Refugees and Open Borders: How Sustainable is the Schengen Agreement in Europe?

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Abstract

The Schengen Agreement has been a prime example of European integration, providing citizens of member states the unique experience of travelling across borders without the inconvenience of border checks. However, the recent peak in the flow of refugees and a changing political environment has challenged the agreement and put the future of open borders in Europe into question. This article initially establishes the background on the Schengen and Dublin conventions, the benefits they have brought to member states, and the role they have played in European integration. Subsequently, the challenges brought by refugees and the reactions of European nations are discussed and finally, the attempts by members to address the current challenges are assessed. In summary, I argue that the situation can only be resolved with political will from all member states in order to make the tough decisions required to maintain an achievement that was itself reached after a collective effort by all member states. There is also a need to realize the extra burden that frontier states are bearing and the need for sharing the responsibility of any collective decision. Inaction or counterproductive measures would either challenge the moral responsibility of the EU in protecting those risking their lives to reach its shores or result in the end of a borderless Schengen zone. Both scenarios are undesired, underscoring the importance of robust, collective action.

Introduction

The instability of the Middle East, in particular the war in Syria, has led to massive flows of refugees to Europe (Aussilloux and Le Hir 2016). In 2015 alone, there were around 1.2 million asylum seekers mostly originating from Syria, Iraq and Afghanistan, indicating a steep rise from 620 thousand refugees in 2014 and 2013, respectively (Aussilloux and Le Hir 2016). More than three decades have passed since the signing of the initial Schengen agreement, and almost two decades since it came into full force. The Schengen area of free movement is widely considered to be one of the most important achievements of European integration (Novotná 2015). A visible outcome is that in continental Europe, people are used to crossing borders within the Schengen area without ID checks (Gros 2015). While many Europeans may have grown accustomed to the concept of open borders, implementation of an agreement that removed all border checks was an incredibly bold step for its time and critical to further integration within the European continent.

However, this important symbol of European integration has had its fair share of challenges, especially over the past years. Part of this stems from the unequal balance in the burdens of open borders; for example, Germany, Hungary, Austria and Sweden have had to deal with the majority of the refugee influx (Aussilloux and Le Hir 2016). Since 2015, Austrian initiated border patrols and built a fence along its border with Slovenia, a fellow Schengen treaty member (Aussilloux and Le Hir 2016). Hungary and Germany also initiated border checks while France took the same course of action following the November 2015 Paris attacks (Aussilloux and Le Hir 2016). The closure of borders

around Europe defeats the original purpose of the Schengen Agreement. Following the refugee crisis, policy makers, scholars, and even the general public are questioning the future of open borders in Europe. In this article, I will explain the making of the Schengen agreement and its importance as a core achievement of the European Union. Subsequently, I will draw upon the challenges that the Schengen and Dublin agreements are facing as a result of geopolitical situations and how these challenges can result in the failure and potential collapse of the Schengen agreement. Finally, I will discuss efforts by EU states to address those challenges and argue why the Schengen, from political, economic and symbolic stand points, is too important for European integration to fail.

AN INTRODUCTION TO THE SCHENGEN AND DUBLIN AGREEMENTS

Schengen Agreement

The ability to control one's borders is a key aspect of sovereignty and it had been a cornerstone of the politics that led to wars in Europe. The Schengen Agreement of 1985 and the convention of 1990 which brought it into force was an attempt by European nations to abolish internal borders while making a collective attempt to strengthen the external borders of what was to become the Schengen zone (Bauder and Matheis 2016). This led to the concept of the European external border as a new concept that was institutionalized and developed into a field of European policy (Bauder and Matheis 2016). The fact that European nations were willing to give up a major aspect of their sovereignty for the purpose of further integration within Europe makes the Schengen Agreement one of the key achievements of the European project. The tangible effects of the Schengen Agreement, including the exchange of information on criminal activity and free movement across borders resulted in a deepening and widening of cooperation which led to its inclusion into the legal framework of the European Union (McCabe 2016).

