post-Second World War Europe was a place of refuge and resettlement which until the seventies had put in place generous migration regimes to rebuild its economy. Then, since the seventies power,

national interests, sovereignty and economic benefits became key factors in explaining the current institutional set-up (section 12.3). This explains why during and after the migration ‘crisis’, the EU has mostly resorted to strengthening agencies, while leaving a strong leadership to Justice and Home Affairs (JHA) bureaucrats who favor the status quo and letting divergences between EU member states becoming more acute (section 12.4). Academically and politically controversies have focused on the issues of trust, politicization and liberalization of migration and asylum policies (section 12.5). Our case study on the European Border and Coast Guard Agency (ECBG) exemplifies how the revision of the mandate of Frontex confirms the ‘liberal paradox’ with a quest by EU security actors for renewed legitimacy through a new humanitarian function of rescue at sea.

12.2. Historical Overview

Although Europe has been a continent of migration and mobility for centuries, the development of a migration and asylum policies at EU level is rather a recent endeavor. Immediately after the Second World War, Europe was a place of refuge, mobility and resettlement. Devastated by the war, many European nationals such as Greeks or Italians emigrated outside Europe. The global refugee regime, which is based around the 1951 Geneva Convention is also tightly linked to the end of the war in Europe which led to the expulsion of 11.5 million Germans from Eastern Europe (Wasserstein, 2011). Surviving Jews also left for Palestine. The predecessor of the International Organization Migration (IOM) was created to help resettle migrants back in their countries.

Generous migration regimes were put in place to facilitate intra-European migration and attract third country nationals through ‘guest-workers’ systems. Rules were put in place to facilitate the freedom of movement of European workers and residents (see Chapter 11). Accordingly, Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany issued 8 million working permits between 1958 and 1972 (Koikkalainen, 2011). While at first, guest-workers wanted to go back to their home countries, many of them became permanent residents. The oil price crisis in the seventies put a halt to economic migration and guest workers programs (Wolff and Hadj-Abdou, 2017). European immigration policies became more restrictive and family reunification is today one of the main legal channels of migration to Europe, representing two-fifth of all permanent flows in Europe (OECD, 2013). The development of an EU migration and asylum policy has thus been marked by this legacy with a commitment to international refugee law, the facilitation of intra-European workers mobility, while restricting legal migration channels for third country nationals.

Box 12.1 Key dates

1951- The Treaty on the European Coal and Steel Community established a right to freedom of movement for workers in the industries of coal and steel

1957 The Treaty of Rome extends that freedom of movement to all workers of the six founding fathers

1985- The Schengen Agreement is signed between Belgium, France, the then Federal Republic of Germany, Luxembourg and the Netherlands.

1990- The Schengen Convention implementing the agreement is signed amongst the same signatories in the village of Schengen in Luxembourg. Also the Dublin Convention is signed on 15 June 1990

1992 The Treaty of Maastricht establishes the freedom of movement and residence for European Union Citizens

1995- The Schengen Convention enters into force and is incorporated into EU law with the Treaty of Amsterdam in 1997

1997- the Dublin Convention enters into force for Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden and the UK

2003- adoption of the Dublin II regulation, Denmark has an opt-out

2005- Frontex the European Agency for the Management of Operational Cooperation at the External Borders starts to work

2008 adoption of the Dublin III regulation

The acceleration of the Single Market (see Chapter 8) and the 1992 program was one of the main reasons for the creation of the JHA policy, which include migration and asylum. The lifting up of internal borders to facilitate the freedom of movement in order to improve trade, business and people's mobility led to conclusion of the Schengen Agreement in 1985¹, seen as a 'compensatory measure' by ministers of interior to fight jointly against cross-border crime (see Chapter 13). A common visa policy was decided as well as common rules on police and judicial cooperation. The strengthening of what is known as EU internal security and the Area of Freedom, Security and Justice (AFSJ) thus emerged out of a necessity to deepen economic cooperation. The Dublin Convention was adopted in 1991 to stop asylum-shopping, a practice that enabled asylum-seekers to apply in other European countries once their application would be rejected in one member state. The Convention endorsed the principle of the first country of entry which stipulates that asylum-seekers need to apply in the EU country where they entered first and where their fingerprints are stored in the Eurodac database, established in 2003 (see Box 12.2)

Yet, since the mid-1980s, and in spite of progresses in European integration, most of the regulation concerning migration and asylum has focused on strengthening border management with the creation of a European border agency (Frontex), also known as the European border and coast guard agency (EBCG). Rules to sanction irregular immigration with the Return directive and the Carrier Sanctions Directive were adopted. Progresses toward a common asylum policy have been cumbersome but have managed to lay the ground for minimum common conditions for reception, qualification directives, asylum procedures and temporary protection.

¹ Initially signed amongst six countries, the Schengen Agreement has expanded to 26 countries. The UK, Ireland, Bulgaria and Romania are not part of it, while Norway, Iceland and Switzerland are signatory parties.

12.3. Main Features Of The Current Institutional Framework

In spite of the establishment of a Common European Migration System, the expansion of supranational competences with the Lisbon Treaty, EU member states' governments, ministries, migration and border services have been very aptly adapting to the devolution of decision-making in the field of migration. This devolution involves 'monitoring and executive powers upward to intergovernmental for a, downward to elected local authorities, and outward to private actors such as airline carriers, shipping companies, employers, and private security agencies' (Guiraudon & Lahav, 2000: 164). EU member states have been able to devolve authority in a way that it 'meets their national policy goals' (Ibid: 165). This is reflected in the institutional framework and the frequent turf wars opposing the European Council and the Council of the EU, the European Commission and the European Parliament. Over the years, and following a new intergovernmentalist reading of the migration crisis (Wolff, 2015), European heads of states have gained under the presidency of Donald Tusk a central role on crisis governance, and in particular on migration.

