



Governing Irregular Migration and Asylum at the Borders of Europe: Between Efficiency and Protection

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1. Introduction

Irregular migration control has been a long standing concern for the European Union, since the adoption of the Tampere Agreement in 1999 and reaffirmed in the Stockholm Programme for the EU area of freedom, security and justice. Since 1999 the EU has consistently attempted to form policies and measures that in one way or another manage and effectively govern mobility towards and within the European Union. Yet, events of the last five years have breathed a new air of urgency into the EU regarding the “management” or governance of irregular migration and asylum. The acute eurozone crisis, limited job opportunities for migrant workers in both the formal and informal labour

This paper investigates recent developments in EU policy on controlling irregular migration and managing asylum at the EU’s southern borders. The paper focuses on the (im) balancing act between efficiency and protection in EU policies. Beginning by expounding the notion of governance of irregular migration and asylum, we turn to critically discuss current European border control practices with a focus on the agencies and policies in place (including the Common European Asylum System). The paper concludes by showing how the EU’s balancing act between irregular migration control and asylum management tips clearly towards the former even if it pays lip service to the latter as well as to the need of preventing the loss of human life.

ABSTRACT

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market across EU member states¹ and what has been perceived as continuous irregular flows reaching southern European shores have intensified an inherent dilemma in EU policies: the responsibility to protect “our” public order and security while respecting human rights. On 3 October 2013, a boat sank off the coast of Lampedusa costing the lives of 360 migrants in what was considered to be one of the worst tragedies in the Mediterranean Sea in recent years.

The response, however, of European leaders showed that the balance between international obligations for protection and policies of “deterrence” has yet to be achieved. Following the JHA Council of 7-8 of October 2013, European leaders proceeded to set up Task Force Mediterranean. The October European Council stated that a “determined action should be taken in order to prevent the loss of lives at sea and to avoid that such human tragedies happen again.”² Nonetheless, the Task Force merely reinforced the existing EU migration management approach by outlining five areas of pre-existing action: cooperation with third countries, regional protection, fighting against smuggling and trafficking, reinforced border surveillance, and assistance to and solidarity with the member states facing the most pressure. The Task Force essentially looked to the Global Approach to Migration and Mobility (GAMM) and the European Neighbourhood Policy (ENP), as well as Home Affairs agencies like the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and the European Asylum Support Office (EASO) in outlining recommendations that “walk the line” between deterrence of migration from the country of origin and/or transit and maintaining the right of access to international protection for people at its borders.

Simultaneously, the event in Lampedusa pushed forth the activation of the European border surveillance system initiative (Eurosur) in December 2013. Eurosur is hailed as the “system of systems” that will prevent migrant deaths in the Mediterranean, “coupling [...]

¹ Anna Triandafyllidou, “Disentangling the Migration and Asylum Knot. Dealing with Crisis Situations and Avoiding Detention”, in *EUI RSCAS Policy Papers*, No. 2013/19 (October 2013), <http://hdl.handle.net/1814/28379>.

² European Council, *Conclusions of the European Council 24-25 October 2013* (EUCO 169/13), 25 October 2013, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/139197.pdf. See also European Commission, *On the work of the Task Force Mediterranean* (COM(2013)869), 4 December 2013, p. 2, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52013DC0869>.

digital bordering practices with surveillance of geographical borders.”³ However, a quick look at its operational capabilities shows that protection is essentially achieved by monitoring known departure points for irregular migration and hubs of transit through the detection and tracking of small boats and the construction of a real-time situational picture in the Mediterranean. Thus, the focus remains at the border and on deterrence at a time of increased political instability and civil war in North Africa and the Middle East (e.g. the Arab Spring, Syria), as well as continuing political unrest and ethnic conflict in several parts of Asia (e.g. Afghanistan) and Africa (e.g. Sudan, Somalia).

Lampedusa was sadly only one of the recent events resulting in migrant deaths. Just as Greece took over the EU presidency in January 2014, a boat carrying twenty six Afghans and two Syrians capsized off the coast of Greece, near the island of Farmakonisi, while being towed by the Greek Coast Guard, which resulted in two deaths and ten missing persons. It is an inherent contradiction of liberal democratic states that they attempt to restrict entry of unwanted migrants while trying to respect human rights and civil liberties.⁴ The physical barriers erected at borders restrict entry to those pre-deemed as unwanted but also reduce the opportunity for protection for those in need, often resulting in loss of life as evident from the aforementioned examples.

It is this governance of response to irregular migration and asylum, and the imbalance between efficiency and protection, that the paper will focus on. The following section offers an overview of the size of irregular migration and asylum seeking in the European Union, aiming to assess the magnitude of the perceived emergency and put it into its current geopolitical context. Section three expounds the notion of governance of irregular migration and asylum looking at how it is embedded in security discourses and practices that are however particularly complex within a transnational political regime such as the EU. In sections four, five and six, we turn to critically discuss current European border control practices with a focus on the agencies and policies in place, while section seven concentrates on the Common European Asylum System through which the governance

³ Julien Jeandesboz, “Beyond the Tartar Steppe: EUROSUR and the Ethics of European Border Control Practices”, in J. Peter Burgess and Serge Gutwirth (eds.), *A Threat Against Europe? Security, Migration and Integration*, Brussels, VUB Press, 2011, p. 111.

⁴ Christian Joppke, “Why Liberal States Accept Unwanted Immigration”, in *World Politics*, Vol. 50, No. 2 (January 1998), p. 266-293.

of asylum takes place, with a particular focus on the contradiction between detention of asylum seekers. The aim is to show how the European migration and asylum regime at the EU's external borders tends to bundle together asylum seekers and irregular migrants eventually deterring and putting at risk both. The concluding section discusses how the implementation of EU border control eventually comes at the expense of proper asylum management; deterring unauthorised entry becomes the buzzword while international protection falls through the cracks of a securitisation discourse and practice.

2. Irregular Migration and Asylum Challenges

The total population of the EU28 stood at 505.7 million in 2013.⁵ In 2012, the EU27 received a little less than 1.2 million immigrants each year, while at the same time a total of 0.6-0.7 million of non-EU citizens have left the EU annually.⁶ This has resulted in a net immigration rate of approximately 0.75 million in 2009 and in 2010, of 0.66 million in 2011, and of just over 0.5 million in 2012. These numbers do not include the total migration movements to, from and within the EU, as a large part of migration takes place between EU countries, but they give a sense to the total size of in- and out- flows. The three largest origin countries for non-EU nationals residing in the EU in 2012 were Turkey (approximately 2 million people), Morocco (1.4 million) and China (0.7 million). On 1 January 2013, the third country nationals living in the EU28 stood at 20.4 million representing 4% of the total EU27 population.

While there are no statistics concerning the irregular migrant population residing in the EU (as the phenomenon by its very nature eludes any form of formal registration), the independent research project CLANDESTINO produced in 2008 a scientifically rigorous calculation estimating irregular migrant residents in the EU27 to be between 1.9 and 3.8 million in a total of the then approximately 498 million inhabitants in the EU, i.e. below 1% of the total population.⁷ The CLANDESTINO project has shown that irregular migration is

⁵ Eurostat, *Population on 1 January 2013*, <http://epp.eurostat.ec.europa.eu/tgm/table.do?language=en&p-code=tps00001>.