Since the signing of the Schengen convention, numerous rules and regulations have been compiled for the Schengen area. These are collectively known as the Schengen acquis (McCabe

2016). The Amsterdam Treaty of 1997 incorporated the Schengen Agreement into EU law and transferred migration and border policy to the European level (Ghimis et al. 2016)(Bauder and Matheis 2016). This led to a combination of 5 European legislative acts on migration that resulted in the Common European Asylum System (CEAS) with the intent of harmonizing the asylum process within EU member states (Bauder and Matheis 2016). In a legal sense, the Schengen convention no longer exists by itself, so aside from the exceptions made for Denmark, the UK and Ireland, leaving the Schengen Agreement means leaving the EU (Ghimis et al. 2016).

Following the removal of borders within Europe, common immigration practices had to be established among member states. As a consequence, entry visa requirements were harmonized across the Schengen zone and the Schengen Information System (SIS) police database was established (Bauder and Matheis 2016). Following the institutionalization of common practices in issuing visa, controlling borders and judicial matters, the SIS has acted as the core security feature that compensates for the lack of completely unified air and borders controls (Rotman 2012). SIS allowed the sharing of third-country citizen information among participating nations and this included migrants and refugees (Rotman 2012). SIS was later complemented by Eurodac, a pan-European database established in 2003 for the sole purpose of tracking irregular migrants and asylum seekers (Bauder and Matheis 2016).

Econometric analysis has shown the Schengen Agreement boosts trade by more than 3% with a higher effect on goods than services (Felbermayr, Gröschl, and Steinwachs 2016). Establishing visa liberalization regimes with the Schengen area and neighbouring countries has also served as a valuable tool for EU foreign policy in pressing for democratic reform in the course of negotiations over visa regime liberalization (Ademmer and Delcour 2016). Security was one of the main issues raised with the removal of internal borders within Europe. In the event of threats to national security, the Schengen acquis allows for internal border protection if member states deem necessary (McCabe 2016), however there are time limits to such mea-

sures as I will touch on further.

The Dublin Agreement

The Dublin framework was signed in 1990 by 12 signatory European nations and it came into effect in 1997 (Bauder and Matheis 2016). The importance of the Dublin framework and its inclusion in the article is that it determines the country responsible for processing asylum applications. Articles 28-38 of the Dublin convention that are regarding the responsibilities towards asylum seekers were copied directly from the Schengen convention which was signed four days after (Bauder and Matheis 2016). The Dublin Convention was followed by the Dublin Regulation which is now a core element of the European Union's internal security acquis (Thielemann and Armstrong 2013). The Dublin System/Regulation is at the centre of discussions of European policy regarding asylum applications, which has been highlighted in the recent refugee crisis.

The Dublin agreement effectively puts the responsibility for processing asylum claims to the state that has caused the entry of asylum seekers by insufficient policing or improper issuing of a visa (Bauder and Matheis 2016). Importantly, the Dublin system focused more on the country that has "caused" the entrance of asylum seekers into the Schengen area while there is an absence of fixed quotas for allotting the burden of processing asylum applications among member states (Bauder and Matheis 2016). Given that countries on the periphery of the EU, such as Greece or Italy, where external borders are located, are more likely to be the port of entry for asylum seekers which leads to them being laid the responsibility of processing applications under the Dublin system. This unequal distribution has led to heated debates within the EU on the effectiveness of the Dublin system.

In order to deal with waves of asylum seekers, the discussion of sending them to "safe" third countries began in the 1980s in an attempt to curb migration to Europe (Bauder and Matheis 2016). The consequence was that applicants transferring through a country that provided protection to refugees under international law, specifically under the Geneva convention on refugees, could be deported to those safe countries to apply for asylum (Bauder

and Matheis 2016). The legal assumption has been that all EU member states are considered safe, thus deportations within EU states is not considered a violation of the non-refoulement principle of the Geneva convention on refugees (Bauder and Matheis 2016). Under article 18 of the more recently revised Dublin III regulation, an electronic communication network called "DubliNet" was set up, which provides Member States an electronically singed and encrypted platform to share and exchange information on the movement of asylum seekers within the Schengen area (Juardo et al. 2016).

