Europe's Commitments and Failures in the Refugee Crisis

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It is easy to agree that the European Union has failed to respond adequately to the massive inflow of refugees and other migrants in 2015. But critiques focus on different aspects. One clear indicator for failure is the death toll in the Mediterranean Sea that has never been as high as in 2016. According to the Missing Migrants Database, the estimated number of migrants arriving by sea in the first eleven months of 2016 declined by 60% compared to the same period in 2015, whereas the number of deaths rose by 32% to 4699.[1] This is mainly due to the shift of the main migration route from the less dangerous one via Turkey to Greek islands to the more often lethal Central Mediterranean route from Libya to Italy. Another major failure is most strongly symbolized by the building of fences and the re-introduction of systematic border controls at previously open internal Schengen borders. 27 years after the fall of the Iron Curtain, the project of a seamless area of open borders and free movement is again in jeopardy. For a third group of critics, both of these failures are merely the result of a misguided humanitarian policy. A third critique, which has come to dominate public discourses, focuses instead on the loss of sovereignty experienced by member states during the crisis. In this view, extending the rescue at sea missions towards the North African coast in spring 2015 and waiving refugees through to Germany and Sweden in the summer of that year sent the wrong signal by prompting people to claim asylum in Europe who might otherwise have stayed in their home countries or neighbouring states.

The disagreement among these different perspectives is not about facts; it is not even about empirical hypotheses on push and pull factors driving the current mass migration. The disagreement is fundamentally about values. How strong should Europe's commitment be to rescue migrants at sea, to admit asylum seekers and to distribute the burdens of refugee admission fairly among member states? And what are morally acceptable limits to these commitments? My argument in this intervention will be unashamedly based on moral premises, because I am convinced that these lie at the heart of the controversies. The normative question of what responsible agents *ought* to do in a humanitarian crisis must always take into account what they are *able* to do, but this is different from asking the empirical question of what they are *likely* to do based on their interests. Those who *defend* the deterrence of refugees or the closure of Europe's internal borders on realist grounds of state interests and domestic political necessities engage in flawed normative thinking.

THREE DUTIES OF STATES TO ADMIT INTERNATIONAL MIGRANTS

So what are the duties of liberal democratic states in immigrant and refugee admission policies? Some liberal political theorists and political economists question whether states ought to have a right to immigration control in the first place (Carens 1987, Kukathas 2005, Moses 2006). Open borders arguments can be based on global social justice. Why should those who had the good fortune to be born in wealthy democracies have a moral right to shut out the less fortunate citizens of poor states? They can also be based on the value of freedom and individual choice. Why should individuals be free to leave any state or move their residence within a state territory but be subjected to state control when they want to take up residence in another state?[2] Finally,

economists point out that open borders would lead to a globally more efficient allocation of labour and an equalization of wage differentials (Simon 1989, Milanovic 2016) . These arguments can be contested on various grounds, but all I want to claim here is that they fail to take into account to whom they are addressed. Liberal democratic states are not mere instruments for promoting global justice, freedom and economic efficiency. As members of the international society of states their external legitimacy depends, on the one hand, on their respect for universal human rights, which form the moral backbone of international law. Their internal legitimacy as liberal democratic states, on the other hand, depends on promoting the freedom and well-being of their residents and on their accountability to their citizens. Such states cannot be obliged to open their borders indiscriminately for immigration if doing so would jeopardize their internal legitimacy.

They can, however, be expected to open them selectively for three reasons. First, promoting the freedom and well-being of their own citizens implies not only that liberal states must let these emigrate or return from abroad, but also that they ought to promote their opportunities to enter other states and take up residence there. Liberal states issue passports for their citizens and negotiate visa waiver conditions for short-term visits abroad. Why should they not also enter broader reciprocity-based agreements on free movement with other states and fully open their border with neighbouring states if these are willing to coordinate their external border controls and immigration policies with them (Bauböck 2011)? This is precisely what the member states of the EU and the Schengen countries have done. Their commitment to free movement for EU citizens and open internal borders has strengthened their internal legitimacy as liberal democracies because it has greatly enhanced the freedom and well-being of their own citizens and residents. But these reasons for open borders and free movement are not universal ones.