⁶ Eurostat, *Immigration in the EU*, April 2014, http://ec.europa.eu/dgs/home-affairs/e-library/multimedia/infographics/index_en.htm#0801262489e0e61e/c_.

⁷ Dita Vogel, "Size and Development of Irregular Migration to the EU", in *CLANDESTINO Comparative Policy*

lower than previously “guesstimated” particularly in the EU15, and has decreased in the period between 2002 and 2008 by an estimated 32%. This decrease has been partly due to the enlargement of the EU to the east and thus the conversion of previously undocumented immigrants from the Central Eastern European countries to EU citizens. However, it was also related to large regularisation programs that took place in several countries particularly in southern Europe as well as to increased border enforcement at the southern and eastern borders of the EU. Although we do not dispose of more recent scientific estimates of the size of irregular migration in the EU, we need to note that the last two years, notably since the Arab spring in 2011, have witnessed an upsurge in arrivals of both irregular migrants and asylum seekers. Nevertheless the large numbers of temporarily displaced persons in North Africa and the Middle East have been directed to the neighbouring countries within the region rather than reaching to European shores.

The continuation of political instability and conflict in the Middle East and North Africa has resulted in mixed flow arrivals, comprised of asylum seekers and irregular migrants and potentially also victims of trafficking as well as unaccompanied minors. “Between 2008 and 2012, France, Germany, Sweden, the UK and Italy were the top-five EU countries for receiving asylum applications in the EU. [On the other hand], it was Malta, Sweden, Cyprus, Luxembourg, Belgium, Austria and Greece that received the highest number of asylum seekers compared to their population.”⁸ Greece specifically, which has attracted a lot of negative attention in recent years due to its failing asylum system, ranked 10th, with a total of 9,500 applicants. According to a Euromed III Project paper

Following the Tunisian revolution in December 2010-January 2011, in addition to the revolution in Libya beginning in February 2011, the number of irregular migrants leaving to Europe from Tunisia increased substantially. It has been estimated that 56,000 persons arrived in Italy in 2011, 28,000 of whom were Tunisian. However, of the estimated one million who fled Libya, only 25,000 of these reached Europe, the majority going to Tunisia, Egypt, Niger, Algeria, Chad and Sudan. [...] The Syrian crisis has also generated large population movements in the region, with over a million

Briefs, 2009, p. 4, <http://clandestino.eliamep.gr/comparative-policy-briefs>.

⁸ Georgia Mavrodi, “EU asylum policy must be fairer for those in need and must distribute burdens more equally among member states”, in *EUROPP Blog*, 19 November 2013, <http://bit.ly/IdnQDm>.

people fleeing to neighbouring Jordan, Lebanon, Turkey and Iraq since March 2011.⁹

Yet the latest figures of the UNHCR tell a different tale of arrival to Europe, with only 76,373 new asylum applications submitted from April 2011 until 2013 in the EU28. In other words, only 4% of those fleeing Syria today seek safety in the EU. Once more, the main destinations are Germany and Sweden, with Bulgaria for the first time ranking third among the asylum seeker-receiving member states in terms of the number of asylum claims.¹⁰

Asylum is a common concern for both northern and southern European countries. Southern countries are exposed to pressures at their borders because of their geographical proximity to zones of instability and conflict. Northern European countries have traditionally been the preferred destinations of asylum seekers from all over the world. Thus, both groups of countries have a common concern to share this burden although they look at the problem from different perspectives: southern European countries face simultaneously the pressure of irregular migration and asylum seeking and have to find ways to effectively filter applications. Northern European countries are more “protected” from irregular migration because of their geographical position and hence face mostly the problem of processing applications rather than that of filtering them at their borders.¹¹

Because of the nature of the flows, fencing and preventive strategies affect irregular migrants and asylum seekers equally. Thus, the management of irregular migration directly impacts asylum seekers attempting to cross the border. Differentiation in policies only exists for those lucky few who succeed in crossing and seek protection. Even then, the governance of irregular arrivals, whether asylum seekers or economic migrants, utilises a series of instruments and tools that often converge and feed-off each other, resulting in a convoluted mix of policies that strive to strike a balance between efficiency and protection.

⁹ Euromed III Project, *The management of mixed migration flows in the last decade: lessons learnt and option for the future*, Background Paper for the Irregular Migration First Peer-to-Peer Meeting, Budapest, 28-29 May 2013, p. 9-10, http://www.euromed-migration.eu/uploads/tx_euromedhelper/130528_IR_Budapest_strategic_overview_EN_01.pdf.

¹⁰ All data from UNHCR, *Asylum Applications of Syrians in Europe: Key Facts and Figures*, 21 February 2014, https://www.unhcr.gr/fileadmin/Greece/News/2014/Syria/Syrians_asylum_applications_EU_EN.pdf.

¹¹ Anna Triandafyllidou, “Disentangling the Migration and Asylum Knot...”, cit., p. 1.

3. The Governance of Irregular Migration

The study of migration governance is to a large extent a critical examination of programs, discourses, technologies and interventions “which do not simply respond to something already there, but instead operate as an active and constitutive force which shapes the social world in particular ways with particular political consequences.”¹²

Irregular migration as a phenomenon has led to the emergence of actors and agencies not seeking merely to react but fundamentally to manage migration. Thus, governance takes place through the introduction of a series of actors and policies that implement - or attempt to - the management of irregular migration.

The EU’s common policy on irregular migration and asylum is at its core an effort to manage certain forms of mobility and, by extension, those who partake in them. Stemming from the notion that human mobility can be “controlled,” the management of irregular migration is a way for states to maintain control of their internal security but also to maintain their regulatory power.¹³ As Cassarino notes in his study on readmission policy in the EU,

beyond their conflicting sovereign interests, countries of origin, transit, and destination share a common objective in the migration management agenda: introducing regulatory mechanisms buttressing their position as legitimate managers of the mobility of their nationals and foreigners.¹⁴

The governance is not limited to irregular migration. Rather, it extends to asylum and the area of legal migration and labour migration policy for third country nationals. Nonethe-

¹² William Walters, “Imagined Migration World: The European Union’s Anti-Illegal Immigration Discourse”, in Martin Geiger and Antoine Pécoud (eds.), *The Politics of International Migration Management. Migration, Minorities and Citizenship*, Basingstoke and New York, Palgrave Macmillan, 2010, p. 73, <http://williamwalters.net/wp-content/uploads/2012/06/2010-Imagined-Migration-World.pdf>.

¹³ Jan Schneider, “Practical measures for reducing irregular migration”, in *Federal Office for Migration and Refugees (BAMF) Working Papers*, No. 41 (2012), <http://www.bamf.de/SharedDocs/Anlagen/EN/Publikationen/EMN/Nationale-Studien-WorkingPaper/emn-wp41-irregular-migration.html>.

¹⁴ Jean-Pierre Cassarino, *Readmission Policy in the European Union*, Brussels, European Parliament, 2010, p. 38, <http://cadmus.eui.eu/handle/1814/14957>.

less, political and institutional developments have been much more directed towards the management of irregular migration and asylum and less towards paving pathways for legal migration.

