

# EUROPEAN IMMIGRATION AND ASYLUM POLICIES

## THE NEED FOR A CHANGE OF APPROACH

**Marie-Laure Basilien-Gainche**

*Jean Moulin Lyon III University, Institut Universitaire de France*

---

European immigration and asylum policies need to be reconsidered. Indeed, the current approach is based on a misdiagnosis: contrary to prevailing opinion, receiving third-country nationals is not only financially sustainable but also economically strategic. As a result, current measures have proven to be detrimental: the European union EU and its Member States have both deprived themselves of a means of responsible development and lost their standing in the protection of rights. In other words, the mismanagement of a politically sensitive issue has unfortunately harmed the competitiveness and credibility of the EU and its Member States.

---

Observations, comments, criticisms, proposals and recommendations on European immigration and asylum policies are in order as the European elections approach and as the follow-up to the Stockholm programme is being prepared.<sup>1</sup> The Tampere 1999,<sup>2</sup> Hague 2004,<sup>3</sup> and Stockholm 2009<sup>4</sup> Programmes set guidelines for European immigration and asylum policies that are both politically and legally challenging.

- 
1. See the answers to the consultation the Commission launched on 29 October 2013 on the *Debate on the future of Home Affairs policies: An open and safe Europe – what next?*, [http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/consulting\\_0027\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-is-new/public-consultation/2013/consulting_0027_en.htm)
  2. Tampere European Council, 15 & 16 October 1999, Presidency Conclusions, points 13 to 17.
  3. Brussels European Council, 4 & 5 November 2004, Presidency Conclusions, points 14 to 20.
  4. Brussels European Council, 10 & 11 December 2009, Presidency Conclusions, points 25 to 33.

First, the current approach is politically awkward insofar as it results from a misdiagnosis that has led to wrong remedies, which have in turn caused new problems. The misdiagnosis comes from the idea that the reception of immigrants and asylum seekers is not financially sustainable in Europe because of the economic crisis and budgetary constraints. While four fifths of migration is South-South migration, many economic studies show that receiving migrants is an engine for growth, and some call for removing visa restrictions on migration in order to promote economic recovery in the South and North (OECD, 2013; Bodvarsson and Van den Berg, 2013). Such a misreading has impacted the choice of remedies. Methods that involve choosing, and actually reducing, legal immigration by strengthening external border controls – and externalising them if necessary – have led to unfortunate consequences: the latter notably include the wrongful refusal to recognise international protection, the worrisome growth in illegal immigration, the dangerous contribution to a nationalist and even xenophobic atmosphere, the increasing number of shipwreck victims, and the consolidation of human trafficking networks.<sup>5</sup>

The current approach is also legally problematic. Connecting immigration and asylum issues has simply allowed the fundamental right to asylum<sup>6</sup> to be undermined by migration management imperatives (Julien-Laferrière *et ali.*, 2013; Belorgey, 2013). The need for a change of approach seems imperative and involves making a distinction between asylum and immigration, which pertain to different political dynamics and legal frameworks. The goal is to develop a new model for addressing asylum and immigration.

## 1. Rethinking the approach to granting asylum

While the asylum package (recast) that is supposed to create a Common European Asylum System CEAS is to be enforced, a crit-

---

5. Nils Muižnieks, Council of Europe Commissioner for Human Rights, “European Union border control policies undermine human rights”, CP, 06/11/2013.

6. The issue is not only a moral imperative affirmed at the international level by the 1948 Universal Declaration of Human Rights (Art. 14), but also a legal obligation under the 1951 Geneva Convention relating to the status of refugees along with the 1967 New York Protocol, the Charter of Fundamental Rights of the European Union (Art. 18) and indirectly the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 3).

ical analysis of it calls for rethinking the approach the European Union has developed on asylum. Directive 2011/95/EU (the so-called Recast Qualification Directive) provisions that are clear, precise and unconditional, entered into force on 22 December 2013.<sup>7</sup> For now, Member States have been working to reform their national asylum systems to ensure the transposition into national law of this text, as well as the recast Directives on Reception Conditions<sup>8</sup> and Asylum Procedures.<sup>9</sup> The application of the Dublin III Regulation 604/2013/EU started 1 January 2014;<sup>10</sup> whereas Eurodac Regulation 603/2013/EU will start on 20 July 2011.<sup>11</sup> This is therefore a good time to ask whether the CEAS complies with obligations under the 1951 Geneva Convention: without requiring that States grant asylum to refugees, it imposes an obligation of *non-refoulement* to a country where their life or freedom might be threatened on one of the grounds listed in the Convention (art. 33-1), and an obligation to grant immunity from penalties for their illegal entry or stay (art. 31-1). Yet the difficulties asylum seekers experience in submitting an application for international protection – and even more so in being granted it – highlight the necessity to simplify access to international protection on the one hand, and guarantee protection to those who need it on the other.