Box 12.2 Key Actors (list 5)

The European Commission has the right of initiative on JHA. Directorate General Home takes the lead on most of the dossiers, but DG European Neighbourhood Policy and Enlargement is also involved in negotiations with third countries .

The European External Action Service (EEAS) also deals with migration and asylum through EEAS delegations, but DG Home is in the lead in terms of agenda-setting and in the conduct of negotiations with third countries.

The Council: various Council working groups are involved such as the SCIFA, Strategic Committee on Immigration, Frontiers and Asylum one of the key committees for examining issues of harmonization of legal and illegal migration policy, visa and asylum before it goes for discussion at the level of Council of ministers. The JAIEX, JAI-RELEX Working Party ensured the coordination between EU's external relations and JHA matters. Other relevant working party and groups involve the HLWG, High-Level Working Group on Asylum Migration, the Asylum Working Party, the Visa Working Party and the Working Party on Schengen Matters.

The European Parliament and its LIBE committee plays a key role in legislation on asylum, migration and border policies. Its AFET committee may also look into the external dimension of the policy. Next to co-deciding, the EP also has an important role in the assent procedure where the EP needs to give its green light on international agreements with JHA implications such as readmission agreements with third countries.

The European Border and Coast Guard Agency also known as Frontex is in charge of coordinating joint operational cooperation of the European border guard and to assist Member states at the external borders. It can deploy rapid intervention teams, it helps member states with the screening, debriefing, identification and fingerprinting of migrants. It also provides risk analysis on migratory flows.

Between December 2014 and January 2017, migration has been the most discussed topic at the European Council (Drachenberg, 2018: 6), an institution that plays an increasingly central role. In 2018, clashes occurred between the newly elected populist Italian government and the rest of the member states. The Italian Minister of interior Matteo Salvini refused to disembark migrants from NGO boats, such as the Aquarius from SOS Méditerranée, and threatened the EU to stop paying Italy's contribution to the EU budget, if his European counterparts would not share the 'burden' of hosting and processing asylum applications. President Tusk, in a letter of June 2018, made migration a central priority of his presidency asking the European Council to set up regional disembarkation outside of Europe, and to increase EU funding to combat irregular migration (Council of the EU, 2018). Rotating Presidencies have also paid a lot of attention to EU migration policy. Delivering results on migration has been a priority for leaders eager to show their efficiency in controlling migratory flows to their public opinion. Although with different objectives, migration and asylum remained a constant concern for older member states such as the 2016 Dutch presidency (Schout, 2018) and newer member states such as Slovakia or Malta. The 2018 Austrian presidency, headed by an extreme-right interior minister, also added migration to the core of its agenda but with the slogan a 'Europe that protects'.

Another key institutional player is the European Commission. Although the European Council and the Council of the EU have increasingly taken a strategic lead on migration and asylum, the Presidency of Jean-Claude Juncker has attempted to put forward a common agenda. The 2015 Common Agenda on Migration led to the transformation of Frontex created in 2004, which became the EBCG (see Section 5), but also to the revision of the Schengen agreement and the Dublin Convention, and of the Community Code on Visas. In fact, in a context of debated decline of the European Commission (Bickerton and al. 2015), migration is one of the areas strategically used by President Juncker to place the Commission back on the political stage through agenda-setting (Dinan, 2016: 103). In his 2018 State of the Union, he announced the need to transform the European Asylum Support Office (EASO) into an EU Asylum Agency. He also proposed to substantially increase the means of the Agency, offering to increase the budget from €321 million for the period 2019-2020 and €1.25 billion for the period 2021-2027 (European Commission, 2018b). Similarly, the EBCG was promised subsequent financial means and human resources. The reinforcement of these two non-executive agencies has been presented by the Commission for Migration, Home Affairs and Citizenship Dimitris Avramopoulos as the way to 'ensure EU solidarity on the ground at all times, in all situations, whilst fully respecting Member states' competences' (European Commission, 2018a). This renewed political activism of the Commission was however only made possible by the support of Germany and its willingness to have other EU member states 'sharing' refugees, after it welcomed more than a million of refugees in 2015 (Dinan, 2016: 108).

Box 12.3: Key concept: relocation and resettlement of refugees

Under the leadership of the European Commission, the Council decided on 14 December 2015 to relocate 40,000 refugees from Greece and Italy to other EU member states. **Relocation** is defined as 'a distribution among Member States of persons in clear need of international protection' (European Commission, 2015). A decision of 22nd December 2015 added 120,000 people. In total, 160,000 refugees were supposed to be relocated, 39.600 from Italy and 66.400 from Greece. As of 7 March 2018, only 29,314 refugees had been resettled. Surprisingly some associated countries like Norway have welcomed 3,500 refugees (European Commission, 2018a). Bulgaria, Cyprus, Hungary, Slovakia, Slovenia or Poland instead refused this

mechanism, revealing a **deep rupture over the concept of ‘burden-sharing’**. Sweden and Austria asked for a temporary suspension of their obligations invoking a high influx their refused.

