

On the Need of a Harmonized and
Progressive Refugee Policy in the European Union.
Written by Nina Verdelli.

One refugee returned to danger is too many.
-UNHCR

Introduction

In theory, EU refugee laws aim to ensure asylum seekers with multilateral protection and to enable member states to “share the burden” of massive migratory fluxes. In practice, given the lack of harmonization of asylum policies, EU countries tend to “shift the burden” in emergency situations, thereby disregarding the responsibility they have towards asylum seekers *in primis*, and fellow member states *in secundis*.

In *this* paper I will explain how these shortcomings could be overcome by harmonizing EU refugee policy in a progressive manner. After introductory remarks on the historical evolution of the international and European legislation on asylum, I will conduct a legal analysis, highlighting how the lack of uniformity in the interpretation and implementation of EU refugee laws among member states is likely to generate unfairness towards asylum seekers and to prevent collaboration among European countries.

To support this argument, I will subsequently present the difficulties Italy encountered in the management of a copious flow of immigrants fleeing North Africa and reaching the island of Lampedusa during the so-called Arab Spring of 2011 as well as the diplomatic impasse that this situation generated between Italy and neighboring countries. The normative analysis together with the case study demonstrate that although European nations have succeeded in converging some aspects of their asylum procedures, much still needs to be accomplished in order to remove

inequality of treatment across Europe and to ensure a more efficient and multilateral management of incoming refugees.

Finally, after having enumerated a series of ethical reasons and realpolitik advantages that should motivate member states to converge their respective refugee policies, I will conclude by emphasizing how such a standardization would represent an opportunity for the EU to demonstrate that strengthening its central institutions toward a federalist direction can complement furthering justice worldwide.

Terminology Overview and Historical Recapitulation

The right to seek asylum in a sacrosanct place, such as a church, originated as far back as European medieval law (Grahl-Madsen 1996, 278-289). However, it is not until the aftermath of World War II that the international community defined refugees as a legal category to address the needs of the millions of forcibly-displaced in consequence of the conflict.

International law distinguishes between “refugees” (i.e., individuals who cross international boundaries to flee persecution and to whom their destination country has granted protection), “asylum seekers” (i.e., applicants whose claim has not yet been formally recognized), and “economic migrants” (i.e., persons who voluntary emigrate to seek better economic conditions in another country). Although the dividing line between refugees and economic migrants is becoming more and more blurred, only the former fall under the authoritative definition of Article 1(A)2 of the *Convention Relating to the Status of Refugees*, signed in Geneva in 1951 (hereinafter referred to as the “Geneva Convention”), according to which a refugee is any person who:

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion, is outside the country of his nationality, and is unable to or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (Geneva Convention 1951, Art. 1(A)2).ⁱ

This definition provides little interpretative guidance. In fact, the Geneva Convention and its subsequent *Protocol Relating to the Status of Refugees* of 1967 (hereinafter referred to as the “1967 Protocol”), were meant to be rather minimalist - the interpretive burden was placed upon the signatory states, solely helped by the United Nations High Commissioner for Refugees (hereinafter referred to as the “UNHCR”). Created by the UN General Assembly in 1950, the UNHCR was intended to provide humanitarian relief to refugees and to cooperate with states to ensure their adequate protection. Notwithstanding its interpretive power to determine who falls within the statutory definition, this organization does not have binding authority over states. Only states have a final say in the determination of the status of asylum seekers.

This delicate equilibrium between the international formulation of a norm and its national interpretation and implementation originated from a twofold necessity - on the one hand, to respect states’ sovereignty, and on the other hand, to ensure that the protection of refugees went beyond being a solely domestic concern and became a global one. Making refugee policy a shared interest of the international community aimed at providing those displaced with a more effective multilateral protection and to distribute the burden of protection among states so that no

country would have had to deal with an excessive burden and that international tensions concerning resettlement are avoided.