The chronological order of the Schengen and Dublin conventions demonstrates a clear anxiety about strengthening external borders of the Schengen area as internal borders are broken down (Rotman 2012). In 2005, Frontex, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States, was established to promote and coordinate the management of external borders and by 2010 its budget had increased 15-fold to 90 million euros (Rotman 2012). Given the highly disproportionate distribution of costs and benefits among member states, with some member states experiencing much more of a burden as a European frontier, it is quite significant that the Schengen and Dublin conventions have been able to survive this far (Thielemann and Armstrong 2013). Expanding on the various conventions and frameworks developed within the last three decades from the Schengen and Dublin agreements is outside the scope of this article, however the trend demonstrates the challenges of maintaining open borders given the anxieties that exist within governments and among the public and act as a foundation for the challenges at hand.

Current Challenges with the Schengen Agreement

Refugees and Geopolitical Challenges to the Schengen and Dublin Frameworks

The issue of migrants and refugees has long been on the European agenda. The definition of refugees is highly contested (Juss 2006) and public perception of the issue has shifted over time. The 1970s saw significant numbers of non-European refugees, which topped in the eighties but paled in

the 1990s in comparison to almost 3 million refugees from the Yugoslav wars (Joly 1996). Incomers are usually divided into asylum seekers or refugees, as defined by the 1951 Geneva Convention on Refugees, or economic migrants (Joly 1996). It is important to recognize the historical context of the 1951 Geneva convection, as it was while the memories of the Second World War and the persecution of fascism was vivid, while the emergence of communist regimes in Eastern Europe had displaced many Europeans (Joly 1996). However, the recent wave of refugees has shown a shift of smuggled migrants from those with a less likelihood of receiving a positive response to their asylum application to those with a higher likelihood of success (Fargues 2015).

One of the main issues that often comes up alongside the discussion on waves of refugees and the challenges they pose to the integrity of the Schengen area is the dimension of opposing human trafficking. As the definition of "trafficking in human beings" (THB) is the transnational crime of moving people across borders, strict control of borders is identified as the key method of controlling the problem (Rusev 2013). Frontex identifies THB as one of its top priorities, resulting in efforts to harmonize Schengen border protocols to deal with the matter (Rusev 2013). While on one hand it seems that strict border controls are the logical path to containing TBH, strict immigration policy can push many towards human trafficking (Rusev 2013). Given the economic and political prosperity within the EU compared to its neighbours to the east and south, human trafficking will always remain a key challenge for a Europe without internal borders. The instability in the Middle East only adds to this serious challenge and fighting human trafficking is a common argument for enforcing strict border codes while clearly the solution is a finer line in immigration policy.

Clearly, the geopolitical situation in the Middle East is shaking the core of open borders within the European Union in direct and indirect ways. The Arab Spring created new levels of challenges for the Schengen agreement. As headlines broke in 2011 about overcrowded migrant boats sinking in the Mediterranean Sea, a sense of heightened alertness was felt in Europe. While the numbers of migrants flowing into Europe were not completely out of the ordinary, the fact that it was happening as the Arab Spring was sweeping North Africa caused Italy to declare a state of emergency followed by France closing its borders with Italy (Rotman 2012). The situation was eventually resolved by EU member states as they reaffirmed their commitment to the Schengen Agreement (Hatton 2016). Nonetheless, it was clear that the conflict of interests among member states posed a serious problem that could jeopardize the future of open borders in Europe. Many point the finger of blame for the existing challenges to the conduct of Greece in enforcing strict control of the external border of the Schengen area. However, such an argument is rather hypocritical given that the country has 1200 islands and does not have a common border with any other Schengen states, therefore all its borders are subject to border checks (Ghimis et al. 2016). This yet again highlights how the disproportionality in responsibilities is damaging the integrity of the Schengen and Dublin Frameworks.