To an extent, this disproportionate focus is also the result of irregular migration deeply integrating the security discourse. What has become known as the securitisation¹⁵ of migration has broader political implications since the state, by determining who is a “threat”, shapes the political debate in terms of threat and survival.¹⁶ Not all actors can securitise an issue effectively, since institutional and political authority is required. In the EU context, securitisation is no longer limited to individual member states, though it can be argued that member states have different perceptions of the “migration threat” depending on their experiences.

Overall, however, securitisation has become embedded in the language and agencies of the EU’s Area of Freedom, Security and Justice (AFSJ), with direct and indirect implications for third country nationals and asylum seekers. Though the securitisation of migration is often seen as a by-product of the post-September 11 world,¹⁷ the same cannot be argued for the desire to manage migration and the emergence of a governance structure of irregular migration and asylum. In fact, we could trace the onset of the common policy on irregular migration, which began before the set-up of formal institutions of the European Union, in intergovernmental fora like Trevi and the Schengen group.¹⁸ The intent to

¹⁵ Bigo points out that the securitization of migration is to a large extent the result of the quest of internal security agencies (national police forces, border guards, customs etc) to find their internal enemies beyond the borders, in what have been terms networks of crime (migrants, asylum seekers, diasporas etc). Didier Bigo, “When two become one: internal and external securitisations in Europe”, in Morten Kelstrup and Michael C. Williams (eds.), *International Relations Theory and the Politics of European Integration. Power, Security and Community*, London, Routledge, 2000, p. 171.

¹⁶ Jef Huysmans, “International Politics of Insecurity: Normativity, Inwardness and the Exception”, in *Security Dialogue*, Vol. 37, No. 1 (March 2006), p. 11-29.

¹⁷ Carl Levy, “The European Union after 9/11: The Demise of a Liberal Democratic Asylum Regime?”, in *Government and Opposition*, Vol. 40, No. 1 (Winter 2005), p. 26-59, <https://www.gold.ac.uk/media/1.%20govtandoppLevy.pdf>; Andrew W. Neal, “Securitization and Risk at the EU Border: The Origins of FRONTEX”, in *Journal of Common Market Studies*, Vol. 47, No. 2 (March 2009), p. 333-356.

¹⁸ Jef Huysmans, “The European Union and the Securitization of Migration”, in *Journal of Common Market Studies*, Vol. 38, No. 5 (December 2000), p. 755, <http://dx.doi.org/10.1111/1468-5965.00263>. See also William Walters, “Imagined Migration World...”, cit.

“manage” was integrated in the early negotiations on Schengen cooperation, which required common procedures on border control and surveillance to ensure free mobility within a specific territorial space. The management of irregular migration was from the early days seen as the counterweight to free internal movement within the Schengen area.¹⁹

There are some obvious, however, problems with attempting to govern irregular migration via a transnational political regime, such as the EU. Setting aside the obvious challenge of physically controlling the Schengen borders (8,000 km of external land borders and 43,000 km of sea borders), the main difficulty arises from the fact that member states are unequal both in terms of the volume of irregular migrants and asylum seekers they receive and actual capacity but also in terms of political will to deal with the issue. The Nordic countries are physically far removed from the issue of irregular arrivals and especially maritime arrivals, in contrast to Europe’s southern borders. Southern countries, on the other hand, tend to receive a significantly lesser share of asylum applicants than their northern European partners.

Taking these imbalances into consideration, the EU moved to set up a Common European Asylum System and common immigration policies, with the aim of eventually transforming the Schengen area into a common asylum and migration space and resolving the aforementioned issues. This has yet to be fully implemented. Instead, freedom of movement has acquired a new security dimension “intimately linked to the construction of an EU citizenship and to the flow of migrants, both within and from outside the EU.”²⁰ This paradox is further integrated in the Lisbon treaty (Article 67) which states that the Union’s common policy on asylum, migration and border controls has to be “fair” towards third country nationals, thereby tying EU policies to third countries and countries of transit and

¹⁹ Walters points out that the EU’s irregular migration policy was legitimised not only on the basis that it would mitigate unauthorised entry and residence but that it would complement the “European framework for the wider governance of all forms of migratory movement”. William Walters, “Imagined Migration World...”, cit., p. 76.

²⁰ Sarah Wolff, “EU Integrated Border Management beyond Lisbon: contrasting policies and practice”, in Ricard Zapata-Barrero (ed.), *Shaping the normative contours of the European Union: a migration-border framework*, Barcelona, Barcelona Centre for International Affairs (CIDOB), 2010, p. 24, http://www.cidob.org/en/content/download/24457/278620/file/m_shaping_normative.pdf.

origin.²¹

Thus, the governance of irregular migration and asylum today extends across three “spaces” of control: the third countries, via the policy of externalisation of border controls and GAMM,²² the external border itself and its governance via Home Affairs agencies like Frontex and EASO; and thirdly within the Schengen area, where abolition of internal controls is counterbalanced with border surveillance of risk groups. All three spaces form part of the Commission’s strategy to manage irregular migration and asylum and govern - for the purpose of ensuring the safety of the population - the EU and its associate countries.

In the following sections, we will look at each space of control and attempt to outline the elements that make up the management of irregular migration and asylum, and thus the reality of the EU’s governance.

4. The First Space of Control: Externalising the Border

The overarching framework for the EU external migration policy is the Global Approach on Migration and Mobility (GAMM) that foresees Mobility Partnerships²³ within the framework of “Dialogues for Migration and Mobility.” According to Carrera et al. “the GAMM was reframed around new Migration and Mobility Dialogues” that differentiate between those countries interested in committing to the EU’s external policies (who will be offered Mobility Partnerships) and those who are unwilling or not ready, with whom “softer forms of cooperation” will be set up, including information exchange and capacity building meas-

²¹ The Lisbon Treaty introduced a series of significant changes in the field of migration and asylum, with the most important being that the majority of border control policies are now governed by “ordinary legislative procedure”, which means that they will have to be co-decided by the Council and the European Parliament.

²² The Global Approach to Migration and Mobility (GAMM) “continued to serve as the overarching framework of the EU’s external migration and asylum policy. The role of the common visa policy to spur growth in the EU has also been in focus since 2012.” European Commission, *4th Annual Report on Immigration and Asylum 2012* (COM(2013)422), 17 June 2013, <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52013DC0422>.

²³ The EU has so far signed Mobility partnerships with Armenia, Cape Verde, Georgia and Moldova and recently with Azerbaijan, Tunisia and Morocco.

ures.²⁴ The GAMM in essence complements EU foreign policy in the field of migration and mobility, by pushing beyond the EU territory - onto third countries - the interests of member states in the areas of border control and human rights (among other issues).

The delegation of migration management to third countries is achieved mainly through partnership and readmission agreements (signed bilaterally between member states or with the EU and third countries). It particularly develops in the context of the European Neighbourhood Policy (ENP). The ENP to the east includes Ukraine, Belarus and Moldova and further east Georgia and Azerbaijan, and to the south the region between Morocco and Syria. The ENP, in relation to migration and border control, involves everything but institution building and is essentially based on the idea that “good neighbours make good fences.”²⁵ Partnerships with countries of origin figured prominently in the Hague (2004) and Stockholm (2008) Home Affairs programmes concerning migration and asylum management. Readmission agreements are an essential part of these partnership agreements, as they enable the peripheral EU member states to return illegally entering/staying third country nationals to their countries of origin or transit. It is an instrument of externalisation, an essential aspect of EU policy on the management of irregular migration.