They apply between states that are sufficiently similar in terms of their liberal democratic constitutions and levels of social protection. Liberal democracies cannot be obliged to fully open their borders or unconditionally admit immigrants if they cannot jointly govern the area of free movement with the other states involved or if the result would be a serious decline in levels of social protection for their own residents. This first set of reasons starts from internal legitimacy concerns but the policies resulting from it generate an external duty of sincere cooperation with other states involved in reciprocal agreements on free movement and joint governance of an area of open borders.

There is, however, a second set of reasons for admitting immigrants from third countries, with whom reciprocity-based agreements and joint governance are not possible if there is an expected 'triple win' for the country of immigration, the individual migrant and the country of origin. This reason supports economic immigration programmes rather than open borders. Numbers will be limited and immigrants will have to apply and be selected according to their expected contributions. Since immigrants ought to benefit also themselves, well-designed and justifiable programmes must include protection against exploitation and discrimination and proactive integration policies. And in order to make sure that countries of origin benefit as well, destination states ought to facilitate the return flow of remittances and refrain from poaching locally scarce skills (e.g. of medical nurses and doctors) or compensate origin countries for the brain drain they suffer. These reasons start again from liberal democracies' self-interests but extend their external duties further by including now special concerns for the freedom and well-being of foreign nationals selected for immigration as well as for the development of their countries of origin.

The third type of admission duties of liberal democracies are derived from universal human rights. They concern, on the one hand, family reunification and, on the other hand, asylum seekers and refugees. A duty to admit close family members of immigrants is based on a human right to private and family life, but it is also supported by the particularistic commitment of liberal democracies to the well-being of all their residents, including foreign ones whom they have previously admitted as economic migrants or refugees. For refugees the problem is a harder one. When holding their government accountable for its refugee policies, the citizens of democratic states can ask two questions: 'Why should other states be responsible for the failure of some governments to protect their citizens' from persecution and violence?' 'And why should *our* state rather than any other one be responsible for taking in a particular refugee?'

Some scholars have suggested that it is easier to convince liberal states and their citizens to admit refugees if these questions are defused by conceiving of refugee protection as a humanitarian duty that cannot be legally enforced and that is limited by the costs incurred by those who are ready to help.[3] Yet this view falls behind the legal entrenchment of a right to asylum and a duty of non-refoulement in international law since World War II. The answer to the first question should therefore be as follows. The territorial sovereignty of states and the institution of national citizenship assign to states a specific responsibility for residents in their territory and for their citizens wherever these live. Peaceful and friendly relations between states based on a norm of non-intervention require that states mutually recognize these assignments of territories and populations. But the moral legitimacy of states depends on their capacity and willingness to protect the human rights of their citizens and those who reside in their territory. If some states fail in this task, this erodes the justification for assigning them special responsibilities and creates a general responsibility for other states to restore the broken link

connecting citizens to their state. Other states acquire then a responsibility to protect refugees '*in loco civitatis*' (Owen 2016) if their basic human rights are no longer protected by their own states. The threshold for legitimate humanitarian intervention by other states must be kept high in order to prevent counter-productive as well as self-interested incursions into territorial sovereignty. However, the protection of those who have left their country of origin because it has failed to protect their human rights, does not require such interventions. Refugee admission by other states is therefore not only a humanitarian duty, but a 'legitimacy repair mechanism' in the international system of states (ibid.).

