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Security in a Liberal Union: EU Asylum and Migration Control Policies

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Is it reasonable to write about asylum seekers and refugees in a context dedicated to EU security issues? The Council of the European Union and the European Commission seem to suggest so. EU policy documents regularly refer to the fight against illegal immigration and human smuggling. FRONTEX, the EU border management agency, has the resources and the mandate to coordinate Member States' civilian and military resources in the joint exercise of border control. 2015 saw a drastic move towards militarization: to check the inflow of asylum seekers, the Council of the European Union decided to allocate military resources against human smugglers and their property outside EU territory, in analogy with operation Atalanta directed against armed pirates off the coast of Somalia (Council Decision (CFSP) 2015/778). Taking operation Atalanta as a role model for 2015's crisis management marked a qualitative shift as it implicitly equated unarmed migrants with armed pirates. To be sure, the smuggling of migrants is clearly beyond the scope of piracy as defined in international law.¹ It appears that the increased levels of migration by asylum seekers and refugees has strengthened associations to security, both conceived as military defence and as human security, concerning societal safety as a whole.

Depicting asylum seekers first and foremost as a security threat to the EU and its members is, of course, grossly reductive. After all, asylum seekers are fleeing a deterioration of security in their home countries. Thus, it would be inappropriate to foreground EU security while backgrounding the security of the asylum seekers. However, we could choose to accept the security language for a moment to consider the ideological architecture behind EU asylum and border control policies. 'Today, European integration has been so thoroughly re-imagined as a technical project that it is difficult to comprehend the political forces and choices that have shaped its unfolding.', as Anne Orford has pointed out (Orford, 2012 p. 277).

So, how should we discuss the relation between the EU and asylum seekers? I suggest that we think about it through the prism of protectionism – a term borrowed from liberal economic theory. Usually, it describes the measures taken by a state or a group of states to stop third party actors from selling goods or services within their borders. What protects the actors within the borders creates barriers to trade for those outside the borders. Liberal thinkers have polemicized against protectionism and suggested alternative orders to hinder it. '[T]he abrogation of national sovereignties and the creation of an effective international order of law is a necessary complement and the logical consummation of the liberal program', as

the Austrian liberal economist Friedrich Hayek pointed out in a 1939 text on ‘The Economic Conditions of Interstate Federalism’ gaining new currency today (Hayek, [1939] 1949 p. 269).

Hayek’s quote supposes that the ‘effective international order of law’ will realize itself when ‘national sovereignties’ are abolished. ‘Indeed’, he writes, ‘this readiness to have no legislation at all on some subjects rather than state legislation will be the acid test of whether we are intellectually mature for the achievement of suprastate organization’ (Hayek, [1939] 1949 p. 266).

The federation will be a delicate interim stage on the way to the abolition of the state and the consummation of legal order, joining together remnants of state sovereignty with a federal structure centered on a market that freely regulates itself. But what nation state attributes are needed to give strength to the emerging federation? And will the perseverance of these state attributes not hinder the full emergence of a supranational legal order à la Hayek? This is the essence of the EU’s dilemma: nationalist protectionism could reemerge in a new and more powerful institutional form in the guise of supranational cooperation.

Is the EU of today an incarnation of Hayek’s federal order? This is famously claimed by Wolfgang Streeck (Streeck, 2014, reintroducing Hayek’s 1939 article quoted above). But Hayek might stand in the way of seeing the Union for what it is (Deutschmann, 2014, arguing contra Streeck that the EU’s prioritization of state solvency during the 2007-08 financial crisis made it fail a Hayekian test). I believe that liberalism offers a prism to understand how a particular form of protectionism can thrive in a supranational setting bent on augmenting the freedom of the markets.²

However, we should not assume that liberal thought is unequivocally in support of migration. Ludwig von Mises, another famous exponent of the Austrian school of liberalism, concluded in 1935 that ‘white European workers should have the right of immigration into the largest and most productive lands, the climates of which are suitable for’ them and made this a precondition for world peace (von Mises 1935, p. 22). von Mises liberalizes migration to serve colonial needs and conditions the right to immigrate on race. Also, Hayek is on record to have supported the British Conservative leader Margaret Thatcher in her call for stringent immigration controls in 1987. ‘While I look forward, as an ultimate ideal, to a state of affairs in which national boundaries have ceased to be obstacles to the free movement of men,’ Hayek declared, ‘I believe that within any period with which we can now be concerned, any attempt to realize it would lead to a revival of strong nationalist sentiments.’ (Ebeling, 1995, chapter 17). When it comes to migration, the 1987 Hayek adheres to ordoliberalism, which seeks to offer an orderly legal frame for the forces of the market to unfold within. This is a far

cry from the radical liberalism expressed by Hayek in 1939. Or does any semblance of contradiction go away as soon as we consider that Thatcher's immigration control was geared against non-whites and non-Europeans – the very group that von Mises failed to include into his right to immigration?