Resettlement programs are an old instrument, pioneered by Sweden originally in 1950 and popularized in the 1970s. Since 2005, it has been introduced with the Regional Protection Programs established in Eastern Europe, the African Great Lake Region and currently implemented in the Horn of Africa and North Africa (Egypt, Libya and Tunisia) (European Resettlement Network, 2018). The Commission announced its ambition to create an ‘EU resettlement’ framework ‘with a unified procedure and common criteria’ and has also encouraged EU member states to resettle refugees under private schemes. Resettlement is defined as ‘the transfer of individual displaced persons in clear need of international protection, on submission of the United Nations High Commissioner for Refugees and in agreement with the country of resettlement, from a third country to a Member State, where they will be admitted and granted the right to stay and any other rights comparable to those granted to a beneficiary of international protection’ (European Commission, 2015). Yet civil society has raised concerns regarding the potential use of this EU instrument to increase migration control and deter irregular arrival. According to the European Council for Refugees in Europe ‘this runs counter to the long-standing function of resettlement as a lifesaving and protection tool for the world’s most vulnerable’ (ECRE, 2016). Other concerns of the proposal is that it could exclude ‘many categories of refugees in need of resettlement, including vulnerable cases and those with no other solution in sight’ (ECRE, 2016)

The European Parliament (EP) has become an important player in the area of migration, asylum and border policies. The extension of the ordinary legislative procedure to most of these areas, including legal migration after the Treaty of Lisbon, have extended its competences. Overall, the EP is perceived as playing increasingly a ‘pivotal leadership role in transforming the character of representative democracy at EU level’ (Shackleton, 2018: 191). Analysis of the roll call votes has shown that 2014 was a critical juncture in terms of how Members of European Parliament (MEPs) voted on legislation with a change of the ‘policy space’. Yet ‘attitudes towards migration are [still] strongly [defined] along the left-right dimension’ (Hix, Noury and Roland, 2018: 16). Policy developments seem to have remained isolated from the growing politicization by anti-immigrants and populist movements of the crisis (see also section 4). Yet at the same time, the EP has not necessarily played the role of ‘liberalizing’ agent, in defense of migrants’ rights it claims to play. MEPs have been eager to show their electorate they are efficient legislators and to respond to the concerns of controlling migration.

These institutional actors all play an important role in EU migration and asylum policy as a level playing field. Since 2015, though the institutional framework is quite different from the 1999 Tampere Council that strategically, set out the objective to create an AFSJ, where common policies were still understood in a supranational understanding. Between the 1999 Tampere program and the 2009 adoption of the Lisbon Treaty- that put an end to the pillar structure and extended the ordinary legislative procedure to a significant number of migration and asylum policies, as well as qualified majority voting in the Council- the legislative pace went rather fast in the area of migration and asylum. The 2004 The Hague and the 2009 Stockholm Programs led to multiple policy initiatives. In the field of asylum the first phase of the Common European Asylum System 1999-2004 saw the adoption of the Qualification Directive, the Reception Conditions Directive and the Asylum procedures directive. All these directives were recast after the Lisbon treaty and most of them entered into force just two years before the crisis, including the Eurodac regulation and the Dublin III regulation. This meant that when the crisis erupted in mid-July 2015, some of that legislation, had just been transposed

in national law. Yet, in spite of common directives, the leeway granted to EU member states is still important. A study of the EP thus concluded that ‘the CEAS is not “common”, in the sense of one EU wide asylum system, nor has it developed into a single “system” used in each EU MS. On the contrary, the Common European Asylum System still consists of 28 different asylum systems, with different actors responsible, different procedures and different results (e.g. recognition rates)’ (Wagner and al., 2016:8). Thus, there is ample evidence that the Temporary Protection Directive 2005/55/EC adopted in the aftermath of the 1999 Kosovo refugee crisis is ‘commonly ignored’ by EU member states.

Box 12.4: Legal basis: the Dublin Convention

Enforced originally on 1st September 1997, the latest recast of the Dublin III Regulation 604/2013 applies to all EU member states, including the UK but not Denmark. Norway, Switzerland, Liechtenstein and Iceland also apply Dublin III.

According to the principle of the country of first entry, asylum-seekers apply for asylum in the EU member state where they entered first. During the 2015 crisis, it has put a disproportionate burden on Italy and Greece that found the system unfair as they did not have the capacity to face the surge of applications. The system is also unfair as asylum-seekers cannot choose freely in which country they can apply for asylum. The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) have issued case-law asking EU member states to suspend their transfers to the country of first entry. In the 2011 *M.S.S. v. Belgium and Greece*, the ECtHR condemned Greece following problematic conditions of detention for asylum-seekers. Belgium suspended transferring asylum seekers to Greece. Similar jurisprudence from national courts happened in Austria, France, Hungary, Italy and Romania (European Parliament, 2012).

A 2016 Commission ‘Communication towards a reform of the CEAS and enhancing legal avenues to Europe’ proposes an ‘automatic fairness mechanism’ which could be triggered once an EU MS has an excess by 150% of its asylum applications. A reference key will help to identify if a Member state is under pressure, and likely to be implemented by the European Asylum Agency.