Externalisation first appears as a policy in the Tampere Council conclusions (1999) and was reiterated in the Seville Council Conclusions (2002), which stated that future cooperation agreements with third countries should include a clause on “joint management of migration flows and on compulsory readmission in the event of illegal immigration.”²⁶ The joint management of migration flows has since been one of the main pillars of partnerships with third countries and has become the focus of various working groups and projects (e.g. Mediterranean Transit Dialogue, EUROMED I, II and III). The UN Special Rapporteur in 2013 noted that there is an increasing trend to ensure that border control no longer takes place at the physical borders of the EU, which he referred to as the “externalization”

²⁴ Sergio Carrera, Leonhard den Hertog and Joanna Parkin, “EU Migration Policy in the wake of the Arab Spring. What prospects for EU-Southern Mediterranean Relations?”, in *MEDPRO Technical Papers*, No. 15 (August 2012), p. 10, <http://www.ceps.eu/node/7215>.

²⁵ Anna Triandafyllidou and Angeliki Dimitriadi, “Migration management at the Outposts of the EU: the case of Italy and Greece’s Borders”, in *Griffith Law Review*, Vol. 22 (2013), forthcoming.

²⁶ Council of the European Union, *Presidency Conclusions*, Seville, 21-22 June 2002, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/72638.pdf.

of border control.²⁷ By extending control beyond the physical border, the EU shifts the responsibility of preventing irregular migration into Europe to countries of departure or transit, especially through capacity-building activities in third countries that work towards stopping irregular migration.

Readmission agreements are a second tool of externalisation. More aligned with the broader policy framework of migration as a security concern, readmission has become part and parcel of the immigration control systems consolidated by countries of origin, transit, and destination. Technically an administrative procedure, in reality it is both a domestic and foreign affairs issue since it requires cooperation with the country of return. Similar to a stick and carrot, partnership and implementation of a readmission agreement or clause (inserted in partnership agreements) can lead to development aid or even trade relations, short term visa schemes or visa-free travel for citizens of third countries assisting with the management of irregular migration.²⁸ Readmission, a form of return, applies for rejected asylum seekers as well as irregular migrants. This reinforces the link between asylum and irregular migration, by adopting a policy of return that effectively equates those whose asylum claim has been rejected with those who opted out of the asylum process and were “labeled” irregular migrants. However by linking, cooperation on the management of irregular migration with aid, attention is diverted from the process of wider reform in the respective countries.

Additionally and even more alarmingly, there is an inherent contradiction in attempting to engage third states in readmission agreements (often undemocratic) while simultaneously ensuring that they comply with human rights and fundamental rights.²⁹ This contradiction underscores most of the Home Affairs policies. On the official website of the Home Affairs it is stated that “A humane and effective return policy - in line with the Charter of

²⁷ Office of the High Commissioner for Human Rights (OHCHR), *EU border management: protecting the rights of migrants*, 22 July 2013, <http://www.ohchr.org/EN/NewsEvents/Pages/ProtectingRightsOfMigrants.aspx>.

²⁸ Anna Triandafyllidou and Maria Ilies, “EU irregular migration policies”, in Anna Triandafyllidou (ed.), *Irregular Migration in Europe. Myths and Realities*, Farnham and Burlington, Ashgate, 2010, p. 23-40; Sergio Carrera, Leonhard den Hertog and Joanna Parkin, “EU Migration Policy in the wake of the Arab Spring...”, cit.

²⁹ Philippe Fargues and Christine Fandrich, “Migration after the Arab Spring”, in *MPC Research Reports*, No. 2012/09 (June 2012), <http://hdl.handle.net/1814/23504>.

Fundamental Rights and based on the principle of giving preference to voluntary return - is essential to a comprehensive and sustainable migration policy.”³⁰ However, member states have at times proceeded with bilateral agreements that incorporate readmission clauses with little accountability in terms of human rights, like Italy with Libya during the Gaddafi government or Spain with Morocco.

5. The Second Level of Control: Agencies and Systems at the External Border

It can be argued that the governance of such a demarcated space, from the north to the south and the east to the west, in fact requires the management of a much broader and more fluid space which emerges; one watched over physically through border patrols and agencies like Frontex, but also digitally through surveillance and biometric technologies.³¹ The necessity of a common policy on external border control, has been integrated into the Treaty on the Functioning of the European Union (TFEU), in Article 67, making operational cooperation a key component in ensuring the Union’s “safety,” whereby the Union is defined and approached as a demarcated space. Furthermore, access to this space is managed and often curtailed by a series of instruments and tools that are focused more on efficiently curbing arrivals and less on ensuring access to protection. Nowhere is this more evident than at the external borders of the Union, which receive the brunt of irregular maritime and land arrivals. The “protection” and management of the external border falls within the scope of EU border management policy and what is known as Integrated Border Management (IBM).

Like much of the EU’s policy on the management of irregular migration and asylum, IBM is not new.³² It initially appears in 2002 in a Commission’s communication and is described as a way of guaranteeing “a high level of security within the European Union after enlarge-

³⁰ See the European Commission DG Home Affairs webpage on Irregular immigration, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/immigration/irregular-immigration/index_en.htm.

³¹ Didier Bigo and Julien Jeandesboz, “Border Security, Technology and the Stockholm Programme”, in *INEX Policy Briefs*, No. 3 (November 2009), <http://www.ceps.eu/node/2669>.

³² Julien Jeandesboz, “Beyond the Tartar Steppe...”, cit.

ment.³³ It incorporates the externalisation policies mentioned above, physical fencing and guarding of the border and the development of Information Communication Technologies (ICT) for mobility governance, enabling remote control (and thus linking with the expansion of the border). In terms of ICT, EU border management includes the Visa Information System (VIS) for third country nationals, the Schengen Information System (SIS III), Eurodac (EU-wide fingerprint identification system) and since December 2013 the European External Border Surveillance System (Eurosur).³⁴ Control, remote or local, takes place through national border guards and a proliferation of agencies like Frontex, and recently the newly set up agency EU-Lisa.³⁵ It should be noted that since arrivals, especially those via land and sea, are first received as irregular and then can be screened and categorised as asylum seekers, by default IBM ends up affecting (and targeting) asylum seekers as well as irregular migrants.

Frontex is the most visible face of the EU's Area of Freedom Security and Justice (AFSJ). Established in 2004, the agency has had from the beginning an explicit mandate to assist in the application of existing and future measures regarding the management and surveillance of the external borders as well as coordinate operational cooperation in the field of management of external borders.³⁶ Starting with the coordination of Joint Operations (JOs),³⁷ it developed and deployed Rapid Border Intervention Teams³⁸ (RABIT) and saw its operational powers reinforced in 2011 with further powers granted in the coordination of JOs and the deployment of European border guards.³⁹ Additionally, it has expanded its influence by participating in Mobility Partnerships, wherein third countries now have to

³³ European Commission, *Towards integrated management of the external borders of the Member States of the European Union* (COM(2002)233), 7 May 2002, p. 4, <http://eur-lex.europa.eu/legal-content/en/TX-T/?uri=celex:52002DC0233>.