In this contribution I argue that the asylum and migration control policies of the EU are usefully analysed as an expression of liberal thought. I will show how this order manifested itself with the creation of the Union in the 1950s, illustrate how it affects the prevailing rules in the areas of migration and asylum and highlight the paradox of how the order was strengthened during the crisis of 2015 and 2016. I will also explain the fact that the concept of solidarity in EU law is poorly constructed due to its subordination to the protectionist order of the EU. Thereafter I will map possible solutions. If the EU is serious about its liberal identity it cannot completely deny the rationality and free will of the asylum seeker. The question is if there is a reformist alternative: a complement to the present protectionist system which acknowledges the rationality and free will of the asylum seeker without demanding utopian or revolutionary wonders of the Union in its present form. I test whether humanitarian visas could constitute such a complement, where the asylum seeker and the EU Member State meet in a rational discourse before the asylum seeker has decided to travel to Europe. As the Court of Justice of the European Union (CJEU) has practically written off this option, I inquire whether this might tell us something of how the particular form of liberalism that the EU represents can be articulated.

1957: a constitutional structure of exclusion

The historical background to the migration policies of the EU can be found in the treatment of the rights of third country nationals as a sacrificial pawn to ensure Member States' acceptance for free movement of EU nationals (Chatty, 2015). The Treaty of Rome of 1957 is at the root of this order. It privileged those foreigners who were nationals of another Member State, while the fate of third country nationals was left to the discretion of the national governments. Member States have ever since carefully guarded their sovereignty in relation to third country nationals, also within the institutions of the EU. The weight of this constitutional shift in 1957 cannot be overestimated in the migration and asylum policy crisis of today. Developments within this policy area should to quite some extent be understood as a collective replication of domestic migrational protectionism at the EU level.

If what we want is for European integration to be something more than a reproduction of nation state structures on a more complex level, this transfer entails significant legitimacy problems. The nation state does not seem to disappear in step with the emergence of a supranational legal order. On the contrary: this supranational legal order is directly dependent on a growing measure of nation state components in the form of protectionist policies. It is in the area of migration and asylum that the Member State prerogative is at its strongest, both in daily policy-making and in the foundational documents of the EU. Hayek's conviction that federalism will decrease state protectionism seems at odds with concrete EU examples. While the EU has enabled its nationals to move freely between Member States at great cost, the Commission complains that this expensive freedom is underused by Union citizens (Chatty, 2015). The liberal foundation of the EU has not inhibited the emergence of a protectionist border control cartel created by the Union to compensate for the abolition of control over the internal borders. As has been shown by the 2015 and 2016 asylum crisis the border control function and the defence of it through individual Member States is a central part of the Union's construction. Market liberalization comes at the cost of an escalating supranational protectionism. This cost is a real one, most starkly manifested in the risks to life and limb imposed on those who question the protectionist order by travelling to the EU without permission.

1987 and onwards: the subordination of asylum to a border control logic

As we have seen, EU immigration and asylum policies have their base in the 1950's attempts at liberalizing free movement of EU citizens. Measures to abolish border controls within the EU, however, gained momentum with the signing of the Single European Act in 1987. The measures were informed by the fall of the Wall and the fact that the authoritarian East European governments, which had previously carried out rigorous border controls along the Eastern border of the Union, no longer existed. EU border control became a matter of utmost concern in the realization of the last of the four fundamental freedoms at the core of the Union's identity.

For this reason we cannot view the EU asylum acquis as isolated from the EU border control acquis. In fact, the EU asylum acquis, known as the Common European Asylum System, CEAS, is critically dependent on the EU border control acquis. Where border controls fail to reduce numbers of asylum seekers below a particular threshold, the CEAS becomes dysfunctional and its rules are no longer implemented in practice.

CEAS norms are not altogether to the detriment of the asylum seeker. On the contrary, the CEAS contains rules that force Member States to review and upgrade the protection offered in domestic law and practice. That said, many central CEAS norms remain much too vague and contain overly extensive mandates for the Member States (see the contributions in Bauloz et al., 2015).

The main issue however is that the CEAS is framed in a way that supports EU border control policies. Border control rules are, in turn, subservient to immigration policies. EU immigration policies are essentially formulated to promote economic interests and do not focus on humanitarian considerations. A known example of this is EU visa rules which prescribe visa requirements for states whose nationals are seen as potential asylum seekers.

The Dublin Regulation and the Schengen acquis can be seen as the hinges between the asylum acquis and border control acquis. The latest Dublin Regulation from 2013 counts as part of the asylum acquis and is listed as an important element of the CEAS. This Regulation sets down the rules as to which EU Member States shall be responsible to assess an asylum application in substance. According to the most used rule in the Dublin Regulation, an asylum application is to be assessed by the state which enabled entry into the EU, regardless of whether that entry was legal or irregular. In reality, the Dublin Regulation creates a system which places the responsibility to process an asylum application on the Member States with the borders that are most difficult to guard. Consequently, it is no surprise that exposed Member States, such as Italy, are known to evade that responsibility by not registering newly arrived asylum seekers or by discouraging them with substandard reception conditions, or both, contrary to EU law. It is the law itself which creates the disproportionate reception responsibility, in turn leading to the circumvention of the law. The destructive effects of the present order have been well-known since the 1990s, but Member States rejected fundamental amendments when the possibility to reform the Dublin Regulation was given in 2000 and 2012.