Legal migration only became an area for the ordinary legislative procedure and qualified majority voting in the Council after the Lisbon Treaty. Article 79 (5) of the Treaty on the Functioning of the EU stipulates that EU member states have the right ‘to determine volumes of admission of third country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed’. In the 2015 European Agenda on Migration most of the measures concentrate on irregular migration, border control, and asylum, relegating legal migration to the bottom of the list of EU priorities. The main policy development is the revision of the Blue Card directive (Directive 2009/50/EC) which was adopted before the Lisbon Treaty but under unanimity, and only in consultation with the EP, leading to a directive that only focuses on the minimal common denominator. Modelled on the US Green Card to attract high-skilled migrants, it is deemed ‘insufficiently attractive and underused’ by EU member states. Thus, in 2013 Germany delivered 93% of the Blue Card directives in the EU (European Commission, 2014a), confirming the wide disparities amongst EU member states. Future employees also need to have a contract signed and that his/her salary threshold should nominally be 1.5 times higher than the average of the gross annual salary (article 5.3 of the Directive). The Blue Card also competes with national systems, such as the

Dutch High Skilled Migrant Program that has been much better promoted over the Blue Card (Prpic, 2017: 3). Other key legal migration directives include the single permit directive (2011/98/EU) that harmonizes residence and work permit application procedures for third country nationals, and Directive 2014/36/EU regarding seasonal workers, Directive 2014/66/EU for intra-corporate transfers, and Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing.

Given the salience of migration in the EU, integration of third country nationals (TCNs) is an area that should be prioritised but again meets severe constraints. EU institutions have highlighted this challenge in the 2014 Common Basic Principles for Immigrant Integration Policy and the 2016 Integration Action Plan (Council of the EU, 2014; European Commission, 2016). In spite of these efforts and the implementation of the European Integration Fund (EIF), today most of TCNs have difficulties to access decent employment, while children are particular at high risk of poverty. The Commission unequivocally states that ‘there is a clear risk that the cost of non-integration will turn out to be higher than the costs of investment in integration policies’ (European Commission, 2016: 4). In 2015, 37% of them have low education, 49% of them are at risk of poverty or social exclusion and their employment rate is only around 56.5%, partly due to the financial and economic crisis (Mipex, 2015).

Finally, since the beginning of 2000s, the EU has developed an external dimension to its asylum and migration policies, which involves cooperation with third countries. This policy expansion beyond EU’s borders is seen as the development of an external governance of EU policies (Lavenex & Wichmann, 2009), as well as further securitization. Overall this has led to the strengthening of EU’s internal security with the inclusion of JHA cooperation in all European Neighborhood Policy (ENP) action plans, and of clauses such as counter-terrorism clauses in association agreements with Mediterranean countries for instance (Wolff, 2009). The 2005 Global Approach to Migration and Mobility (GAMM) revised in 2011 is the main policy framework for the external dimension. It is interesting to note that until 2011 asylum was not an external priority. In the field of asylum, Regional Protection Programmes (RPPS) enhance the capacity of third countries to protect refugees through repatriation, local integration or resettlement.

The GAMM sets the framework for a wide range of dialogues over visa liberalization action plans, mobility partnerships, readmission agreements. Next to bilateral dialogue with third countries, regional dialogues are also prominent. The Prague process for instance focuses on cooperation between the EU and 19 Eastern partners including Russia. The Eastern Partnership Panel on migration and asylum focuses on cooperation with Armenia, Azerbaijan, Belarus, Georgia, Moldova and Ukraine while the Budapest Process, initiated in 1991 involves more than 50 countries including Eastern Partnership countries, Western Balkans, Central Asia, Afghanistan, Iraq, Russia, Pakistan and Turkey. The EU is also involved in the Africa-EU Migration, Mobility and Employment Partnership since 2007. The Rabat process, under the leadership of Morocco, was launched in 2006 at the occasion of the first Euro-African Ministerial Conference on Migration and Development. There is also a dialogue with Latin America and the Caribbean via a Structured and Comprehensive Dialogue and Migration launched in 2009. Although these regional dialogues enable high level policy dialogue, ‘operational results are more mixed’ and that EU member states are not necessarily sufficiently engaged. (European Commission, 2014b: 13-14).

12.4. Recent Policy Developments

This section analyses policy developments prompted by the so-called 2015 crisis. From an outsider perspective, the EU has appeared as a weak actor in the crisis, unable to stop migration

for some, unable to rescue and provide decent conditions to migrants and refugees for others. In spite of years of European integration, it has failed to bring more ‘successful problem-solving’ (Börzel, 2018: 477). Overall the ‘crisis’ policy development story is one of continuity with past patterns of policy-making. Three policy trends can be identified: agencification, a leadership of JHA bureaucrats who favor the status quo and strong divergences between EU member states.

First, the EU has decided to continue with the same good old recipe of delegating expertise to (new) agencies. One of the most prominent pieces of legislation, that was adopted very swiftly was the transformation of Frontex into the EBCG agency (section 5). Similarly, the European Asylum Support Office (EASO), created in 2010 and based in Malta to support member states with asylum applications in particular in Greece and Italy, should become a European Asylum Agency. Faced with constraints to deploy experts, on the hotspots for instance, and its inability for the moment to grant international protection status to applicants directly, EASO has been considered too weak and requiring more extensive powers. The draft regulation proposes to extend its competences with third countries and that EU member states would have a duty to cooperate and to exchange information (European Commission, 2016). EASO could deploy an asylum intervention pool of at least 500 experts which member states would be obliged to put at the disposal of the agency. The budget and the staff resources would also increase considerably. One of the main problems with the extensive delegation to agencies is that they are non-majoritarian agencies whose legitimacy is under question (Wolff and Schout, 2013). The choice of agencies as policy instruments over other options (i.e. network), is not neutral. Although they are framed as credible actors and experts, better able to solve the tensions around Dublin, as preconized by the principal-agent theory, their ability to coerce member states to ask for their intervention, might in fact be detrimental to building trust in the Dublin and Schengen systems. These agencies are perceived by weaker member states, also more exposed to migratory flows but with low capacities, to act as proxies of stronger member states (Ripoll Servent, 2018). In addition, the agencification of EU migration and asylum policies also participate to a process of de-politicization of highly salient issues (Wolff, 2015) which with the crisis has undergone a strong backlash.