³⁴ See also Anna Triandafyllidou and Maria Ilies, "EU irregular migration policies", cit.; Anna Triandafyllidou and Angeliki Dimitriadi, "Migration management at the Outposts of the EU...", cit.

³⁵ An EU Agency for the operation management of large-scale IT systems, LISA began on 1 December 2012 and is responsible for the operational management of SIS II, VIS and EURODAC.

³⁶ See the so-called "Frontex Regulation": Regulation (EC) No 2007/2004 of 26 October 2004.

³⁷ Operation Hera in the Canary Islands, Hermes in Italy, Poseidon in Greece.

³⁸ RABIT was for the first time deployed in the Greek Turkish land border, in 2010. See Sergio Carrera and Elspeth Guild, "Joint Operation RABIT 2010: FRONTEX Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe's Dublin Asylum System", in *Liberty and Security in Europe Papers*, No. 34 (November 2010), <http://www.ceps.eu/node/3920>.

³⁹ See the amended "Frontex Regulation": Regulation (EU) No 1168/2011 of 25 October 2011.

sign working agreements with Frontex⁴⁰ and conduct joint surveillance exercises outside EU borders (e.g. with Mauritanian authorities⁴¹). In the amended regulation Frontex has the authority to launch assistance projects in third states and exchange liaison officers.⁴²

Interestingly, though Frontex's mandate is directly linked with irregular migration and trafficking, it has a direct impact on asylum seekers through its Joint Operations and interception missions. Though a humanitarian argument is at the forefront, whereby migrants are saved by being intercepted⁴³ and essentially prevented from crossing into EU's territorial waters, this ignores the fact that the person might very well be trying to apply for asylum. By preventing his/her exit, we are simultaneously eliminating his/her right to access the asylum procedure - the very right the EU is claiming to uphold and protect. This tips the balance away from protection.

Additionally, Frontex's continuously expanding mandate and influence raise questions about the balance between efficiency and protection but also accountability. Frontex publishes very little information about ongoing and past operations and its arrangements with third countries are not disclosed and thus not available to the public. Following criticism from the European Ombudsman, NGOs and the UNHCR on allegations concerning the Agency's cooperation with Libya (part of the Italian-Libya partnership) and especially the situation at the Greek-Turkish land border in the detention facilities,⁴⁴ Frontex appoint-

⁴⁰ Sergio Carrera, Leonhard den Hertog and Joanna Parkin, "EU Migration Policy in the wake of the Arab Spring...", cit.

⁴¹ Sergio Carrera, "Frontex and the EU's Integrated Border Management Strategy", in Juliet Lodge (ed.), *Are You Who You Say You Are? The EU and Biometric Borders*, Nijmegen, Wolf Legal Publishers, 2007, p. 67-100.

⁴² The EU has already done something similar in Libya. On 22 May 2013, the Council of the European Union gave the green light for EU Border Assistance Mission (EUBAM) in Libya. EUBAM Libya's initial mandate is for two years, with an annual budget around 30 million euros. The purpose is to support the Libyan authorities in developing border management and security at the country's land, sea and air borders.

⁴³ Nina Perkowski, "A normative assessment of the aims and practices of the European border management agency Frontex", in *RSC Working Paper Series*, No. 81 (April 2012), <http://www.rsc.ox.ac.uk/publications/a-normative-assessment-of-the-aims-and-practices-of-the-european-border-management-agency-frontex>.

⁴⁴ Human Rights Watch, *Greece: End Inhumane Detention Conditions for Migrants*, 6 December 2010, <http://www.hrw.org/news/2010/12/06/greece-end-inhumane-detention-conditions-migrants>; Human Rights Watch, *Unwelcome Guests. Greek Police Abuses of Migrants in Athens*, June 2013, <http://www.hrw.org/node/116082>.

ed a Fundamental Rights Officer in 2012 and established a Consultative Forum on Fundamental Rights. In instances where breaches of fundamental rights are alleged, Frontex can resort to a number of measures ranging from voicing its concern to relevant member states, to reporting to the European Commission to even temporarily suspend or terminate the joint operation or the pilot project.⁴⁵ Interestingly, Frontex defines “humanity” as a fundamental facet of its work and according to Perkowski this is increasingly evident also in its official communications and language.⁴⁶ Yet, the lack of transparency and external evaluation of Frontex’s operations means that there is little information on whether fundamental rights have been incorporated into the Agency’s practices or only in its rhetoric.⁴⁷

Part of Frontex’s operations, and also the flagship of the EU’s ICT management of irregular migration and asylum, is Eurosur.⁴⁸ Its eventual purpose is to bring together maritime surveillance systems of the EU member states (and eventually air surveillance) into a common cross-border information sharing and analysis system. Eurosur is significant in three ways. First, it will open up the Union’s southern maritime borders to generalised surveillance that will extend beyond well-defined borders and territory. Secondly, if successful it will connect surveillance systems with identification systems, police and military control systems (like the Spanish SIVE⁴⁹). Thirdly, if implemented fully, it will construct a pre-frontier picture under the aegis of Frontex, with information available eventually in near-real time.

Obviously, all of the above depend on the level of success of the first phase, cooperation between member states and available funding. We should also take into consideration that various actors and agencies come into play at Eurosur from the defence and securi-

⁴⁵ Amnesty International, *Frontier Europe: Human Rights abuses on Greece’s border with Turkey*, 19 July 2013, <http://www.amnesty.org/en/library/info/EUR25/008/2013/en>.

⁴⁶ Nina Perkowski, “A normative assessment of the aims and practices of the European border management agency Frontex”, cit.

⁴⁷ For example, in June 2010 the European Parliament called on the Member States that deport migrants to Libya in cooperation with Frontex (referring primarily to Italy) to cease returns immediately since they had not had the guarantee that their safety and human rights would be respected and protected. European Parliament, *Resolution on executions in Libya* (P7_TA(2010)0246), 17 June 2010, <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0246&language=EN>.

⁴⁸ Regulation (EU) No 1052/2013 of 22 October 2013.

⁴⁹ Sistema Integrado de Vigilancia Exterior, system of electronic surveillance that will be integrated with Eurosur. See Julien Jeandesboz, “Beyond the Tartar Steppe...”, cit.

ty industry to the Navy. However, if successful it will essentially provide the EU with the ability to control, beyond the border line and before the border crossing, the movement of persons suspected of becoming irregular migrants, thereby preventing exit and entry and making the journeys fundamentally longer, more dangerous and more costly. Again, however, similarly to Frontex's operations, the argument for Eurosur that was put forth is humanitarian: saving lives at sea.⁵⁰ Following events in Lampedusa, European policymakers argued that Eurosur's technology would have saved migrant lives at sea, despite the fact that the system is structured around prevention and early warning. Finally, the system contributes to the "spatial displacement" of European border control and surveillance practices⁵¹ that increasingly make up the management of irregular migration and asylum.