### 1.1. The need to simplify access to protection

In order to guarantee the effectiveness of the fundamental right of asylum, two objectives must be formulated and pursued: first, the clarity of the procedures for determining the EU Member State that is responsible for examining the asylum applications lodged by a third country national should be enhanced; secondly, the

---

7. Directive 2011/95/EU of 13 December 2011 amending Directive 2004/83/EC of 29 April 2004 on standards for the qualification of third-country nationals as refugees or as persons who need temporary protection.

8. Directive 2013/33/EU of 26 June 2013 amending Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers in Member States.

9. Directive 2013/32/EU of 26 June 2013 amending Directive 2005/85/EC of 1<sup>st</sup> December 2005 on procedures for granting and withdrawing refugee status.

10. Regulation 604/2013/EU of 26 June 2013 amending Regulation 343/2003/EC of 18 February 2003 on determining the Member State responsible for examining an asylum application lodged by a third-country national, also known as Dublin II.

11. Regulation 603/2013/EU of 26 June 2013 amending Regulation Eurodac 2725/2000/EC of 11 December 2000 on the creation of a system for the registration and comparison of the fingerprints of asylum seekers; Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a massive influx of displaced persons.

reception conditions of asylum seekers should place greater emphasis on the principle of human dignity.

Under the Dublin II and now Dublin III Regulations, only one Member State is responsible for considering an asylum application presented by a third country national on the EU territory. It is thus assumed that all Member States process asylum applications in the same way. This is deleterious fiction that contributes to glaring inequalities in access to the right to asylum. The criteria used to determine which State is responsible for examining an asylum application tend to entrust to the State with which the asylum-seeker has family, administrative or material ties. Yet the responsibility for handling the application is most often entrusted to the State where the migrant first entered the EU. Access to international protection hence depends on the geographical origin, financial resources and migration paths of third-country nationals seeking asylum. This results in great discrepancy in the effectiveness of such a fundamental right; which is not compatible with international, European, national legal instruments of human rights protection.

Regarding the reception conditions, they harshly depend on the concerned EU Member States. In some of them (i.e. Greece, Bulgaria), the ECtHR has notably acknowledged inhuman and degrading treatments, as defined in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>12</sup> Moreover, reception conditions are highly tricky as the almost systematic detention of asylum seekers, including vulnerable people, is admitted. While the Commission was pushing for a framework on detention during the negotiations on the Reception Conditions Directive and Dublin III Regulation, Member States imposed vague formulations granting them considerable leeway in their interpretation, assessment and action. To be sure, States cannot detain a person solely on the ground that s/he is requesting international protection. However, Member States can detain asylum seekers on a great number of loosely termed grounds. The situation of asylum seekers is thus in quite an odd manner finally similar to the one of illegally staying third country

---

12. ECH Court, 21 01 2011, *M.S.S. v. Belgium and Greece*, Req. n° 30696/09; CJEU, GC, 21/12 2011, *N.S. et alii.*, joined cases C-411/10 & C-493/10.

nationals. More importantly, it trivializes the deprivation of liberty that, besides, limits asylum seekers' access to the legal assistance needed to seek international protection and claim their corresponding rights (Basilien-Gainche, 2014).

## 1.2. The need to grant required international protection

In addition to the need to simplify access to international protection, there is a need to grant asylum to those who need it. The CEAS fails in doing so because it allows for many procedural exemptions and substantive limitations.

The recast Asylum Procedures Directive establishes common standards of safeguards and guarantees to access a fair and efficient asylum procedure. The procedures applicable for the examination of asylum applications have actually proven to be long. The new EU norms tend therefore to make them faster and firmer, even though such procedures may in practice last 21 months some asylum seekers are likely to spend in detention. However States sought and managed to drastically reduce the duration of asylum procedures when applications are deemed inadmissible or unfounded, in order not to better guarantee effective access to the right to asylum but to better limit public expenses. Two issues are worth mentioning (Julien-Laferrière *et ali.* 2013). First, numerous grounds allow the bypassing of normal and lengthy procedures, and some are in contradiction with the principles linked to the right to asylum (the principle whereby the asylum seeker does not need to have any document whatsoever to be able to exit a State's territory and enter the territory of another State to seek international protection). Second, such derogatory accelerated procedures allow States to swiftly remove asylum seekers. Admittedly, judicial remedies exist. However, effective protection against a decision of refusal of entry into the territory or access to normal procedures is particularly hindered by the lack of an automatic suspensive effect.<sup>13</sup>