Second, the policy trend is that of a reinforced JHA monopoly over the definition and direction of EU migration and asylum policy. While I do not find securitization theories particularly helpful, it is difficult to see how migration during the crisis has been addressed outside of a security lens. Arguments about the social and economic added-value of refugees and migrants, demographic and skills’ labor challenges have been almost inexistent amongst EU policy-makers. Too rarely, scholars show that European migration policies are socially classed with discourses on the selection of migrants, their skills, but also their integration and ethnicity (Bonjour and Chauvin, 2018). Instead, the crisis has strengthened the bureaucratic monopoly of JHA practitioners. This idea is not new since intensive transgovernmentalism (Lavenex and Wallace, 2005) has led law enforcement agents, interior and justice ministries’ bureaucrats to bypass national constraints through the EU as a new venue for influence. During the crisis street-level bureaucrats have continued with ‘business as usual’ and the status quo in favor of restrictive policies and border control has prevailed. The crisis is more an example of policy ‘inertia’ with little or ‘any reorientation of policy goals or means’ (Guiraudon, 2017: 150). Far from agreeing with those who see strong supranational trends (Niemann and Speyer, 2017), I concur that the ‘transnational field of EU border security’ is definitely one where its ‘stakeholders resist change’ (Guiraudon, 2017: 151). Even where new actors have joined the ‘circle’, the monopoly of JHA actors is not contested. These include diplomatic actors (foreign affairs ministries and the European External Action Service), but also private actors in charge of border security, including biometrics, or managing detention centers.

Finally, strong divergences between EU member states, in particular between Eastern and Western states, have worsened. Distrust amongst EU member states, and vis-à-vis existing instruments has increased. Internal border controls were reintroduced in Autumn 2015 at the German-Austrian border, but also by Slovenia, Sweden and Norway (see Chapter 13). Hungary that saw the arrival of 350,000 refugees in the summer of 2015 developed strategies to stop migrants and to return them. A border fence was constructed with Serbia and Croatia, and the border with Croatia was closed down (Kallius, Monterescu and Rajaram, 2016: 27). The Dublin Convention, as explained in Box 12.1, became rapidly in trouble. Italy and Greece decided to renounce to their legal responsibilities under the Convention and to let through migrants to other EU member states. The main initiatives tabled during the crisis by the European Commission, such as the relocation system (see Box 12.2), were never as far reaching than the ones made during the Eurozone crisis (Biermann and al., 2017). The measures proposed by the Commission were a drop in an ocean and therefore one may even question the political leadership in the first place regarding the measures tabled during the migration crisis. Even in spite of President Juncker's initiatives, the Commission is not hard-wired anymore for more integration, giving some credit to the new liberal intergovernmentalist thesis (Wolff, 2015).

12.5. Current Political and Academic Controversies

Controversies in the political and academic circles have centered on three main issues: trust, politicization and liberalization. First, while some had already identified 'little evidence for inter-state solidarity in the EU' (Thielemann, 2003: 253) and that a norm-based understanding of burden-sharing provided a more compelling explanation, the Dublin system has mainly served inter-state cooperation and instead to 'shift responsibility for the examination of asylum claims to member states situated at the EU external border' (Mitsilegas, 2014: 184). Because the system organizes the transfer of individual asylum-seekers between EU member states, this requires a 'high level of mutual trust' between European asylum systems that should entail similar conditions and the respect of fundamental rights (Mitsilegas, 2014: 190).

Another aspect of the crisis is that after years of de-politicizing integration of asylum and migration policies by devolving its management to JHA experts and agencies, EU migration and asylum policies have become highly politicised. Politicisation is defined holistically as 'contestation within the political system; within society; and within a media that communicated between views in society and between society and the political system' (de Wilde and Lord, 2016: 149). This politicization is taking place between the political forces that denounce the European policy of migration and has taken different forms across Europe. In Central and Eastern Europe, for instance, the refugee crisis has been fueling 'defensive nationalism' which Kriesi defines as 'asserting itself against internal enemies (such as ethnic minorities, including Roma and Jews) and external ones (such as foreign corporations colonizing the national economy)' (Kriesi, 2018: 38). In Western Europe, this would rather be associated to a process of 'denationalization' particularly felt as a result of globalization and those who are losing out of global economic integration (Kriesi, 2018: 37). Combined the East/West divisions, and to some extent North/South too, political leaders have adopted reactive or *status quo* policies.

Anti-immigrant narratives that are central to Eurosceptical and populist parties have contributed to this politicization. Europe and the migration crisis have provided these parties with transnational venues to join up forces beyond national borders. Thus, we have seen anti-immigrant movements mobilising transnationally although not always successfully. This is for instance the case of the Germany PEGIDA that has been active in Austria, Norway, Sweden and Switzerland. On the other end, pro-immigrant movements have also showed transnational solidarity across borders to provide assistance to refugees such as across the UK/ French border [Help refugees/ Auberge des migrants] or in the Alps between France and Italy. SOS

Méditerranée is saving lives with multi-national teams. The refugee crisis in a way has enabled a certain politicization of the EU that has impacted ‘Europeanised national public spheres’ (de Wilde and Lord, 2016: 148).