Disagreements in the Extent of the Challenge

The Syrian exodus has brought the European refugee asylum system (notably the Dublin Framework) into chaos and led to polarized debates within Europe (Hatton 2016). Until now, most states have not recognized the legal obligation to take in these refugees, however public statements from national leaders demonstrate that most states do recognize the moral obligation to do so (Lambert 2016). Given the high stakes for human rights, it is even argued that moral obligations can be given normative force to have a legal dimension (Lambert 2016). This is mostly due to the geopolitical situation in countries like Syria, Libya, Iraq and Afghanistan, making the argument that most refugees are actually economic migrants less and less acceptable. In such a scenario were rejecting asylum applications is encountering legal and moral challenges, more and more pressure is being put on the first point of entry for these refugees. The transfer request under the Dublin framework clearly favour the more wealthier core member states at the expense of those with external borders (Thielemann and Armstrong 2013). This has again put the spotlight on the inherent dis-

proportionality in the distribution of responsibilities within the Dublin framework and the need for fundamental reform in that regard.

Many scholars criticise the exaggerations made for the challenges at hand. Guild et. al. (2015) argue that the language of crisis for the challenges with migration, refugees and border controls is overseeing the fact that 320 million foreigners entered the Schengen area peacefully and that countries that temporarily introduced border control did so according to articles 23-25 of the Schengen Border Code (Guild et al. 2015). However the real challenge is ensuring that member states continue to enforce Schengen borders consistent with their obligations under International law towards refugees and consistent with the right to non-discrimination enshrined in the EU Charter of Fundamental Rights (Guild et al. 2015).

It is also important to consider that a violation of the Schengen Treaty by reintroducing internal borders is also a violation of EU law. The texts of the Treaty of European Union (TEU) and the Treaty of Functioning of the European Union (TFEU) clearly state that threats to leave the Schengen by permanently restoring internal borders must also leave the EU altogether (Ghimis et al. 2016). While there may be disagreements in the extent of the challenge, whether it is the claim that the "Schengen is under attack" (Gros 2015) or simply undergoing a challenging period, there seems to be agreement in the fact that there is a tough road ahead both in political terms and in public perception for the future of Schengen.

WHY THE SCHENGEN AGREEMENT IS TOO IMPORTANT TO FAIL

Consequences of a Weakened Schengen Agreement
The Schengen agreement remains one of the main accomplishments of the EU, not only having high value as a source of European identity, integrity and solidarity, but with substantial economic importance. Even short-term disruptions in open borders can have significant negative economic impacts on EU member states. The freedom to live and work wherever in the European Union has been one of the most, if not the single most, important principle of the European project (Juss 2006).

While the freedom of movement is not necessarily tied to the Schengen Agreement, it is facilitated by it (Aussilloux and Le Hir 2016). A roll back of the Schengen Agreement can have severe consequences on the freedom of movements, goods, services and economic activity in general (Aussilloux and Le Hir 2016). The implementation of border controls, would not only be costly due to the implementation of those restrictions but would result in heavy traffic jams and a reduced number of travelers, affecting tourism within the Schengen zone (Aussilloux and Le Hir 2016). This means negative impacts on the number of tourists, cross border commuters and import/export freight costs (Aussilloux and Le Hir 2016). If the Schengen Agreement were to be removed, bilateral trade among members would drop by 10% with an average GDP reduction of 0.8%. Most importantly, however, it would cast a shadow on the whole European project (Aussilloux and Le Hir 2016). With such dire consequences, it is not surprising that Schengen member states have taken numerous steps to maintain the Schengen Agreement despite the significant obstacles it faces.

EU ACTIONS TO SAVE THE SCHENGEN AGREEMENT

It is important to understand the underlying mentality of EU actions to deal with the refugee crisis. The EU has resorted to "extra-territorialism" to address the issue of migrants to maintain open borders in Europe (Rotman 2012). This is effectively "policing at a distance" as the EU tries to contain the flow of refugees outside its borders by creating extraterritorial buffer-zones (Rotman 2012). Such actions can be seen as efforts to circumvent the 1951 Geneva Convention on Refugees, which provided the right of protection from persecution and refoulement to asylum seekers (Rotman 2012).