There are several possible answers to the second question ('why our state rather than any other?'). One is that our state has been somehow involved in the origin of a refugee crisis. This argument supported special duties of the US and France to take in large numbers of boat people after the end of the Indochinese wars in the 1970s. Another reason for resettlement has been that states such as Canada or Australia see refugees as potential immigrants whom they select according to their skills and integration potential. A third answer is that our state happens to be close by and is the first safe territory that refugees can reach. This reason is fleshed out most strongly in the Geneva Refugee Convention's individual right to asylum and the customary international law duty of non-refoulement of persons to territories where their life or liberty would be in danger. Even taken together these three reasons clearly will not secure effective protection for a maximum number of refugees since many will lack the special connections or skills that create a readiness to admit them in far-away countries as well as the resources needed to reach the closest safe country of asylum. Moreover, if it is impossible to create safe havens in or close to the refugees' countries of origin and if not enough refugees are resettled from there, then democratic states in the proximity of massive refugee crises will quickly feel overburdened

by their duty to admit asylum seekers. The 'legitimacy repair mechanism' (Owen 2016) of international refugee law is therefore incomplete in the absence of a more general duty of states to share the burdens of refugee protection.

BURDEN SHARING IN REFUGEE ADMISSION

Such a duty of burden sharing cannot be met by simply distributing refugees across states in relation to their capacity as measured by size of territory, population or GDP. The rationale is after all the effective protection of a maximum number of refugees and the question is thus:Which redistribution will achieve this goal best? This means that burden sharing can also involve redistributing costs rather than refugees, since effective protection can hardly be achieved by sending refugees to states where they are unwilling to go and that are unwilling to have them.

In 1997 Yale law professor Peter Schuck proposed a scheme of tradeable refugee admission quota (Schuck 1997). Economists have recently suggested optimizing the redistribution of refugees and costs through matching states' preferences for certain refugees and refugees' preferences for certain destinations. In this scheme an equilibrium price would determine the amount of financial transfers from states that are reluctant to admit refugees to those states that are ready to take in more (Fernández-Huertas Moraga and Rapoport 2014). Objections have been raised that such schemes would 'commodify refugees' (Anker, Fitzpatrick, and Shacknove 1998, Sandel 2012). But these seem to be misplaced concerns if the purpose and effect is to make states pay for their unwillingness to host refugees. As long as discriminatory preferences (to keep out certain refugees on the basis of their skin colour or religion) can be

ruled out, such a model would approximate the goal of providing effective protection and integration options to the largest feasible number of refugees far better than the current system of spontaneous asylum and refugee resettlement.

How can states' general duties to cooperate in international burden sharing with regard to refugee protection be reconciled with the other two migration policy commitments of liberal democracies that I have identified above? Does the prior commitment of EU member states to open their territories for free movement of EU citizens exempt them from duties of burden sharing in refugee admission? Can states that have a generous policy of admitting economic immigrants from less developed countries argue that they do not have to top up their immigration quota with refugees?

The answer to both questions must be 'no' for two independent reasons.
First, if refugee protection is a matter of human rights and state legitimacy, then such duties arguably trump the self-interested reasons states have to promote free movement opportunities for their own citizens and to develop their own economies through immigration. With regard to economic immigration many states decide annual immigration ceilings or quota for specific categories. This is not only legitimate but also necessary in order to plan for the investments liberal states need to make for integration policies. By contrast, in an international burden sharing scheme, states may decide to pay other states to take in some of their refugee quota, but the scheme cannot be fair if each participating state can decide autonomously whether and how much it is willing to contribute.

Second, the questions rely on a false empirical premise that I suggest to call the 'fallacy of fixed integration capacities'. It assumes that there is a specifiable numerical limit to how many immigrants states can absorb (often expressed in percent of the resident population) so that EU

free movers crowd out third country economic immigrants and the latter crowd out refugees. The same idea underlies the notion that less densely populated states have greater capacities to admit immigrants (Walzer 1983: 42-48). Yet immigrants of all kinds – including refugees – integrate most easily in highly urbanized societies where previous immigration has transformed labour markets to create additional jobs for new immigrants and where educational or health care services have adjusted to culturally diverse populations. This does not mean that there are no criteria for determining limits of state capacities to integrate refugees. Current unemployment rates and prior intake of refugees in the immediately preceding period are plausible indicators.[4]