In political circles, compliance with EU law is also contested by an increasing number of actors at national level (Börzel, 2018: 481): ‘non-compliance then becomes a way for member states to dodge adjustment costs, which regulatory policy, such as [the relocation system] shifts to the implementation at the domestic level rather than addressing them at the decision-making stage at EU level (Majone, 1997)’ (Börzel, 2018: 481). Instead, we observe tendencies among member states to circumvent and suspend existing rules’ such as in the relocation scheme, the Dublin Convention or the re-installment of border control within the Schengen area (Biermann and al., 2017: 2).

Last but not least, an important controversy that defines the academic debate is whether the refugee crisis is symptomatic of a restrictive migration policy trend. Many scholars agree that the ‘European migration regime’ is mostly targeting the control of irregular migration (Hampshire, 2016: 539), and that like at state level, a lot of attention is devoted to controlling borders and externalizing migration control to EU’s external partners. The DEMIG Database found that even though it is possible to identify an overall historical trend towards liberalization of rights of migrants and refugees once they are in the country of destination, the trend is towards increasingly restrictive border controls (De Haas, Natter and Vezzoli, 2016). Based on a database of 6,500 policy changes in 45 countries, the DEMIG Policy team has shown that overall liberalisation of policy outnumber restrictions. However, it varies across policy areas and migrant categories: ‘entry and integration policies are less restrictive’ but ‘border control and exit policies have become more restrictive’ (Ibid). They conclude that border controls and laws have become more restrictive, even if other policies regarding family migrants, high-skilled and low-skilled migrants as well as refugees and asylum seekers have become more liberal. This is a global paradox of increased border controls in a mobile world.

12.6. A Paradigmatic Case Study. European Border and Coast Guards: Humanitarian Agents and Legitimizing Discourses

One of the most paradigmatic case studies of the migration crisis is the way in which EU actors have developed a new discourse regarding rescue at sea and the rapid adoption of the regulation on the new mandate of Frontex, the EBCG (European Commission, 2016). This case study evidences several paradoxes discussed earlier in the chapter: the choice of de-politicized instruments to respond to the crisis while framing their functions from a humanitarian perspective that brings a renewed legitimacy, based on more liberal commitment of EU migration and asylum policies.

The picture of a Danish police officers playing a game with a young Syrian refugee girl at the German-Danish border² has been diffused worldwide and illustrates how European border guards are being framed as new humanitarian actors: they save lives. The new humanitarian discourse is being ‘used for framing and giving meaning to institutional and operational practices’ (Pallister-Wilkins, 2015: 53). This stands in stark contrast with reports of police and border guards violence denounced by NGOs. In 2015, in Macedonia, a candidate country to EU accession, Human Rights Watch reported abuse of Macedonian officials, this involved being physically beaten, the systematic detention until July 2015 of asylum-seekers and migrants ‘including children and pregnant women’ in the Gazi Baba detention facility (Human Rights Watch, 2015).

² https://www.huffingtonpost.com/entry/danish-police-officer-syrian-refugee_us_55f8d9d3e4b0b48f67013caf

In the light of the rising number of deaths in the Mediterranean Sea, which peaked at 3,771 (IOM, 2015), and the criticisms addressed by UN special rapporteur on the human rights Francois Crepeau or even Pope Francis, Jean-Claude Juncker proposed to transform Frontex into the EBCG. The new mandate of the agency was adopted in less than 9 months by the EP and the Council which wanted to quickly adopt this symbolic piece of legislation. The main concern was to provide the agency with the ability to rescue people at sea which was not initially in its mandate. In addition, the agency is very dependent on EU member states and for instance had difficulties to buy its own equipment (although allowed since 2011) (Wolff and Schout, 2013). Existing mechanisms to cope with sudden influx of migrants such as the Rapid Border Intervention Teams (RABIT) could have been used. These teams can be deployed on the request of a Member state within five days upon receiving the request, which leads to an operational plan drafted by Frontex. But RABITs have in fact been only deployed once on the Greek-Turkish border in 2010, demonstrating the limitation of the deploying common teams acting under a single command (EP and Council, 2007).

The new mandate (Regulation 2016/1624) has expanded the agency competences with a sort of RABIT plus and the possibility for ‘Member State may request that the Agency launches joint operations to face upcoming challenges, including illegal immigration, present or future threats at its external borders or cross-border crime, or to provide increased technical and operational assistance when implementing its obligations with regard to the control of the external border’ (article 15) which has given rise somehow to the hotspots approach. The agency can also process personal data (article 46) which is balanced by more safeguards regarding fundamental rights. The agency has expanded slightly its ‘right to intervene’ as it can ‘carry out a vulnerability assessment including the assessment of the capacity and readiness of Member States to face threats and challenges at the external borders’ (article 8). Many have deplored the fact that this reform is in fact limited, ‘falls short of establishing a [Union] professional culture in border control cooperation’, that it focuses mostly on return, and does not for instance establish an independent complain mechanism, outside of the fundamental rights’ officer which sits in the agency (Carrera and den Hertog, 2016).