Building upon the effort of the international community to simultaneously ensure a centralized creation and decentralized interpretation of refugee law, the European Union included asylum policies within the EU legal system. As early as 1985, Germany, France, the Netherlands, Belgium, and Luxembourg signed *The Schengen Acquis* (hereinafter referred to as “Schengen Accords”), which removed all border controls among them while strengthening the common external border in an attempt to enhance regional cooperation in matter of asylum and immigration.

Successively, in 1992 the *Treaty on European Union* (hereinafter referred to as the “Maastricht Treaty”) required the EU and member states’ asylum policies to comply with the *European Convention on Human Rights* (hereinafter referred to as “ECHR”) and with the Geneva Convention. Additionally, membership in the EU was made conditional upon ratification of the latter which, thus, became legally binding upon all member states. On the other hand, however, the Maastricht Treaty established that asylum policy would be a component of the EU’s Third Pillar of Justice and Home Affairs, thus enabling collaboration through intergovernmental means. In this way, each state preserved the prerogative of having a final say for its own asylum affairs.

Significantly, in 1997, the *Treaty of Amsterdam amending the Treaty of the European Union* (hereinafter referred to as the “Amsterdam Treaty”) attempted to resolve inconsistent European refugee policies by transferring this issue to the First Pillar; hence, directly under the aegis of the EU. Additionally, the Amsterdam Treaty called for a harmonization of asylum policies, by stressing member states’ responsibility for asylum applications and by determining

shared minimum reception, qualification, and procedural standards for granting and withdrawing refugee status.

To fulfill these obligations, in 1999, the European Council met in Tampere where it inaugurated a Common European Asylum System (hereinafter referred to as the “CEAS”) aimed at embodying the key values of the Geneva Convention and especially the principle of *non-refoulement*.ⁱⁱ Alongside the short-term goals set forth by the Amsterdam Treaty, goals that were enacted into law during Phase I of the CEAS (1999 – 2004), the *Presidency Conclusions* of the Tampere meeting (hereinafter referred to as the “Tampere Conclusions”) set the long-term objectives of establishing a common asylum procedure and a uniform status for those granted asylum.

The latter were carried out during Phase II of the CEAS, which began in 2004 and which, according to the 2009 European Council’s *Stockholm Programme* (hereinafter referred to as the “Stockholm Program”), is supposed to culminate in 2012. The Stockholm Program carried out the aim of the *Reform Treaty*, signed in Lisbon in 2007 (hereinafter referred to as the “Lisbon Treaty”), to work toward a progressive homogenization of EU law in matter of asylum and immigration. Whereas prior to the promulgation of the treaty, measure concerning the entry, residence, and rights of legal immigrants (among which refugee seekers) were agreed upon unanimously, now they are decided through Qualified Majority Voting (hereinafter referred to as “QMV”). With respect to this, a scholar emphasizes how

[t]his shift offers the European Parliament a right to veto new immigration legislation, allowing it to play a key role in the policy-making process. Such measures

demonstrate that the EU is continuously playing a more significant role in the coordination of immigration efforts among EU member states. (Pacella 2011, 366).

Notwithstanding the aforementioned effort made by the EU, member states' asylum policies are far from being uniform. As we shall see, in consequence of the lack of harmonization in the interpretation and implementation of refugee laws, the EU fails to meet the two objectives for which the CEAS was instituted in the first place: it fails to grant asylum seekers with a genuine multilateral protection, and to neutralize the disproportionate impact that immigration has on some EU states. The latter, in its turn, often causes diplomatic frictions concerning resettlement.

Literature Review and Normative Analysis

Several studies have attested that a considerable variation of refugee policies among member states subjects asylum seekers to arbitrariness in the assessment of their claim, depending on which country of destination the claim is decided upon (Noll 2000).ⁱⁱⁱ Discrepancies among member states' attitudes are mainly due to inherent factors such as the political and the economic conditions of a country, as well as the public sentiment toward incoming immigrants.