This is the case when an asylum seeker is the national of a "safe country of origin." This notion is very awkward because Member States do not interpret it in the same way and some consider notable dangerous countries as safe (i.e. France regarded Ukraine as

---

13. Also see ECH Court, 2 02 2012, *I.M. v. France*, n° 9152/09.

a safe country of origin until April 2014). Moreover, it promotes a narrow view of international protection and of the right of asylum. If asylum seekers are unable to benefit from the conventional protection and so the refugee status, they might be granted EU subsidiary protection. Nevertheless these two forms of international protection are not equivalent: the former confers the right to a long-term residence permit whereas the latter only guarantees a temporary residence permit. While the number of asylum applications has risen (435 000 in 2013 versus 332 000 in 2012 and 302 000 in 2011), this increase needs to be assessed within a longer time frame (480 000 in 2001). The HCR has estimated that the number of asylum seekers has fallen by 42% over the past decade across industrialised countries.<sup>14</sup> While 102 700 third country nationals received protection in 2012 in Europe, they only accounted for 25% of asylum seekers.<sup>15</sup> Worldwide, the CEAS is the most developed harmonised regional asylum regime. Yet it is still largely conditioned by its implementation by Member States that view the right to asylum as an element of immigration management. This also needs to be reconsidered.

## 2. Renewing the approach to immigration management

Although not all migrants who come to Europe looking for a better life are asylum seekers, many of them are. This is the case of the Eritrean, Somali and Syrian migrants who venture onto the Mediterranean sea to escape the persecution stemming from the conflicts that plague their countries of origin. 20.000 of them have perished in the Mediterranean over the past 20 years, including 4 000 in the last two years. It can besides be argued that the situation of those shipwrecked at sea does not fall within the scope of migration policy, but rather the basic obligation to protect the right to live that is of particular importance in the Law of the Sea.<sup>16</sup> Yet the reality of these shipwrecks highlights the harmful implications, to say the least, of the policies implemented by the European Union and its Members States to manage migration flows and

---

14. <http://www.unhcr.fr/522f2ad59.pdf>

15. Eurostat, "Decisions on asylum applications in the EU27", 96/2013 to 18/06/2013.

16. Labayle H., 2013. "Lampedusa: chronique de drames annoncés" [Lampedusa: chronicle of tragedies], <http://www.gdr-elsj.eu/2013/10/14/asile/lampedusa-chronique-de-drames-annonces/>

control EU external borders. Two aspects of the relevant policies should be reviewed in particular: it is necessary to question and evaluate the redefinition of the EU borders as they are relocated, extra-territorialised and de-territorialized.

### 2.1. The need to question the extra-territorialisation of borders

In order to secure Europe's borders, migration policies have focused on preventing the arrival of migrants by outsourcing border control to neighbouring States on the one hand, and by entrusting the Frontex agency with the coordination of surveillance operations on the other.

The EU and its States have transferred the responsibility for monitoring borders to neighbouring countries by prompting them to accept migration related provisions in some agreements, or to conclude readmission agreements, as a condition of development aid.<sup>17</sup> In order to meet European requirements, neighbouring countries modify their norms and practices: they have employed ethnic profiling at border crossings, confiscation of travel documents, detention in centres funded by the EU, inhuman and degrading treatments, and practices of pushback of migrants to the desert. Moreover neighbouring States tend to prevent the departure of people suspected of wanting to apply for asylum in Europe, hence depriving them of the right to leave a country, including theirs (COE, 2013). This raises some concern about the credibility of EU discourses regarding human rights protection.

Frontex coordination of border surveillance operations brings up the issue, among other troubling ones, of the responsibility for the violation of rights committed during related operations. The aim of these being to locate, catch and redirect migrants to their country of departure or transit, interceptions can take place in international waters or in the territorial waters of third countries, in conjunction with police authorities of partner States under working agreements concluded and implemented by Frontex without any monitoring.<sup>18</sup> The issue of shared responsibility is

---

17. Billet C., 2010. "EC Readmission Agreements: A Prime Instrument of the External Dimension of the EU's Fight against Irregular Immigration", *European Journal of Migration and Law*, 12/1, 45-79.