6. The Third Level of Control: The Schengen Area

The governance of irregular migration is not only outward-looking, beyond EU borders, but it is also very much inward looking, and to a large extent the result of the Schengen zone. The basis of the latter is the freedom of movement within the EU for employment, studies, tourism or relocation. The Schengen area is "secured" through a series of policies, some aforementioned, and ICT instruments,⁵² soon to be integrated under the Smart Borders System which will target third country nationals travelling to, within and out of the Union. The VIS, the first to be rolled out, requires all third country nationals to provide fingerprints and biometric data in their application. Schengen consulates around the world are connected with VIS and register visa applicants. Complimentary to this is the Schengen Information System II which contains information on all Third Country Nationals (TCNs) refused entry or subject to specific checks.

The Smart Borders System (SBS) aims to build on these initiatives. The cornerstone of the SBS is the entry/exit system that seeks to "battle" the main source of irregular migration today in the EU: visa-overstayers. By registering those who enter and allocating an expected

⁵⁰ Michela Ceccorulli, "Security framings and governance patterns: irregular migration in Mediterranean relations", in *EU-GRASP Working Papers*, No. 25 (2011).

⁵¹ Julien Jeandesboz, "Beyond the Tartar Steppe...", cit., p. 9.

⁵² Such as the Schengen Information System II (SIS II) and Visa Information System (VIS).

date of exit, the system auto-processes arrivals and departures and alerts border guards and agencies linked to it of those who have failed to leave the EU territory following visa expiration. Thus, while looking inwards the Commission still flexes its muscles outwards, in order to ensure protection of the Schengen area at this time. However, despite extended discussions, the SBS package was brought up once more following events of the Arab Spring.

In the Spring of 2011, Italy received an estimated 30,000 Tunisians. In an attempt to deal with the arrivals, Italy agreed to grant temporary protection permits allowing travel in the Schengen area for them. New arrivals would fall under the partnership agreement signed with Tunisia on 6 April 2011. The Tunisian government had refused immediate return of its nationals that had entered prior to the agreement, thus the six-month permit was a compromise for Italy. The decision prompted France to reintroduce border checks at the French-Italian border utilising the Schengen clause allowing reestablishment of border controls following a genuine threat to public policy and internal security. Given the long-standing history between Tunisia and France, there seemed to be an expectation that Tunisians would travel to France, thus absolving Italy of the responsibility of finding a durable solution. This was confirmed through various statements of French officials, like the deputy mayor of Nice who declared that “It is a little too easy for Italy to be generous with the territory of others.”⁵³

Events of the Arab Spring resulted in the Schengen Governance Package adopted in September 2011, in which it is now clearly stated that the crossing of a large influx of third country nationals can under exceptional circumstances justify reintroduction of internal controls. Again movement towards EU territory was controlled, but interestingly, with the expansion of the regulation, movement within can also be limited under extenuating circumstances. The problem with this argument, however, is that it leaves undefined what constitutes a large number of TCNs and what is an exceptional circumstance.

⁵³ Quoted in Steven Erlanger, “On Journey, Young Tunisians Need Only a Final Destination”, in *The New York Times*, 19 April 2011, <http://nyti.ms/1oMhtHe>. See also Anna Triandafyllidou and Angeliki Dimitriadi, “Migration management at the Outposts of the EU...”, cit.

7. A Common European Asylum System

Similarly to irregular migration and to a large extent affected by it, the EU has attempted to structure a system of governance around asylum, in a continuous balance between ensuring access to protection and deterring unauthorised entry. The policy in relation to the management of asylum is the Common European Asylum System (CEAS) and the main agency is the European Asylum Support Office (EASO).

As defined in the Stockholm Programme (2010-2014), “the key objective of the CEAS is to establish high standards of protection and ensure that similar cases are treated alike and result in the same outcome, regardless of the Member State in which the asylum application is lodged.”⁵⁴ The right to asylum is embedded in the EU Charter of Fundamental Rights (Article 18) and the EU today has designed, in principle, a system whereby minimum standards are shared across member states, enabling access to protection following similar mechanisms, criteria and processes. CEAS is based on two presumptions: on the one hand that “bogus” asylum seekers resort to asylum shopping (choosing a country to lodge the asylum claim), which is effectively curtailed by applying uniform standards and procedures; and on the other hand, that the common asylum space that is constructed via CEAS is one of safety. The presumption of safety in fact underscores the system, assuming that safety exists within the EU, thereby making every member state a possible (and capable) country to lodge an asylum claim.

Three directives and two regulations make up CEAS. The Reception Conditions Directive, the Asylum Procedures Directive and the Qualification Directive set out the minimum standards for reception, processing and interpretation of asylum in the EU, essentially striving for uniform treatment across all member states. Along with the Dublin III Regulation and the Eurodac Regulation, they outline the policies in place to uniformly manage asylum in the EU. It should be noted that according to the Stockholm Programme, the adoption and common application of these rules, must prevent secondary movements of asylum seekers among EU member states, thereby increasing mutual trust. Yet, ac-

⁵⁴ Asylum Information Database (AIDA), *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System*, AIDA Annual Report 2012/2013, October 2013, p. 8, <http://www.asylumineurope.org/node/117>.

According to a recent assessment dealing with asylum seekers, conducted by NGOs in the EU, despite the adoption of an elaborate body of legislation, “the CEAS as defined in the Stockholm Programme remains a theoretical concept in particular for the men, women and children seeking international protection in the EU.”⁵⁵ Protection remains uncertain, dependent upon the member state a person arrives at. Secondary movement is also not completely curtailed, since inherent imbalances in the system continue to force asylum seekers to travel to other member states (often with assistance from smugglers and at the risk of their lives) to seek protection and safety.

This is where the impact of restrictive migration policies on asylum seekers is evident. Restrictive visa policies, carrier sanctions and an absence of legal channels of entry to the EU compound the problem of access to the EU territory, an essential prerequisite for a person to lodge an asylum claim. This forces asylum seekers to resort to routes and means of entry used by economic migrants. Stigmatised already as “illegal” migrants, asylum becomes a game of chance depending on the member state the person has arrived in. The Dublin Regulation (now Dublin III following the recast in July 2013) allocates responsibility to the member state where the applicant first arrived (and/or was apprehended), following a set of objective criteria.

The aim behind the Dublin Convention was to limit the movement of asylum seekers in transit in Europe and inhibit them from lodging their application in the country that they preferred. The underlying principle was that the right to asylum is only about international protection and is irrelevant to personal preferences. One could argue, however, that the underlying policy and political priority was for the countries with the largest immigrant and refugee communities such as the UK and Germany to face less pressure, while the countries in the periphery of Europe that are the “natural” geographical stepping stones of asylum seekers would receive at least part of the applications.