It is important to note the context of the 1951 convention, as during that historical junction most refugees were those fleeing from the communist bloc and thus were of important political, ideological and even economic value (Rotman 2012). This mentality about asylum seekers clearly shifted after the breakup of the Soviet Union. Turkey has been a prime example of such buffer zones for the Syrian refugee crisis as it is geographically bridging the

EU with crisis zones in the Middle East. There is no doubt that European leaders face a tough choice between acting as a moral compass by accepting refugees with open arms or by scrambling to maintain one of the key accomplishments of the European project, open borders. As time passes, the internal politics of many European countries and the rise of Eurosceptics is further complicating the situation and forcing policy makers to choose the latter.

The Greek case has been one of the most important milestones of the Dublin Agreement for the first time, as it involved an EU member state dropping out of the Dublin framework for the first time (Bauder and Matheis 2016). Given the geographic positioning of Greece, it has been the bottleneck of incoming asylum seekers from the Middle East. The Greek asylum system was effectively approaching the issue of asylum by evading the asylum applications and urging refugees to move on to Northern Europe (Bauder and Matheis 2016). Given the worsening economic situation in Greece over the past few year, asylum seekers have less motivation to stay in Greece and a stronger urge to move north towards more economically prosperous nations such as Germany. As the effectiveness of Eurodac sharpened, the situation began to change, with more refugees being tracked and deported back to Greece (Bauder and Matheis 2016). This leaves policy makers with a key question on how to preserve the fundamental rights of refugees that are enshrined within the democratic institutions of the EU while also maintaining a robust external border.

One of the key responses to the refugee crisis in order to save the Schengen Agreement was the December 2015 announcement by the European Commission to create a European Border and Coast Guard (Fargues 2015). While this response would be understandable for some, it is criticized by others for mistaking refugees with invaders. Given that Europe's Mediterranean shore holds the title of "the world's most lethal border" (Fargues 2015), one would question many of the current attempts to strengthen European borders, given that so many people are willing to make such a perilous journey to Europe. There is consensus among governments that economic migrants can be deported, but for those seeking persecution, is there not a legal duty to keep them until their asylum applications are adequately processed? (Fargues 2015).

On the other hand, it is quite apparent that to save the Schengen Agreement, a comprehensive solution must be found to ease the burden from the refugee crisis. Hatton (2016) argues that a tightening of border controls is needed in the long term to move away from the current system of spontaneous asylum migration, but this must be accompanied by a comprehensive settlement program that allows all members to share the burden and an expansion of capacity to host refugees (Hatton 2016). Consequentially, it is important to work with the grain of public opinion rather than against the general sense of anxiety, otherwise the political backlash could lead to accepting far fewer refugees if any at all (Hatton 2016). However, the argument that stricter border controls are the only solution has often been countered by other European scholars. Another solution commonly expressed is dealing with the smugglers that facilitate these large waves of refugees. However, this could either make the journey to Europe even more perilous for the refugees or trap them in war zones (Fargues 2015). This leaves that the moral solution, continuing to accept refugees and showing political will in dealing with the situations that result in the flow of refugees, rather than how they are reaching European borders.

As a result of the many obstacles that parties to the Schengen Agreement are facing, the last few years have seen major revisions and transformations of the agreement. In 2011, as thousands of Tunisian asylum seekers were arriving on the shores of the Italian island of Lampedusa following the turmoil from the Arab Spring, the Italian government asked the EU for help in managing the difficult situation (Pascouau 2013). However, the EU did not share Italy's viewpoint on the severity of the situation and an offended Italy started issuing travel permits to the refugees allowing them to travel throughout the Schengen area, especially to France (Pascouau 2013). As a results, the French government started enacting police controls on its border with Italy, effectively limiting the freedom of movement (Pascouau 2013). In this scenario, both countries were challenging the freedom movement that had resulted from the Schengen Agreement and thus saw the need to address the issue. Both

countries subsequently sent a request to the European Commission to revise the Schengen governance and that was responded with unusual speed (Pascouau 2013).