18. Own-initiative inquiry launched by the European Ombudsman on the compliance of Frontex with fundamental rights obligations, OI/5/2012/BEH-MHZ.

complex – the legislative gaps have not yet been filled by the case law of the Luxembourg Court.<sup>19</sup> However, the Council of Europe has asserted its positions: the Strasbourg Court found Italy in violation of its extra-territorial human rights obligations under the ECHR, reminding the country of the implications of exercising its jurisdiction over a vessel flying its flag and receiving shipwreck victims on the high seas;<sup>20</sup> the Parliamentary Assembly has worked on the problem of *Lives Lost in the Mediterranean Sea* (doc. 12895 of 5 April 2012). Yet the responsibility that Frontex must bear raises the question of what to do with people who have been rescued, particularly where they should be disembarked. Here the denial of responsibility highlights the lack of solidarity between the Member States. Furthermore, Frontex is in charge of managing Eurosur, the European Border Surveillance System that has been running since December 2013 and includes all the personal databases involved in home affairs.

## 2.2. The need to assess the digitalization of borders

The extra-territorialisation of borders occurs through their digitalization: migrants' personal data are collected, consulted, and exploited throughout their journey.

The goal of the European Union and its Members is to create a digital grid over the space they wish to control by using databases, and to streamline cooperation between the authorities that use them through interoperability between these databases (*Visa Information System; Schengen Information System; European Electronic System of Travel Authorisation; Entry/Exit System; Register Traveller Programme; Eurodac system*). There are problems with the guarantees offered to migrants regarding the use of personal data thus collected and used. In particular, the new version of the Eurodac Regulation paves the way for national and European police authorities invoking fights against organised crime and terrorism to access this database of asylum-seeker fingerprints. This results in the assimilation of asylum seekers and migrants on the one hand, with criminals and terrorists on the other, thereby fostering a xenophobic atmosphere and encouraging a criminalizing approach,

---

19. CJEU, GC, 5 09 2012, *Parliament v. Council*, case C-355/10.

20. ECH Court, GC, 23 02 2012, *Hirsi Jamaa v. Italie*, Req. n° 27765/09.

which both break down integration processes and social cohesion in Europe.

Nevertheless using these new surveillance technologies comes at a cost. One is financial: the public funding of technological research and development programmes that support the activities of private sector operators, as well as the public expenses of purchasing systems developed by these private operators who market them (Bigo *et al.*, 2010). There is also a political cost, given that the surveillance operations are conducted by private operators, for instance when processing visa applications on behalf of consulates, or when airline companies check identity documents of their boarding passengers. For the time being, the efficiency of such expenditures, which have reached billions of euros, has not been questioned.

### 3. Conclusion

Reforming Europe involves questioning the model that European immigration and asylum policies are following, in order to unveil its disadvantages and contradictions. The idea is to profoundly change the way the EU and its Member States deal with such a sensitive issue.

*A few recommendations:*

1. Conduct quantified cost-benefit analyses of external border control policies by dividing total expenditures by the number of intercepted third-country nationals; by considering the social cost of the absence of a willingness to integrate foreign populations and to provide a welcome worthy of asylum seekers; by accounting for the foregone economic growth incurred by the closing of borders.
2. Reverse the conception and implementation of immigration and asylum policies by clearly distinguishing asylum rights from migration management; by understanding sovereignty as the power not only to refuse, but also to accept the entry of a third-country national; by defining guidelines no longer in terms of private operators' needs, but rather in terms of public authorities' ambitions; by considering immigration as

a driver of responsible development; and by asserting asylum as a fundamental right to which there may be no derogation.

### Reference

- Basilien-Gainche M.-L., 2014. "Regard critique sur le Régime d'Asile Européen Commun." [Critical analysis of the Common European Asylum System], *Europe*, 2: 6–10.
- Belorgey J.-M., 2013. *Le droit d'asile*, LGDJ.
- Bigo D., Carrera S., Guild E. and Walkern R., 2010. *Europe's 21st Century Challenge: Delivering Liberty and Security*, Ashgate.
- Bodvarsson O. B. and Van den Berg H., 2013. *The Economics of Immigration*. Springer.
- Commissioner for Human Rights at the European Council, 2013. *The right to Leave a Country*, COE.
- Julien-Laferrière F., Preuss-Laussinotte S. and Pouly C., 2013. "Régime d'asile européen commun." [Common European Asylum System], *Dictionnaire permanent – Droit des étrangers [Permanent dictionary – rights of foreigners]*, 226–1.
- OECD, 2013. *International Migration Outlook*.