With political conditions I intend a sum of factors including, *inter alia*, the composition of the government (whether right-wing, centrist or left-wing), the influence of right-wing populist (and xenophobic) parties regardless the government's political orientation, and a country's human rights record. Not surprisingly, countries wherein a right-wing government is in power or wherein xenophobic parties have electoral success tend to promulgate more restrictive asylum (and immigration) policies (Neumayer 2005, 52).^{iv} In addition, a state's inclination to comply with

human rights is an indicator of the likelihood of that same state to enact progressive measures toward refugees. In fact, researchers point out that, for countries that are inadequately protecting their own citizens' human rights, granting asylum "means little more than legal recognition because the state is unable or unwilling to protect the asylee" (Morrill 2010, 103).

Economic conditions refer to elements such as a country's per capita GDP, and the unemployment rate. The latter, especially, is thought to be associated with recognition rates, since "destination countries tend to shift asylum seekers into statuses with lower protection levels when unemployment rates are high and the perception of being overburdened by asylum seekers is popular" (Neumayer 2005, 64).

Finally, a hostile public perception of asylum seekers as 'bogus' refugees "makes it easier for policy makers to enact [...] deterrent measures aimed at curbing the seemingly widespread abuse of a supposedly liberal asylum regime" (Neumayer 2005, 49).

In sum, these studies emphasize that the variation in member states' refugee policies causes asylum claims across Europe not to be exclusively assessed on a meritocratic basis. The situation has become even more problematic after the entry into force, in 1997, of the *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities* (hereinafter referred to as the "Dublin Convention") and of its successive replacement, *Regulation 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national* (hereinafter referred to as "Dublin II"). These provisions removed asylum seekers' possibility to lodge an application in their preferred state by requiring that those fleeing persecution claim asylum in the appropriate

member state (i.e. usually the country of first entry), and by enabling the use of one member state's denial to close the EU to the applicants.

Originally created to hinder the practice of filing multiple applications, either simultaneously or successively, by one asylum seeker in more than one member state – a practice sometimes pejoratively called “asylum shopping” (Morrill 2010, 91; Neumayer 2005, 44) – this system does not acknowledge the fact that a person's chance to be recognized as a refugee varies substantially across the EU. Therefore, although Dublin II partially ended the habit of asylum shopping, these provisions (involuntarily) entailed an even more troublesome situation, labeled “asylum lottery” (Morrill 2010, 91; Neumayer 2005, 64), wherein the odds of acquiring the status of refugee are contingent upon the country in which the claim is processed.

To overcome this risk of unfairness, in 2004, the European Council has enacted the *Directive 83/2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* (hereinafter referred to as the “Minimum Qualification Directive”) as the first legally binding supranational instrument of regional scope aimed at establishing shared minimal standards for people fleeing persecution to qualify for international protection in the EU. The Minimum Qualification Directive provides EU member states with interpretive guidance on the application of the Refugee Convention which – as mentioned above – was created to place the interpretive burden upon the states parties.

Although the Minimum Qualification Directive was intended as an instrument of harmonization, because of some of its intrinsic characteristics, true uniformity remains elusive. Peculiarly, the Minimum Qualification Directive hinders standardization since it allows “member

states to deviate, even if only in an upward manner, from the minimum standards established” (Allard 2010, 313). Furthermore, difficulty of homogenization is exacerbated by the existence, among member states, of various interpretations of the minimum standards themselves. These differences in interpretation affect the process of transposition of the common text of the directive into national texts which are, hence, inconsistent with one another.

To surmount this problem, the European Court of Justice (hereinafter referred to as the “ECJ”) has been called, by virtue of its capacity to issue preliminary rulings,^v to settle disputes concerning heterogeneous interpretations of some of the Minimum Qualification Directive’s key concepts. For instance, in *Elgafaji v. Staatssecretaris van Justice*, the Dutch Council of State requested a preliminary ruling from the ECJ to clarify the periphrasis “serious and individual threat” contained in Article 15(c) of the Minimum Qualification Directive.^{vi} Although in this case the ECJ has successfully uniformed interpretation,^{vii} scholars do not omit to point out that “the necessary intervention of the Court highlights the continuing disparity in interpretation of the Minimum Qualification Directive, which frustrates true harmonization” (Allard 2010, 321).