Protectionist solidarity in asylum reception

That a sort of nationalist protectionism has informed EU immigration and asylum policies is obviously to the detriment of third country nationals. But it also harms the unity between Member States. This is clear from the inability of Member States to create a solidarity-informed migration and asylum policy vis-à-vis the asylum seeker. The reception crisis in

2015 and 2016 also shows that nation state protectionism made states act upon their own interests rather than community interests.

An amendment to the Treaty of Lisbon added a peremptory rule, regarding solidarity among Member States, to the Treaty on the Functioning of the EU (article 80 TFEU). The provision concludes a chapter regulating the EU's authority over border control, asylum and migration and it reads as follows:

The policies of the Union set out in this Chapter and their implementation shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

I have described in my earlier work how the actual policies are headed towards a de-solidarization in refugee reception. Nonetheless it is justified to ask whether the solidarity rule could have been a meaningful counterweight, had it been taken seriously.

The prevailing interpretation of article 80 is that it concerns solidarity merely between Member States and not between Member State and refugee, or Member States and other recipient states in crisis regions (such as Lebanon and Jordan which are carrying a disproportionate burden in the reception of Syrian refugees). But the very term 'solidarity' does point in the opposite direction.

The term has its roots in Roman civil law, referring to the relationship between a creditor and a group of persons responsible for a debt – the debtors. In joint and several liability cases the creditor can demand payment of the whole debt from any one of the debtors at any time, not just that particular debtor's share of the debt. Solidarity thus increases the chance of a debt being paid. How debtors should handle the situation when the creditor has demanded payment from one of them is a separate, and indeed secondary, question.

How is a historically informed concept of solidarity to be applied in EU asylum and immigration policies? The use of the term 'solidarity' is only meaningful if you consider Member States to be equally responsible for fulfilling a legal claim brought by an asylum seeker, as is usually the case in contemporary forms of joint and several liability. This protection claim is founded in human rights and refugee law, which stipulate that states cannot return persons in need of protection to states where they face certain risks or threats. The interesting aspect of joint and several liability is that it provides both the creditor and in

turn the asylum seeker with a freedom of choice. The claim can be directed at any member state. This contradicts the coercive measures of the Dublin Regulation where other factors than the preferences of the individual are guiding. In order for there to be solidarity among Member States naturally there has to be some sort of compensation for the state that is subject to the asylum seeker's claim of solidarity.

My point is not that article 80 TFEU should be reinterpreted in this historically informed way. My point is that article 80 TFEU is so contradictory in its legal construction that it cannot lead to any practical results – neither in policy nor before the CJEU.

What would happen if the EU's weak solidarity concept were to be applied to market transactions? Let us have a look at an example: ten owners of a particular business want to take up a joint loan to fund one of its projects. Let us assume that the bank will only lend money if each of the owners accepts joint and several liability, implying that the bank can demand payment of the whole debt from any one of them. An agreement is signed and the money collected, but the owners somehow forget to agree between them what to do if the bank shows up one day and terminates the loan, demanding payment from only one of the owners. What happens if the remaining owners of the business do not have the money or have other reasons not to pay their share to the partner that the bank happened to target? And how should they calculate the share they owe?

But this is not something a person serious about her or his business would do, right? No, indeed not. It would be silly to skip such an important step as the signing of an agreement between business owners since it creates an unnecessarily messy situation that might jeopardize the cohesion and finances of the common business. Unfortunately, this is the situation we have within the EU. As the bank in our example, an asylum seeker knocks at the door of a single Member State with her claim. However, while the bank can choose whether it will claim payment of the loan from the whole group of owners or just one of them, an asylum seeker can only rely on a single Member State for a substantive assessment of her claim. What if multiple asylum seekers claim fulfilment of international law obligations from one and the same Member State, despite the Union having 26 other members (Denmark having opted out) which have committed to these obligations collectively in EU law?

This is exactly the case in point. A majority of asylum seekers arriving in the EU in 2015 and 2016 sought asylum in Germany and Sweden. States such as Italy and Greece are highly affected due to being countries of first entry to the EU; many asylum seekers and other migrants enter the EU through these states often after having risked their lives on the Mediterranean. But asylum seekers rarely remain there, largely due to poor reception

conditions. Both first countries of asylum, like Italy and Greece, and final countries of asylum, such as Sweden and Germany, find themselves under considerable pressure by the growing number of asylum seekers. Both groups of states experience lack of adequate assistance from other EU Member States.