Paradoxically, the saving lives narratives contrast with the practice of the hotspot approach developed since 2015 at the Southern peripheries of the EU. In Lampedusa, Pozzallo, Taranto and Trapani in Italy but also in the islands of Chios, Kos, Lesbos, Leros and Samos in Greece, the EU has organized a reinforced and concerted efforts of EU agencies to identify, select and standardize the selection of refugees (Tazzioli, 2017:2). This policy development is contested by asylum seekers who ‘refuse to comply with the restrictive conditions established by EU asylum and migration policies, enacting and claiming freedom of choice’ (Tazzioli, 2017: 3).

The ‘paradox of the liberal state’ has become a true reality for the EU. Although the EU would through a traditional neo-functionalist logic encourage free trade and the mobility of people, as well as respond to its normative commitments such as the commitment not to send back refugees in countries where their life is at risk (*principle of non refoulement* of the 1951 Geneva Convention), the EU also sees migration as a political risk (Hollifield, 2006: 886). The EU, at supranational level, prioritizes its own internal security and the economic well-being of its citizenry (Hollifield, 2006: 886). Although EU member states remain the main gatekeepers, we see that EU institutions are not necessarily always upholding this liberal paradox against restrictive member states and that EU migration and asylum policies present both liberal and restrictive features. The rise of populist movements however is a real danger for the direction integration that migration and asylum policies may take in the future.

Group Discussions

- ✓ Are EU migration and asylum policies liberal or restrictive?
- ✓ Who leads the agenda on EU migration and asylum policies?

Individual Research

- ✓ Research the EU position during the negotiations on the Global Compact for Migration and explain why the EU did not manage to maintain a united front.
- ✓ Research to what extent has the Mediterranean Sea become a contested humanitarian space for NGOs and European border guards

References to go further

- ✓ [Bauböck, R. \(2018\). Refugee Protection and Burden-Sharing in the European Union. *JCMS: Journal of Common Market Studies*, 56\(1\), 141-156.](#)
- ✓ Lavenex, S. (2018). 'Failing Forward' Towards Which Europe? Organized Hypocrisy in the Common European Asylum System. *Journal of Common Market Studies*, (56)5, 1195-1212
- ✓ Natter, K. (2018). Rethinking immigration policy theory beyond 'Western liberal democracies'. *Comparative migration studies*, 6(1), 4.
- ✓ Tazzioli, M. (2014). *Spaces of governmentality*. Rowman & Littlefield International.
- ✓ van Ballegooij, W. and Cecilia Navarra (2018). *The Cost of Non Europe in Asylum Policy*. European Parliamentary Research Service, [http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627117/EPRS_STU\(2018\)627117_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2018/627117/EPRS_STU(2018)627117_EN.pdf)

References

- Bickerton, C., D. Hodson and U. Puetter (2015). [*The New Intergovernmentalism States and Supranational Actors in the Post-Maastricht Era*](#). Oxford: Oxford University Press.
- Biermann, F., N. Guérin, S. Jagdhuber, B. Rittberger and M. Weiss (2017). 'Political (non)-reform in the euro crisis and the refugee crisis: a liberal intergovernmentalist explanation', *Journal of European Public Policy*
- Bonjour, S., & Chauvin, S. (2018). Social Class, Migration Policy and Migrant Strategies: An Introduction. *International Migration*, 56(4), 5-18.
- Börzel, T. A. (2018) 'Researching the EU (Studies) into demise?', *Journal of European Public Policy*, 25(3), 475-485.
- Carrera, S. and L. den Hertog (2016), "A European Border and Coast Guard: What's in a name?", CEPS Paper in Liberty and Security in Europe No. 88, CEPS, Brussels.
- Council of the EU (2018). *Invitation letter by President Donald Tusk to the members of the European Council ahead of their meetings on 28 and 29 June 2018*. Press Release 409/18 27/06/2018

Council of the EU (2014). *Council conclusions of the Council and the Representatives of the Governments of the Member States on the integration of third-country nationals legally residing in the EU*. JHA Council meeting Luxembourg, 5 and 6 June 2014

Council of the EU (1999). Tampere European Council 15 and 16 October 1999 Presidency Conclusion. Accessed on 27/10/2018 at http://www.europarl.europa.eu/summits/tam_en.htm

Dinan, D. (2016). Governance and Institutions: A More Political Commission. *Journal of Common Market Studies*, 54: Annual Review, 101–116

Drachenberg, R. (2018). European Council: Facts and Figures. European Parliament: July 2018. Accessed on 3rd September 2018 at [http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625119/EPRS_BRI\(2018\)625119_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625119/EPRS_BRI(2018)625119_EN.pdf)

ECRE (2016). Untying the EU resettlement Framework. ECRE's recommendations on breaking the link with migration control and preserving the humanitarian focus of resettlement. Accessed on 1st November 2018 at <https://www.ecre.org/wp-content/uploads/2017/07/Policy-Note-06.pdf>

European Commission (2018a). Annex to the Communication from the Commission. Progress report on the implementation of the European Agenda on Migration, Brussels, 14 March 2018. COM(2018) 250.

European Commission (2018b). State of the Union 2018- Commission proposes last elements needed for compromise on migration and border reform. Press release, Strasbourg, 12 September 2018

European Commission (2016). Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No 439/2010

European Commission (2015). European Agenda for Migration. Annex. European schemes for relocation and resettlement. Accessed on 1st November 2018 at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_annex_en.pdf

European Commission (2014a). *Communication from the Commission to the European Parliament and the Council on the implementation of Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment ("EU Blue Card")*. Brussels 22 May 2014, COM(2014) 287.