The Convention has not been successful in achieving this. Instead, the southern member states receive the majority of irregular arrivals, yet countries like Germany and Sweden remain at the top of the lists in asylum applications. For example, in Greece in 2013 there were almost 43,000 apprehensions. Of those, the Afghans were estimated at 6,412 ap-

⁵⁵ Ibidem.

prehended, yet data from the new asylum service indicate that only 1,223 applied at first instance (new applicants for asylum). A further example are the Syrians, with only 485 Syrians claiming asylum in Greece in 2013, while 8,517 arrests of Syrian nationals for irregular entry were recorded by the Greek authorities.⁵⁶ This difference could be explained by the fact that those left stranded in Greece continue, despite the presence of a new asylum system, to be sceptical and avoid lodging an asylum claim. This in turn begs the questions of what kind of asylum persons seeking protection are looking for, as well as how the established CEAS fails to accommodate existing needs. Although it is not the aim of this paper to analyze the CEAS Directives, when discussing the issue of balance between protection and efficiency, the Reception Directive and the Dublin III Regulation need to be mentioned.

The Dublin Convention was replaced in 2003 by the Dublin Regulation⁵⁷ (in common parlance referred to as Dublin II) and most recently by the Dublin III Regulation which entered into force on 19 July 2013.⁵⁸ The Dublin Regulation is complemented by the Eurodac Regulation, which establishes a Europe-wide fingerprint database for unauthorised entrants to the EU.⁵⁹ This database, combined with the provisions of the regulation, allows member states to rapidly and relatively easily establish which member state is responsible for dealing with an asylum claim and hence to transfer the asylum seeker to that member state. Thus, when an asylum seeker lodges an asylum claim in the Netherlands, and it is found that s/he entered from the Greek-Turkish border, the asylum seeker is returned to Greece as Greece is the first safe country in which s/he entered and hence the country responsible for processing the claim.

Dublin II received numerous criticisms from NGOs, with a most recent report conducted by the Jesuit Refugee Service Europe highlighting the lack of procedural safeguards in

⁵⁶ Data provided from Hellenic Police (apprehensions) and UNHCR (asylum applications). See Hellenic Police, *Στατιστικά στοιχεία: απολογισμός συνολικής δραστηριότητας της Ελληνικής Αστυνομίας για το έτος 2013* (Statistics: Developments in the overall activity of the Greek Police for the year 2013), 14 February 2014, http://www.astynomia.gr//index2.php?option=ozo_content&perform=view&id=37630&Itemid=1240; UNHCR, *Asylum claims in industrialized countries: Latest monthly data*, updated 2 February 2014, <http://www.unhcr.org/statistics/asylumdata2013.zip>.

⁵⁷ Regulation (EC) No 343/2003 of 18 February 2003.

⁵⁸ Regulation (EU) No 604/2013 of 26 June 2013.

⁵⁹ Regulation (EC) No 2725/2000 of 11 December 2000.

various EU member states, lack of access to legal assistance and the emphasis placed on detention in the context of Dublin procedures.⁶⁰ Dublin II was also indirectly criticised, along with CEAS in the landmark judgments from the European Court of Human Rights (ECtHR) issued in 2011.⁶¹ Following suspension of transfers to Greece in 2012, legislative change of the regulation began. Dublin III does not challenge the fundamental principle underlying the system of the equal standards of protection across the EU. This was to be expected, considering that this is the foundation of CEAS and a natural progression from what was designed in the Hague and Stockholm programs. Dublin III, however, introduced important safeguards (see Article 3, paragraphs 1 and 2) highlighting that member states should consider the situation in the first country of arrival at the time of arrival as well as the current situation before returning an asylum applicant to that country. They should ensure that such return would not expose the asylum seeker to inhuman or degrading treatment in the sense of Article 4 of the European Convention for Human Rights.

Nonetheless, the Dublin III regulation does not manage to address the close link between asylum seeking and irregular migration and particularly the main question of how to control irregular migration while ensuring that asylum seekers have access to international protection. Dublin III also introduces an early warning preparedness and management of asylum crises to improve the solidarity between member states. However, as ECRE has pointed out, the mechanism does not compensate for the fundamental problems in the recast Dublin Regulation.⁶² The early warning mechanism essentially seeks to ensure the continuous and proper functioning of the Dublin Regulation. The identification of a crisis, whether through the request issued by a particular country or through EASO and/or Frontex reports, triggers a sequence of actions to be taken by the member state under

⁶⁰ Jesuit Refugee Service Europe, *Protection Interrupted. The Dublin Regulation's Impact on Asylum Seekers' Protection*, June 2013, https://www.jrs.net/assets/Publications/File/protection-Interrupted_JRS-Europe.pdf.

⁶¹ The Court found that the dysfunctions of the Greek asylum system and the inhuman and degrading conditions of detention in the country violated articles 3 and 13 of the European Convention for Human Rights and deprived the asylum seeker of his right to an effective remedy, thereby challenging the *per se* assumption of safety. See European Court of Human Rights (ECtHR), Judgment of the Grand Chamber on the case of *M.S.S. v. Belgium and Greece* (Application No. 30696/09), 21 January 2011, <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-103050>.

⁶² Kris Pollet, *Enhancing Intra-EU Solidarity Tools to Improve Quality and Fundamental Rights Protection in the Common European Asylum System*, Brussels, European Council on Refugees and Exiles (ECRE) January 2013, <http://www.ecre.org/component/content/article/315>.

pressure, or in cases where the asylum system is malfunctioning or collapsing. At the same time, the Regulation allows for member states to cease returns, on an individual basis in order to ensure that the rights of asylum-seekers are protected. As such the “tool box” aims at preserving the Regulation itself by ensuring that a road map is in place for the continuing returns under the safe-country principle. In that sense it could be argued, it is less about the people and more about the process.⁶³

EASO, established in 2010, is the most recent of the Home Affairs agencies, and is expected to have a significant role in the activation (when needed) of the mechanism. Through its mandate, EASO is designed to be the implementing arm of the Common European Asylum System, enabling member states to cooperate in the area of asylum, offering operational support and training as well as the ability to deploy Asylum Support Teams (AST) in member states in need of support. Its first deployment took place in 2011 in Greece, where EASO has maintained a permanent presence since. By focusing on asylum seekers and refugees, it acts as a complement to Frontex, thereby enabling the EU to cover the entire prism of irregular mobility. However, in what can be seen as evidence of the imbalance between security and protection, EASO risks being used as “a scapegoat [...] for the lack of progress in addressing some of the key weaknesses of the CEAS”, largely due to its “lack of resources and staff” being as a key obstacle to reaching its full potential.⁶⁴

The second element of CEAS, where the management of asylum ties in with irregular migration, stemming from the Reception Directives but also Dublin III, is that of detention. Detention has been used frequently as part of the Dublin procedures (to ensure return to the first country) and is a commonly enforced strategy of migration management across the EU. In the recast Directives, the provisions on the detention of asylum seekers are the most alarming.⁶⁵ Though originally aiming to include a safeguard to prevent arbitrary detention and ensure it is used as a last resort, the end result remains unclear. In the Return Directive detention cannot be applied for the sole purpose of having lodged an asylum application.⁶⁶ Detention needs to be proportionate and a measure of last resort (i.e. in-

⁶³ See also Anna Triandafyllidou, “Disentangling the Migration and Asylum Knot...”, cit.

⁶⁴ Kris Pollet, *Enhancing Intra-EU Solidarity Tools ...*, cit., p. 17.

⁶⁵ Directive 2003/9/EC of 27 January 2003 (recast version 2013/33/EU, due to be transposed by July 2015).