In 2015 the European Commission proposed a mandatory system for a more even distribution of asylum seekers among Member States. Hardly surprising, this proposal was met with heavy criticism by the United Kingdom and a number of Central European Member States. After all, mandatory distribution would force these states to receive more asylum seekers. Reverting to our business example, it is clear that this was too late a point in time to make an agreement within the group of business owners. We need to have crystal-clear solidarity agreements in place well in advance before solidarity is claimed, not when we are in the middle of a crisis.

The inequitable distribution of asylum processing and protection has led to high tensions among governments and unusually unruly meetings in the Council of the European Union. The idea of a united Europe seems to be at risk. This crisis was foreseeable, however. The war in Syria and precarious living conditions in parts of Africa are hardly new. To operate a dysfunctional solidarity concept under such conditions is a recipe for trouble once the number of asylum claims starts to rise.

We should consider the possibility that the solidarity clause in article 80 TFEU was never meant to make use of the full potential of the solidarity concept and enable a better protection of asylum seekers and refugees. Its contradictory character is an important element in understanding the mechanisms at work in EU law. Had article 80 TFEU been constructed so that refugees, asylum seekers and the Member States hosting many of them could benefit from it, a European community of solidarity would have been put in evidence. This kind of community is exactly what Hayek wanted to eradicate with his liberal federalism.

Three dimensions of solidarity and EU practice

A comparison of EU solidarity to the Roman model of solidarity as joint and several liability is problematic in one respect. In Roman civil law, as in our example of business owners loaning from their bank, transactions relate to money. The good thing about money is that it is abstract and therefore maximally exchangeable. Our business owners will presumably not worry about whether one euro they loaned from the bank is equal in worth as one euro paid back. The complex relations that a state and an individual asylum seeker have

cannot be transposed into a monetary value, because they are so concrete and individualized. While great precision can be achieved in monetary transactions, we need to factor in a lot of non-monetary aspects into the question who owes whom how much in a multilateral system of asylum.

So how should we think about long-term solidarity in asylum and refugee policies? In an earlier text, I have proposed looking at three dimensions that may contribute to solidarity: sharing norms, distributing funds and distributing people; here asylum seekers and refugees (Noll, 2000 p. 270).

Sharing norms within the EU means that all Member States give asylum seekers and refugees similar rights and benefits, that the asylum procedure is based to the same extent on the rule of law and that reception conditions are equivalent to those of other states. If all states apply the same norms there is less reason for asylum seekers to choose certain Member States over others as their final country of asylum. This is the very point of harmonizing domestic asylum legislation through the supranational CEAS. It is, however, a problem that the ambition is set so low in the CEAS, too low to really make a difference in evening out the unequal reception of migrants in the EU. And, perhaps more importantly, decision-makers and judges across the EU assess evidence and credibility of asylum seekers very differently, which ultimately results in widely varying recognition rates. To the very limited extent an asylum seeker is able to choose amongst EU states as destination countries for her claim, a comparison of recognition rates for her nationality would be a rational way to organize that choice. Another issue is the feeble monitoring of rule compliance. It might take years before the European Commission, CJEU or European Court of Human Rights really deal with issues of non-compliance in a state, if they deal with them at all. In all, and as of today, the sharing of norms on asylum has not made a tangible contribution to solidarity in refugee reception.

The next dimension of solidarity is the distribution of funds between EU Member States. There are two ideas behind this. One is to help Member States with weak reception systems or large inflows of refugees and asylum seekers to improve reception conditions and protect those in need of protection. The other idea is that states that receive fewer asylum seekers and refugees compensate those that receive more asylum seekers and refugees. This distribution policy will of course raise the question of whether money and refugees are economically comparable; can a sufficient number of euros really purchase hospitality in another state and consequently buy off one's own responsibilities?

The reception of asylum seekers and the integration of refugees cannot be readily monetized. Refugee reception is a social and political question as much as one of

demography, finances and planning. Thus the mere redistribution of funds cannot itself solve the problem of uneven distribution among certain Member States, it will only be a small contribution to a more comprehensive solution.

There is today an EU-orchestrated economic redistribution in the asylum area. Between 2014-20 funds have been allocated in the EU's budget for Member States to draw money from. For example Sweden could be granted up to 118.5 million euros, Spain 257 million euros, Greece 259 million euros and Italy 310 million euros. The sums are hardly trivial, but they are still not likely to affect the political will of a government, a parliament or a population of voters. An extreme example is that of the 2016 agreement between Turkey and the EU, where a package including up to 6 billion euros in transfers, a resettlement mechanism and the speeding up of visa liberalization for Turkish citizens bought Turkey's cooperation in stemming the inflow of asylum seekers to the EU (EU-Turkey Statement, 2016 para 6). Even so, I would think that the truly dominant factor was the visa dimension, suggesting how hard it is to 'monetize' asylum seekers in isolation of other factors.