If all states that do not themselves generate refugees – or even if only all liberal democratic states – were willing to participate in an international cooperative scheme that balances the above considerations in a fair way, then the burdens of refugee protection would be rather small for each state. Countries in the vicinity of refugee crises would still have to initially admit many more than others but they would be compensated for this extra burden by proportionate transfers of resources. And refugees who need permanent integration and a new citizenship rather than temporary protection until they can return to their countries of origin would be relocated across countries in a way that takes into account their own preferences and interests as well as those of states.

In the international arena, the problem is of course that such a rational and fair scheme is impossible to implement in the absence of incentives and enforcement mechanisms. One can argue that, as a matter of justice and legitimacy, states should be ready to cooperate much more extensively, but as long as moral blame is the only consequence of non-cooperation most states are ready to pay this price rather than their fair contributions to a cooperative solution. The result is that the only feasible form of burden sharing remains a 'coalition of the willing' whose

members decide individually – maybe after some mediation by the UNHCR – which and how many refugees they are ready to resettle.

Does this lack of institutional preconditions for burden sharing mean that each state is morally justified in shirking its hypothetical duties under a fair cooperative solution? This is what the standard political rhetoric suggests. 'We would be willing to do our part if all other states did theirs. But we know that they won't and you cannot expect us to take in all the refugees of the world.' This argument is hypocritical since other states' unwillingness to cooperate is invoked as a pre-emptive justification for one's own. In the international arena, no state has a duty to take in alone all refugees, but each liberal democratic state has a robust duty to build a coalition of states that are ready to cooperate in refugee admissions and to contribute its fair share within such a coalition.

THE PROBLEM-SOLVING CAPACITY AND FAILURE OF THE EUROPEAN UNION

Consider now how the European Union provides a context for refugee admission that is different from the international arena. The latter is populated not only by states but by international organisations through which states pursue specific goals and try to resolve some of their collective action problems. Some of these organisations, such as the United Nations High Commissioner for Refugees and the International Organisation for Migration address specifically refugee and migration policies. Yet the modus operandi of these organisations is to seek state consensus on norms and permissive mandates that allow the organisations to carry out operational missions.

The EU provides a very different institutional environment. First, the Treaties give its legislative, executive and judicial institutions a broad mandate to generate and enforce legally binding norms that take supremacy over national law and have direct effect on the member states and their citizens. Moreover, its primary law explicitly invokes a principle of sincere cooperation with regard to the tasks spelled out in the Treaty on European Union (TEU Art. 4.3) and a principle of solidarity and fair sharing of responsibilities, including its financial implications, between the Member States in matters of border checks, asylum and immigration (TFEU Art. 80). The EU can also claim much stronger democratic input legitimacy for the common policies that it adopts through dual representation of member states in the Council and of citizens in the European Parliament and co-legislation powers of these two bodies. Finally, the EU wields a much broader repertoire of incentives and sanctions in order to induce member state compliance with such policies, ranging from cross-policy linkages, such as with negotiations about the next rounds of subsidies, to infringement procedures and court injunctions.

Second, in the Schengen area the logic of the international system of asylum changes in fundamental ways. Refugees arriving on Greek or Italian coasts do not only enter a national but also a wider European territory that is structured as a space with open internal borders and joint external border control. It is therefore quite natural to assume that all states that have built this space also have joint responsibilities for asylum seekers arriving there. The EU institutions understood this dynamic already before the current crisis when they introduced three directives that aim at harmonizing the criteria for awarding refugee status, the asylum determination procedures and the conditions for reception of asylum seekers.[5] Member states' interpretations of these standards, however, still vary significantly. The EU average recognition rate of Syrian refugees in 2014 was 95%, but dropped to 50% in Estonia and 43% in Slovakia.[6] The

Commission has therefore recently proposed to replace the asylum qualification and procedures directives with regulations.[7]

The difference between the international and European contexts is thus that there should be no need to build an ad hoc coalition of the willing to resolve the burden sharing dilemma. There is already a permanent coalition of member states who have committed to sincere cooperation and have created the political institutions and policy instruments for an effective system of burden sharing.