European Commission (2014b). Report on the implementation of the Global Approach to Migration and Mobility 2012-2013. Brussels, 21.2.2014 COM(2014) 96.

European Court of Human Rights (2011). *M.S.S. vs. Belgium and Greece*, 21 January 2011.

European Court of Justice (2011). Cases C-411/10 and C-493/10 *N.S. and M.E.*, 21 December 2011

European Parliament and Council (2016). *Regulation 2016/1624 of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC*. OJ L 251, 16.9.2016

European Parliament (2012). *Transfer of asylum-seekers and fundamental rights*. Brussels: Library Briefing, 30/11/2012.

European Parliament and Council (2007). *Regulation (EC) No 863/2007 of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers* OJ L 199, 31.7.2007, p. 30–39.

Guiraudon, V. (2017). The 2015 refugee crisis was not a turning point: Explaining policy inertia in EU border control. *European Political Science*, 1-10.

Hampshire, J. (2016). ‘European migration governance since the Lisbon treaty: introduction to the special issue’. *Journal of Ethnic and Migration Studies*, 42(4), 537-553.

Hix, S. A. Noury and G. Roland (2018). ‘Changing Political Cleavages in Advanced Democracies: Evidence from the European Parliament’. Paper access at <https://wc2018.ipso.org/sites/default/files/ipso-events/wc2018/papers/paper-103050-2018-07-05t060414-0400.pdf>

Hollifield, J. F. (2004). ‘The Emerging Migration State’. *International migration review*, 38(3), 885-912.

Kallius, A., Monterescu, D., & Rajaram, P. K. (2016). Immobilizing mobility: Border ethnography, illiberal democracy, and the politics of the “refugee crisis” in Hungary. *American Ethnologist*, 43(1), 25-37.

Koikkalainen, S. (2011). Free Movement in Europe: Past and Present. Migration Policy Institute, accessed on 29 August 2018 at <https://www.migrationpolicy.org/article/free-movement-europe-past-and-present/>

Kriesi, H. (2018). ‘The politicization of European integration’. *Journal of Common Market Studies*, 54, 32-47

IOM (2015). IOM Counts 3,771 Migrant Fatalities in Mediterranean in 2015. Accessed on 2nd November 2018 at <https://www.iom.int/news/iom-counts-3771-migrant-fatalities-mediterranean-2015>

Lavenex, S., & Wallace, W. (2005). ‘Justice and home affairs’ In: Wallace, H. and W. Wallace. *Policy-making in the European Union*, 457-80.

MIPEX (2015). Migrant Integration Policy Index 2015. Huddleston, Thomas; Bilgili, Ozge; Joki, Anne-Linde and Vankova, Zvezda (2015). Accessed on 1st August at <http://mipex.eu/what-is-mipex>

- Mitsilegas, V. (2014) 'Solidarity and Trust in the Common European Asylum System'. *Comparative Migration Studies*, 2 (2), 181-202
- Niemann, A., & Speyer, J. (2018). 'A Neofunctionalist Perspective on the 'European Refugee Crisis': The Case of the European Border and Coast Guard'. *Journal of Common Market Studies*, 56(1), 23-43.
- OECD (2013). Global Trends in Family Migration in the OECD. Presentation by Johan Chaloff, accessed on 31 August 2018 at <https://www.oecd.org/els/mig/Chaloff.pdf>
- Prpic, M. (2017). *Revision of the Blue Card Directive*. European Parliament Research Service. Briefing, EU Legislation in Progress
- Ripoll Servent, A. (2018). 'A new form of delegation in EU asylum: Agencies as proxies of strong regulators'. *Journal of Common Market Studies*, 56:1, 83-100.
- Shackleton, M. (2017). 'Transforming representative democracy in the EU? The role of the European Parliament'. *Journal of European Integration*, 39 (2), 191-205
- Tazzioli, M. (2017). 'Containment through mobility: migrants' spatial disobediences and the reshaping of control through the hotspot system'. *Journal of Ethnic and Migration Studies*, DOI: 10.1080/1369183X.2017.1401514
- de Wilde, P. and C. Lord (2016) 'Assessing actually existing trajectories of EU politicisation', *West European Politics*, 39:1, 145-163.
- Wagner, M. and al (2016). *The implementation of the Common European Asylum System*. Brussels: European Parliament. 128p.
- Wasserstein, D. (2011). Europe Refugee Movements after World War Two. BBC, accessed on 10 January 2019 at http://www.bbc.co.uk/history/worldwars/wwtwo/refugees_01.shtml
- Wolff, S. and L. Hadj-Abdou (2017) 'Mediterranean Migration and Refugee politics: between continuities and discontinuities' In: Volpi, F. and R. Gillespie (2017). *Routledge Handbook on Mediterranean Politics*. London: Routledge.
- Wolff, S. (2015). *Integrating in Justice and Home Affairs: A Case of New Intergovernmentalism Par Excellence?* In: Bickerton, C., D. Hodson and U. Puetter (2015). *The New Intergovernmentalism States and Supranational Actors in the Post-Maastricht Era*. Oxford: Oxford University Press.
- Wolff, S. (2009). 'The Mediterranean Dimension of EU Counter-terrorism' *Journal of European Integration*, 31(1), 137–156.