One might feel that it is insufficient to share norms and distribute funds and that the EU must also deal with the distribution of people – the third dimension of solidarity. It is also the most sensitive and incisive dimension – forced displacement of people in history is not a happy memory. Asylum seekers often have good reasons to choose a certain country of asylum, not necessarily linked to the asylum procedure. The language, access to the labour market, presence of family members, the existence of a diaspora, the state's reputation with regards to human rights – all of this can affect the decision. And many of these factors are directly related to possibilities of integration; finding a job, paying taxes, learning the language and becoming part of the community. If we were to create a mandatory distribution system which ignored these preferences we would probably end up with a large number of asylum seekers still trying to bypass their assigned country of asylum instead of trying to move to or stay in their preferred country of asylum. The use of coercive measures would increase, meaning more resources to the police force bringing candidates eligible for transfer into detention or forcing them onto planes. Detentions and forced returns are very costly both from an economic perspective and considering the risk for traumas, self-destructive behaviour or human rights violations.

Are there any examples of distributing asylum seekers within the EU? Yes, the instrument known as the Dublin Regulation offers some. As mentioned, its formal purpose is to identify the Member State responsible for considering the substance of an asylum claim filed somewhere in the EU. Its rules were clearly not created to accomplish a more even

distribution of asylum seekers and refugees but to give further incitement to stronger control of external borders. This means that states with external land and sea borders that are difficult to guard are burdened under the Dublin Regulation while states whose external borders are airports or harbours (such as Sweden and Denmark) are relieved. In theory the latter can transfer asylum seekers to the more southern Member States if they can prove the asylum seekers' registration there after entry to the EU. In practice the system is falling apart since the reception systems in many southern European states are so poor that the European Court of Human Rights and the CJEU have prevented transfer of asylum seekers there in a number of high-profile cases, among others *M.S.S. v Belgium and Greece* from 2011 and *Tarakhel v Switzerland* from 2014. Some Southern European states have stopped registering newly arrived asylum seekers and are rather content that these are migrating further north. They do not consider themselves capable of dealing with two tasks at once: being both first and final country of asylum which entails both saving lives on the sea and offering long term care for the rescued.

The Dublin system is a compulsory system. With its failure being apparent (Guild et al., 2015), patches are considered that would add a layer of distributive justice to it. But an additional compulsory system aimed at evening out the unequal distribution Dublin has created would entail further bureaucracy, expenses and human suffering. Compulsory redistribution is not only problematic for the individual affected but also for Member States. In June and September 2015 the Council of the European Union decided upon a redistribution system affecting 160 000 asylum seekers arriving in Italy and Greece over a two-year period. The debate preceding the decision was unusually harsh despite the redistribution mechanism's limitation in both time and numbers. The implementation of the decision also caused trouble. Due to practical issues only 116 people were redistributed until the beginning of November 2015. Among the reasons were some Member States' continued unwillingness to accept the system but also the asylum seekers' opposition against losing even more autonomy when choosing country of destination. The CEAS kindles a fire and then calls on solidarity to extinguish it. The asylum and immigration acquis is too dysfunctional for a weak redistributive practice to offset. Are there policy options for the EU that might overcome this lockdown?

Reform options

The asylum crisis of 2015 and 2016 has fostered quite a debate on reformist solutions. The control of asylum seekers' ability to access European territories and the expansion of protection capacity were dominant themes in the panoply of proposals made. Let us first look at four proposals in which the control theme dominates:

- increased funding to refugees' region of origin,
- making asylum claimable only in regions of origin,
- directing additional resources towards migration control, and
- increasing resettlement.

I will test each proposal against three criteria:

- Legality: is the proposal implementable without violating international law?
- Acceptance among EU nationals: can the proposal receive enough support from EU nationals?
- Acceptance among migrants and asylum seekers: can the proposal affect migrants' and asylum seekers' behavior to the desired extent?

A proposal that is often resorted to is the increase of EU and Member State funding to the refugees' region of origin. At times this solution is linked, explicitly or implicitly, to demands for decreasing refugee reception in the EU and its Member States.

Syrian refugees may serve as an example to think this through. This proposal obviously does not meet any impediments in international law and my assessment is that EU nationals would support such an increase within certain limits. But the proposal fails in that it would not affect migrants' and asylum seekers' behavior. More than four million Syrian refugees are in the neighbouring areas (Turkey, Lebanon, Jordan, Iraq and Egypt). Before the inflow of 2015 around 124 000 Syrians had sought refuge in Europe making up four per cent of the total number of Syrians in flight. The EU and its Member States are already the second largest donor to refugee reception in Syria's neighbouring countries (3rpsyriacrisis.org, the webpage of the UNHCR and UNDP, continuously updates on economic needs and approved funding). Not even a substantial increase in economic support to the neighbouring countries would compensate for the flaws in the reception conditions caused by one fourth of a state's inhabitants being refugees (as is the case in Lebanon). The possibility of reaching the EU will continue to be more appealing than staying in a slightly upgraded camp.