All the more sobering is the failure of the member states to live up to their human rights duties towards the refugees and their duties of solidarity towards each other. As of 5 May 2017, out of 160.000 refugees to be relocated within the EU, member states have pledged less than 29,000 places and 18,000 have been actually relocated.[8]

Nothing can justify this failure but what may explain it? Apologists will point to the special features of the refugee flows: the massive rise in numbers in 2015, the mixed motives and composition of flows that include many migrants without claim to refugee status, and the prevalence of security concerns because of the strong involvement of criminal smugglers and the potential presence of jihadist terrorists. I find it difficult to understand how any of these concerns could justify policies of deterring legitimate asylum seekers and defecting from cooperation with other member states in the admission and relocation of refugees. On the contrary, all of these concerns reinforce the case for cooperation and as long as member states do not renege their duties under international refugee law, this cooperation must focus not only on combatting organised crime and terrorism but also on providing effective protection for the large number of genuine refugees.

The second and in my view most important structural reason is the late, contradictory and incomplete Europeanization of asylum and migration policies (Noll 2015). While the Schengen principles provide the strongest reason for cooperation between EU states, the Dublin Regulation has entrenched the very principle that prevents it by shifting the whole burden to the first state of entry in the EU. Court decisions in Strasbourg[9] and Luxembourg[10] have blocked the return of asylum seekers to Italy, Greece and Croatia, but the Dublin principles still provide states that reject cooperation with a perfect excuse. Reforming Dublin is now on the agenda, but the moment when this could have been a game changing move was in the summer of 2015 when the Dublin and Schengen principles clashed with each other head on. Schengen implied that asylum seekers could move to their preferred destinations further north while Dublin meant that these countries had the right to send them back to Greece. In this confrontation, member states had to choose between a cooperative solution that would have preserved open borders and distributed the refugee admission burden and a non-cooperative one where each country would retake control over its national borders. At this point the fixed coalition set of EU and Schengen member states that would otherwise have facilitated effective burden sharing turned into a trap. Defection by a few states was enough to create a domino effect that tipped the balance towards non-cooperation.

The third reason is the rise of nationalist populism in Europe. The uncontrolled refugee movements of summer 2015 triggered an outpouring of spontaneous support in civil society that in Germany became known as *Willkommenskultur*. But it also nourished deep anxieties among large sectors of the population about a further loss of control of nation-states through European integration, which fed into the ongoing rise of populist parties. Where these have grasped political power, as they have in Hungary and Poland, they were able to pull the trigger for the

tumbling of dominos. And centrist governments in Western and Northern European states drew the lesson that cooperative compliance on their part would strengthen similar nationalist populists in their own countries.

This picture may be somewhat too gloomy. The deal with Turkey has bought the EU time by reducing the pressure of new arrivals to Greece. And the mills of the EU Commission keep grinding slowly but persistently towards further Europeanization of asylum and refugee policies. But there is still no end in sight of the Syrian nightmare. And the death toll in the Mediterranean is rising. This is, after all, the strongest indicator that Europe has failed to live up to its potential when put to the test by the refugee crisis.

References

Anker, D., Fitzpatrick, J. and Shacknove, A. (1998) 'Crisis and Cure: A Reply to Hathaway, Neve and Schuck', *Harvard Human Rights Journal* 11 (1): 295-310.

Bauböck, R. (2011) 'Citizenship and Free Movement', in R. Smith (ed.) *Citizenship, Borders, and Human Needs*, Philadelphia: The University of Pennsylvania Press, 343-376.