⁶⁶ Directive 2008/115/EC of 16 December 2008.

dividual assessment), while alternatives to detention should be included in the national legislation. Yet, for all the exhaustive list restricting grounds for detention, it allows asylum seekers to be held in order to determine their nationality or identity and/or to decide the applicant's right to enter the territory and in cases there is a risk of absconding. All options are open to interpretation and systematic application, since fear of absconding remains undefined in the recast and in reality most asylum seekers arrive undocumented and are thereby "eligible" to be detained until their identity is verified.

The Greek case is an example of the continuous application of detention for both irregular migrants and asylum seekers.⁶⁷ Detention is currently used in Greece as a punishment for the "illegal" border crossing without due examination of the specific personal and family circumstances of an irregular migrant or asylum seeker, their probability to commit crimes, or the harm that detention will do to them and to the minors often accompanying them. Detention has been a hotly debated issue in Greece. The country was heavily criticised for detaining asylum seekers,⁶⁸ a practice which not only continued in 2012 but was also strengthened, through the modification of the Presidential Decree 114/2010, which enables the detention of asylum seekers for 12 months (rather than three and under special circumstances six months, which had been in place until then).⁶⁹ Currently Greece imposes the maximum time for detention, which is 18 months (prescribed in the Return Directive only for exceptional circumstances) for both irregular migrants and asylum seekers.

Interestingly, in what is another obvious link with the management of irregular migration, detention is now being increasingly linked with "voluntary" return, a procedure initiated during detention and often with the assistance of the International Organisation for Mi-

⁶⁷ For a detailed discussion on detention in Greece see Anna Triandafyllidou, Danai Angeli, Angeliki Dimitriadi, "Detention as Punishment: can indefinite detention be Greece's main policy tool to manage its irregular migrant population?", in *MIDAS Policy Briefs*, April 2014, <http://www.eliamep.gr/en/?p=19588>; Medecins sans frontieres (MSF), *Invisible Suffering. Prolonged and systematic detention of migrants and asylum seekers in substandard conditions in Greece*, April 2014, <http://www.doctorswithoutborders.org/node/55166>.

⁶⁸ UNHCR, "Detention of asylum seekers should be an exceptional measure, not a standardized practice", in *UNHCR Greece Press Releases*, No. 12/27 (18 October 2012), <https://www.unhcr.gr/fileadmin/Greece/News/2012/12pr27en.pdf>.

⁶⁹ Unofficial English translation by UNHCR available in Refworld website: <http://www.refworld.org/docid/4cfdadf2.html>.

gration (IOM), whereby the migrant is presented with the alternative to “go home” or remain in detention while his/her asylum claim is processed or travel documents are issued for removal. Because voluntary return means the migrant cooperates and embassies tend to also be more cooperative (when the individual wishes to return), it is also a more expedient process. However, it has raised criticism as to what an extent it is “voluntary” and how “sustainable” is the return (or whether the migrant re-migrates upon return).

8. Conclusions

The volume and complexity of cross border flows has changed as well as increased in the last decades. This has transformed the governance of mobility from a desired outcome to a necessity but also a difficult challenge for states. In the context of the EU, that challenge has exponentially increased for a variety of reasons: the different geopolitical interests of member states, the different migrant and refugee flows they receive, the different financial capabilities and political wills and the commitment to respect human rights in a framework that is designed and oriented more towards security and deterrence. It is this last contradiction that makes the discussion on the governance of irregular migration and asylum in the EU critical today. While the EU is surrounded by political upheavals (e.g. the Arab Spring) and external borders that are difficult to patrol (and cut off), it will continue to try and walk the line between efficiency and protection, whereby efficiency is more oriented towards successfully deterring unauthorised entry (or at least ensuring apprehension and return) and protection of vulnerable groups (asylum seekers and even irregular migrants) risks falling through the cracks of a deter-and-fence-off policy.

In a supranational framework of cooperation, governance is made up of various agencies, tools, policies and systems that attempt to control and regulate irregular entry and exit and residence and legal migration at the border, within the border and, by extension, across the border. This management of mobility is neither completely successful nor altogether ineffective, as is evident in the case of the southern European member states of Italy, Spain and Greece.

Spain successfully cut off the Strait of Gibraltar to irregular arrivals from Ceuta and Melilla through the build-up of the fence, the SIVE in 1999, and readmission agreements with Mauritania and Senegal as well as Frontex joint patrols of the Atlantic coast. Yet, a decade later and as recently as February 2013, NGOs reported that fifteen African migrants died while trying to cross the border between Morocco and the Spanish city of Ceuta after being fired upon to prevent their crossing over to the sea.⁷⁰ Italy proceeded with bilateral agreements with Libya during the Gaddafi regime to re-admit migrants in conditions in which the very survival of the deportees was sometimes in danger. Furthermore, it set up a satellite system on Libyan land borders to identify border crossings before they take place. The dramatic reduction in apprehensions in Italian waters is largely a result of extensive surveillance and aggressive deterrence measures, yet on January 2011 and for the months of the Arab spring, Lampedusa remained the main arrival point for asylum seekers and forced migrants escaping the upheavals. Greece has been the main point of entry for irregular arrivals and asylum seekers in the EU since 2010. Borders and fences still constitute a powerful “condensation symbol” of the ability of “state apparatuses to confront contemporary developments.”⁷¹ The Greek fence built in late 2012 along the Greek-Turkish land border that was aimed at preventing entry of irregular migrants (and effectively sealing them off from Greek land) is an example of such state apparatuses. It was largely successful, coupled with increased border guard presence and Frontex assistance; nonetheless a noticeable switch took place to the sea border, the main point of arrival today.

In all the aforementioned examples, there have been documented incidents of migrant deaths and loss of life at sea as well as the prospect of a still-uneven reception and processing system for irregular migrants and asylum seekers alike. Yet the tools are there for the EU to transform itself into a truly common space governed by common rules, standards and procedures for both the management of irregular migration and asylum. It is an issue of political will - or lack thereof - as well as of intra-EU solidarity and the need to admit that deterrence is not in itself an adequate measure to manage irregular migration and asylum, especially when it is surrounded by the rhetoric of humanitarianism.

⁷⁰ Human Rights Watch, *Spain/Morocco: Protect Migrants, Asylum Seekers*, 24 March 2014, <http://www.hrw.org/news/2014/03/24/spainmorocco-protect-migrants-asylum-seekers>.

⁷¹ Julien Jeandesboz, “Beyond the Tartar Steppe...”, cit., p. 115.

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Imagining Europe

As the unprecedented financial crisis and ensuing economic recession push Europe to the brink, a critical question arises as to what the foreseeable trajectories for EU governance are in the decades ahead. The crisis has already accelerated EU policy and institutional evolution in key policy areas, but the integration project remains torn apart by centrifugal political and economic forces. The “Imagining Europe” series aims at delineating what kind of governance models the EU could head towards, and which of these models is best suited for the purpose of a more united, effective and legitimate EU. In particular, the research sheds light on the degree and nature of integration at the “core” of Europe and the relationship of that core with those member states (current and future) which opt to remain outside it. It does so by exploring five policy areas: fiscal and monetary policy, infrastructure and communications, security and defence, migration and citizenship, and energy and environment.