It is also proposed from time to time that asylum in the EU should be claimable only from the region of origin. The aim is to take away the incentive to reach the EU. The UK Prime Minister Theresa May made this argument in October 2015 when she was Home Secretary. I

have previously demonstrated at length that this type of proposals is incompatible with international law (Noll, 2003). The point of this proposal is to deny asylum seekers reaching the territories of the European Union an assessment of their claim and point them back to the region of origin. However, the European Convention on Human Rights and other international legal instruments give such asylum seekers the right to have the risk of human rights violations upon return assessed in substance. If Member States were to deny that right and return an asylum seeker to regional processing centres, they would be in breach of the European Convention on Human Rights. From this follows that EU Member States cannot implement this proposal and continue to be members of the Council of Europe and the EU. Additionally, they would have to withdraw from certain international treaties. As soon as this becomes clear to EU citizens, opposition against such a proposal is likely to grow. Finally, migration to Europe would likely continue but result in a status as undocumented and not as refugee.

Could additional funds allocated towards migration control be a solution? Tougher migration control tends to increase the risk for human rights violations. It is no coincidence that the European Court of Human Rights has found the immigration control systems of Italy and Greece to be in violation of human rights obligations. Furthermore, experts agree that increasing control on one route means migration – including refugee migration – chooses another route. To control effectively all outer borders would demand an increasingly totalitarian practice of border monitoring and would, unacceptably to many EU-nationals, change the identity of the EU. Near draconic measures would be needed to change migrants' behaviour and my assessment is that the price paid by home affairs and foreign policy would be too high.

Instead, increasing resettlement offers itself as a fairly sympathetic idea. Resettlement means that a receiving country provides certain refugees who do not enjoy necessary protection in their region with entry and residence permits. Resettlement does not entail a legally claimable right: states have no legal obligation towards the individual to offer resettlement. Today about one in a thousand of the world's refugees receive protection in this way. Increasing resettlement would be compatible with international law and it would probably be supported by at least the northern and western parts of the EU. As resettlement is a form of plan economy characterized by much demand and little offer, refugees cannot be certain that their need for protection correlates to the probability of being chosen for resettlement. My assessment is that even a great increase in the number of resettled refugees

will not change asylum seekers' and refugees' behaviour. The reason is that resettlement systems are too unpredictable from their point of view.

Let us now leave the protectionist proposals and move on to two proposals that seek to open up access to Europe beyond the piecemeal engineering of resettlement. The first one is the abolition of visa requirements and carrier sanctions. These measures could be directed at certain nationalities which are deemed to have a general need for protection. It means that these nationals could travel legally to the EU and that carriers enabling their journey would no longer risk fines and economic liability. International law poses no obstacle to such proposals, but EU law and the Member States' domestic legal systems would need to be reformed. I do not believe that these two measures would gain a sufficient degree of support among EU nationals in the current climate. The reason is that they not only benefit refugees. All migrants of the nationality that benefits from waived visa demands and carrier sanctions could enter, not just those in need of protection. This might not seem as an issue for Syrians or other nationalities where protection needs can be assumed. But on closer thought it implies that persons having committed war crimes or crimes against humanity during the conflict in Syria could travel legally to the EU.

Lastly I would like to address the proposal of free migration which is occasionally raised in the debate. Obviously, free migration would face the same counterarguments as waiving visa demands and carrier sanctions. However, any further assessment would depend on what specific meaning the concept of 'free migration' is thought to have. It has different meanings depending on how freedom of migration is related to the existence of the nation state.

Maintaining the nation state and a capitalist economy while deregulating migration completely would move global income gaps into the nation state. This was the type of globalization we had in the nineteenth century, where migrants from peripheral European economies emigrated to the new world without twentieth century-style migration control barriers. Quite logically, while the twentieth century was characterized by the inequality between states as drivers of global inequality, the reverse was true for nineteenth century globalization (O'Rourke, 2001 p. 17). We may expect starker domestic income differences if movement were deregulated under conditions of capitalism. We should therefore expect a boost in authoritarian night-watchman features of the state in the form of surveillance and policing. A class of underprivileged migrants would risk being excluded from minimum rights and might come to live outside the social protection system we have today for the least privileged citizens and denizens. These changes would raise issues under international human rights law. It is unlikely that EU nationals, asylum seekers or refugees would find them

acceptable. If free migration were taken as a shorthand to achieve abolishment of the nation state and a new form of economic redistribution, that would be revolutionary. Then it would be pointless to apply international law criteria or consider the legitimacy of that measure on the basis of democratic processes taking place within the nation state that we are about to abolish. But are we capable of creating a more solidarity-based successor to the nation state? The less we trust in the system of refugee protection today the more we are confronted with this issue. And if we were to devise such a successor, is there a reformist proposal that might point the way? If there is, what ideological issues does it raise?

Humanitarian visas as the liberal test-case

Cosmopolitan liberal thought would seem to invite us to give reasonable leeway to migrants' preferences and seek to minimize constraints on them. Any attempts to foster a more equitable distribution of asylum seekers across the EU would need to take this into account, provided that it is ideologically liberal. This can take a very simple expression. Why do asylum seekers not remain in Greece or Italy where they entered the EU? 'Clearly good quality first reception is the key to equitable distribution of asylum seekers', Elspeth Guild wrote in 2015, referring to the poor conditions in Greek and Italian asylum reception systems (Guild, 2015).