Carens, J.H. (1987) 'Aliens and Citizens: The Case for Open Borders', *The Review of Politics* 49 (2): 251-273.

----------(2013) *The Ethics of Immigration,* Oxford: Oxford University Press.

Fernández-Huertas Moraga, J. and Rapoport, H. (2014) 'Tradable Immigration Quotas', *Journal of Public Economics* (115): 94-108.

Gibney (2004) *The Ethics and Politics of Asylum. Liberal Democracy and the Response to Refugees*. Cambridge, UK: Cambridge University Press.

Kukathas, C. (2005) 'The Case for Open Immigration', in A. Cohen and C. Wellman (eds), *Contemporary Debates in Applied Ethics*, Oxford: Blackwell: 207-220.

Milanovic, B. (2016) *Global Inequality. A New Approach for the Age of Globalization,* Cambridge, MA: Harvard University Press.

Miller, D. (2016) *Strangers in Our Midst. The Political Philosophy of Immigration,* Cambridge, MA: Harvard University Press.

Moses, J. (2006) *International Migration. Globalization's Last Frontier,* London: Zed Books.

Noll, G. (2015) 'Why the EU gets in the way of refugee solidarity', *Open Democracy*, 22 September. https://www.opendemocracy.net/can-europe-make-it/gregor-noll/why-eu-gets-in-way-of-refugee-solidarity.

Owen, D. (2016a) 'In Loco Civitatis: On the Normative Basis of the Institution of Refugeehood and Responsibility for Refugees', in S. Fine and L. Ypi (eds) *Migration in Political Theory*, Oxford: Oxford University Press, 269-289.

----------(2016b)'Refugees, fairness and taking up the slack: On justice and the International Refugee Regime', *Moral Philosophy and Politics* 3 (2): 141-164.

Sandel, M. (2012) *What Money Can't Buy. The Moral Limits of Markets,* London: Alan Lane.

Schuck, P. (1997) 'Burden-Sharing: A Modest Proposal', *Yale Journal of International Law* 22: 243-297.

Simon, J. (1989) *The Economic Consequences of Immigration,* Oxford: Basil Blackwell.

Walzer, M. (1983) *Spheres of Justice. A Defense of Pluralism and Equality,* New York: Basic Books.

Notes

[1] https://missingmigrants.iom.int/, own calculations.

[2] See Carens (2013) for the most comprehensive statement of these two arguments.

[3] See Gibney (2004). David Miller (2016) considers refugee admission as a human rights-based duty of states but regards the duty to 'take up the slack' if other states fail to do what they are morally obliged to, as a purely humanitarian duty. For objections to this latter view, see David Owen (2016a, 2016b).

[4] The mandatory EU relocation plan of 120.000 refugees (in addition to 40.000 decided earlier in May 2015) adopted by qualified majority vote in the Council in September 2015 uses the following criteria: 40% of the size the population, 40% of the GDP, 10% of the average number of past asylum applications, 10% of the unemployment rate. See http://europa.eu/rapid/press-release_MEMO-15-5698_it.htm.

[5] Qualifications Directive 2011/95/EU; Asylum Procedures Directive 2013/32/EU**;** Reception Conditions Directive 2013/33/EU.

[6] European Stability Initiative 2015 http://www.esiweb.org/pdf/ESI%20-%20Refugee%20Statistics%20Compilation%20-%2017%20Oct%202015.pdf.

[7] http://europa.eu/rapid/press-release_MEMO-16-2436_it.htm.

[8] See European Commission, DG Home Affairs, Member States' Support to Emergency Relocation Mechanism, at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf.

[9] ECtHR Case M.S.S. v. BELGIUM AND GREECE (Application no. 30696/09), judgment of 11 January 2011; ECtHR Case TARAKHEL v. SWITZERLAND (Application no. 29217/12), judgment of 4 November 2014.

[10] CJEU Case C-578/16 PPU C.K. and Others v. Supreme Court of Republic Slovenia, judgment of 16 February 2017.