Two years of intense negotiation and legislation from the EU parliament led to a transformation of the Schengen governance in two key ways (Pascouau 2013). This tense period revived questions about national interests and the power of the European Commission and while the member states made sure to protect their public policy rights, the Commission gained a greater role in Schengen governance (Pascouau 2013). The "Schengen Governance Package" which resulted, called for solidarity among member states in temporarily imposing internal border controls in the event of challenges with managing external borders (Novotná 2015). The transformation included two key areas, firstly a clarification in when internal borders can be introduced after evoking a "sovereignty clause" that had previously existed, effectively making its implementation more difficult by bringing it further under the control of EU law (Pascouau 2013). The amendments set out the circumstances, grounds and time limits for which member states can implement internal border controls (Guild et al. 2015). Secondly, changes in the Schengen evaluation mechanism meant that there was a new definition for the role of the Commission in the mechanism (Pascouau 2013). The Schengen Governance Package has been the most significant change made to the agreement in response to the refugee crisis, but it seems to avoid the major changes that many demand.

The revised Schengen governance falls short of addressing the main solution: further solidarity among member states and the sharing of burden at times of crisis. Currently, the only agreements covering those issues, such as the European Pact on Immigration and Asylum and the Stockholm program are non-binding (Novotná 2015) and clearly do not have the required impact. Europe even has a legal instrument for a mass influx of refugees called the EU Temporary Directive, but a lack of political will and fear of a promoting more migration has led to the instrument remaining inactive (Lambert 2016). The current ad hoc resettlement clearly is not working and there needs to be a sharing of the burden among all member states based on GDP and population (Novotná 2015). While such a solution would certainly meet stiff opposition from many member states and result in deep disagreements.

It is important that the Schengen Governance Package be seen as what it is, a document to clarify the rules governing the re-imposing of internal borders and to assure it is not abused by member states (Novotná 2015). It is clear that addressing the issue of internal borders is a key step. However, it fails to address the core issues that are resulting in member states reintroducing border checks. As the former foreign minister of Luxemburg, who was present at the original signing of the agreement in Schengen, Luxemburg put it, "Schengen is not the reason why Europe is currently in such a difficult situation. The real reason is the lack of cooperation, solidarity and political will" (Ghimis et al. 2016). The majority of European scholars believe that the fundamental issues at hand are not being addressed. As Bauder and Matheis (2016) put it eloquently, the current rationale seems to be: "Yes, refugees should receive protection, but no, not in my neighbourhood" (Bauder and Matheis 2016). This again highlights one of the key values that have brought European nations together, solidarity and the sharing of responsibility. That is the example member states must follow in the light of these challenges, with those values, it is possible to maintain a Europe without borders with failing the moral test of accepting those seeking refuge.

Conclusion

The key question is: how far would the EU go to maintain the Schengen framework? Obviously, there is no straightforward answer. However, the consequences of inaction seem clear. If the Schengen Agreement is to remain a prime example of EU solidarity and the success of European integration, tough choices must be made to maintain it in light of the many challenges that it faces. This includes the acceptance by all member states that in order to benefit from open borders within Europe, there is a price to pay and that includes sharing the burden of refugees in a fair way. There must also be greater appreciation for the role that frontier nations, such as Greece and Italy, play in protecting the external

border of Europe. Given the prominent role that that European Commission plays following the introduction of the Schengen Governance Package, it has a key role to play in bringing together member states to share the responsibility and reduce the burden on external border-states. However, simplifying the solution to the introduction of quotas seems not to be the answer given the possible backlash in some member states and issues of public perception that may result in even more far right governments coming to power that may not look at the whole European project favorably. Evidently, European policy makers face a delicate balancing act, but if political will was able to bring European nations to agree to a borderless Europe three decades ago, the same will should help overcome many of the current challenges.

ACKNOWLEDGEMENTS

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