Consequently distributing people is firstly about sharing norms; the rights of the asylum seekers have to be guaranteed in reality, not just in law, so that they de facto have more states to consider as potential protectors. Here remains a lot of work to be done. Even before the substantive increase of asylum seekers during 2015 and 2016 it was clear that the reception systems of many Member States displayed serious deficiencies. As Steven Peers pointed out, insufficient implementation of EU standards contributes to the emergence of crisis situations as the one in Calais (Peers 2015).

Guild's comment implies that we must take seriously the rationality and free will of the asylum seeker. If the level of rights protection reaches the prescribed legal standard all across the EU this will be known to future asylum seekers. These asylum seekers will then have less reason to try and reach certain states while avoiding others.

An ideology that keeps intrusions into personal liberty at a minimum level will entail further changes. In the next step, Member States would strive to set up a communication with potential asylum seekers much earlier in the migration process than what is the case today. Currently the diaspora, human smugglers and informal information sources influence the individual's choice of route and goal and shape the expectations of protection prospects.

Contact with the authorities is not initialized until late in the process – generally not until the asylum seeker has reached the country where she intends to seek asylum. By then it is too late to correct erroneous impressions that affected the initial choice of country of destination. A future system must provide an incentive for the asylum seeker to reach out to the authorities as early as possible. Then proper information about the chances to be granted asylum can be offered. Information from the diaspora, human smugglers and informal sources would no longer be the dominating factor in decision-making. The importance of the latter cannot be overestimated.

What can Member States do concretely to offer information early on? The established network of Member State embassies is the basic asset here. Persons who are considering leaving their region of origin to seek asylum in Europe should be given the opportunity to start the asylum procedure in an embassy. In case of a rejection in the embassy procedure the asylum seeker might realize that she should not invest a fortune and risk her health to travel irregularly to the territory of the embassy she has contacted. A positive *prima facie* decision, on the other hand, would come along with a humanitarian visa enabling the asylum seeker to pursue the remainder of the asylum procedure in the Member State of the embassy she has visited. In this way the asylum seeker can travel legally to the EU avoiding the perils of the Mediterranean and other smuggling routes. The resources that would have gone to smugglers can then be used in a better way.

A system of humanitarian visas would be a further step towards equitable distribution of asylum seekers. First, a fairly big number of contact points with the asylum process would be made available all over the world. Today geography and the smugglers' routes and resources decide what Member States the asylum seeker will come into contact with. Second, well-resourced Member States usually have more embassies than less resourced states. This in turn creates a proportional distribution. With this system it seems unlikely that for example the UK could continue benefitting from its geographic location and only receive four per cent of all asylum applications in the EU, as it did in the first quarter of 2015.

The point is not to abandon the territorial asylum system of today (that would be in contravention of international law). Rather, the humanitarian visa system would be a complement to it. Together with Jessica Fagerlund and Fabrice Liebaut I proposed a system based on humanitarian visas in a 2003 report to the European Commission (Noll et al., 2003). We had studied the practice of a number of Western states and found good examples which were almost unknown. Switzerland crystallized itself as having the most advanced system which was well-functioning during two decades with high rule of law ambitions. However, in

2001 Switzerland, Denmark and Spain abolished their systems instead of coordinating them. The reason was the increased influence of nationalist parties over asylum policies. It is worth considering whether the steps taken by these states were in the right direction for Europe. Newer research confirms our conclusion that there is a qualified legal obligation to protect asylum seekers at embassies. Sanderijn Duquet and Jan Wouters found in a 2015 article that this obligation also extends to the EU when an asylum seeker turns to its diplomatic missions, triggering a duty to protect asylum seekers in certain cases (Duquet and Wouters, 2015).

The finding of a thin international law obligation to grant a humanitarian visa was confirmed in the opinion of Advocate General Megozzi in the 2017 case C-638/16 (*X and X v Belgium*) before the CJEU. Nonetheless, the Court decided not to follow Megozzi's lead and held that granting a humanitarian visa was beyond the confines of EU law (CJEU 2017). Politically, this judgment is the death knell for the proposal for a comprehensive humanitarian visa regime under the auspices of the EU.

We may read this as an empirical test-case for the ideological preferences at work. The CJEU otherwise normally uses every opportunity to extend its own powers for the good of the integration project. In the *X. and X.* judgment, however, it chose to place the power over human rights with Member States alone, knowing full and well that Member States are unwilling to grant humanitarian visas to avert human rights violations. To the extent the EU is a liberal project, this shows that it is not a cosmopolitan one. Its market liberalism comes with a form of border control that the CJEU confirmed to be ostentatiously illiberal. There is no question of a gradual dismantling of protectionist remnants or the gradual reduction of Member States' powers. Going back to Hayek's 1939 text, this would imply that the federation is in continued need of its Member States as armed guards of market integration.

Conclusion

My analysis has shown that it is impossible to accomplish a more even distribution of asylum seekers using authoritarian measures to force sceptical asylum seekers to relocate. The restrictive proposals accounted for in an earlier section also appear problematic from a rights- and legitimacy-based perspective. A gradual worsening of the situation could be avoided if Member States devote to a package consisting of three parts:

- The Dublin Regulation must be abandoned and asylum seekers shall gradually be granted free movement within the EU. The Dublin system is poorly functioning and asylum seekers are already moving between Member States. To patch up Dublin by

adding a plan-economic redistribution system will add further complications, further violence and further attempts at circumvention.

- Rights protection must be strengthened in most EU Member States' reception systems. The cost for this is likely to be high and it is doubtful that the Southern European Member States can finance it on their own, with Greece being the most extreme example of a state with great needs and small resources. Other states must step in and funds must be redistributed at the EU level to a greater extent than today.
- Monitoring rights compliance must be intensified through domestic courts, the CJEU, international courts and supervisory agencies. Today certain states benefit from setting aside basic rights for some time, fully aware that they might get a slap on the wrist by a court – but only after a number of years. The message conveyed during this time is clear: this state implements a tough and restrictive approach.

All this could well be handled within the present structure without changes to the Treaties or a major change in EU policies. But is it likely to happen? Experience gained since the 1992 Maastricht Treaty shows that the reformist agenda is doomed to stay on the sidelines. At worst it legitimizes rights violations and interstate tensions caused by the disproportionate allocation of asylum seekers and refugees.

I have also explained how humanitarian visas might work to open up access to the Union for persons in need of international protection. The CJEU seems to have removed this option from the table for the time being, however. This might invite us to reflect on the type of liberalism undergirding the EU.

In the beginning of this chapter, Hayek acted as a prototypical liberal thinker launching the federation as a strategy to conquer the inherent protectionism of the nation state. It is clear that protectionism remains strong in the EU's approach to international mobility. We might use that fact to claim that the EU is not a liberal-federative project after all. Or we might use EU asylum and immigration policies as an invitation to inquire what its particular form of liberalism might be. The failure to address responsibility sharing and the Union's clinging to a border control regime with disastrous effects for both asylum seekers and host states suggests that we are not dealing with ordoliberalism, which seeks to offer an orderly legal frame for the forces of the market to unfold within. While post-2007 European Central Bank-interventions to maintain Member State solvency during the financial crisis might be explained in ordoliberal terms, post-2015 asylum and migration control policies were more a maintenance of chaos than a resurrection of order. Hayekian neoliberalism invites us to accept a larger dose of chaos, perhaps an infinitesimally larger one. A particular form of chaos, after all is a

prerequisite for the self-organizing cosmos of pricing by the market and is supposed to be minimally reined in with essential night-watchman tasks shared by state and federation. What we see in this policy area is the manifestation of the night-watchman. As we saw in the introductory section, the function of a night-watchman keeping non-white and non-European immigration at bay is well in line with von Mises' and Hayek's liberal thinking.

With such foundational structures, any reformist practice will remain marginal. This is why I believe that it is most urgent to discuss what democracy really is in a world where people migrating is the new normal. After all, I am a jurist for a reason. When the law leads to people drowning I must be prepared to reevaluate the law and seek a new content for it. I also support democracy for a reason. When democracy is claimed to need a deadly policy to survive I have to be prepared to seek a new form for democracy.

Notes

¹ The definition of piracy in article 100 of the 1982 United Nations Convention on the Law of the Sea (UNCLOS) contains a requirement of violence, detention or depredation, which will regularly not be met in cases where migrants consent to being transported. The term 'piracy' might cover qualified cases of trafficking, but it is not applicable where migrants are smuggled rather than trafficked.

² Hayek's treatment of colonial possessions might offer some guidance as to how the relation to less powerful entities beyond the member states of the federation should be considered: 'the question (...) whether colonies ought to be administered by the states or by the federation, would be of comparatively minor importance. With a real open-door politics for all members of the federation, the economic advantages derived from the possession of colonies, whether the colonies were administered federally or nationally, would be the same to all the members of the federation. But, in general, it would undoubtedly be preferable that their administration should be a federal and not a state matter.' (Hayek 1949, p. 269). Economic advantages drawn from colonial possessions would be automatically rendered mobile through the forces of the federation's single market. Put otherwise, they would be federalizing themselves. Hayek does not consider the costs of maintaining colonies, e.g. by allocating military or other resources to them. Yet Hayek must undoubtedly have been aware of these costs. Why, then, would he suggest administering them at the federal level? Would he have thought this to be part of the minimal package of federal duties? If so, why? Would it not be more in line with a Hayekian logic to see them as cause for taxation and redistribution, hence to be maintained at member state level, if only to make them part of the competition amongst states seeking to attract resourceful market actors?

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