All in all, it clearly appears that – despite the *de jure* attempts of standardization of EU refugee law – *de facto*, the state wherein an asylum application is lodged continues to play a pivotal role in the likelihood of an applicant’s success. Hence, given the existing disparities among states’ refugee policies, the question becomes: what happens to asylum seekers who enter a country ruled by a right-wing government and characterized by adverse economic conditions, wherein far-right populist parties boast electoral success, and the public climate is adverse to refugees and immigrants in general? This is exactly what asylum seekers fleeing Tunisia and

Libya during the so-called Arab Spring of 2011 found where they disembarked in Lampedusa, Italy.

Case Study

From the vantage point of aspirant refugees, Italy represents a compendium of all possible worse conditions in terms of facilitating the success of their asylum applications. Geographically situated at a vulnerable angle in proximity to both Northern Africa and Eastern Europe, each year Italy receives thousands of immigrants and of asylum seekers who reach the country through the perils of crossing the Mediterranean Sea, all too often with inadequate boats.

However, as a traditional sending nation in terms of immigration, Italy has only recently experienced such transformation at its borders and it is, thus, often unprepared to cope with massive flows of newcomers: the government's difficulty in monitoring Italian extensive coastal borders, together with the parliament's ineffective immigration laws, have rendered the country an accessible target for illegal immigrants (Christiansen 1997, 461-463). Additionally, once immigrants arrive on Italian shores, they are exposed to disorganized reception centers that, being unable to handle substantial inflows of entrants, often return people entitled to international protection to their homeland, thereby violating the principle of non-refoulement (Pacella 2011).

Furthermore, Italy is pervaded with an anti-immigrant sentiment which becomes more and more manifest as the country progressively passes from being a homogenous nation to adapting to the presence of a more multicultural component. Often, in recent years, xenophobic feelings have given rise to acts of verbal and physical violence toward Italy's new arrivals. Numerous would be the examples of racist behaviors or anyway of uneasiness toward the different, last but not least the dismantlement of Roma camps all over Italian territory occurred in 2010 (European

Roma Rights Centre 2000. European Roma Rights Centre 2008. European Roma Rights Centre et al. 2008); however, an extensive enumeration of these episodes goes far beyond the scope of *this* paper.

For the present purpose, I simply want to mention that a 2001 public opinion poll demonstrated that 72% of Italians blame immigrants as the major cause of criminality in Italy (Caritas Di Roma 2001). Moreover, a survey conducted by the International Herald Tribune in 2007 revealed that 60% of Italians believe that immigrants should be expelled from the country (International Herald Tribune et al. 2007). Additionally, the 2008 financial crisis and the 2011 euro crisis, by worsening the overall economic conditions of the country, intensified the public hostilities toward newcomers who are stereotypically perceived as potential competitors in an already difficult job-market.

This anti-immigrant sentiment is perfectly reflected by the electoral success of the Northern League,^{viii} a far right-wing and xenophobic party that, although small, obtained 8.3% of votes during last political elections in 2008, and conquered the Presidency of Region Piemonte and of Region Veneto during the regional elections in 2010. The increasing popularity of this party, which was one of the allies of former Prime Minister's, Silvio Berlusconi, right-wing coalition^{ix} (both during the 2001-2006 and the 2008-2011 administrations), played a pivotal role in twisting Italian immigration laws toward a more discriminatory direction.

In 2002, Italy amended the existing pro-immigrant *Law 286/98 concerning immigration discipline and norms relative to the condition of the foreigner* (hereinafter referred to as "Turco-Napolitano"), with the much more restrictive *Law 189/02 modifying the norm concerning immigration and asylum* (hereinafter referred to as "Bossi-Fini", Umberto Bossi being the leader

of the Northern League). This law, which scholars describe as the emblem of the “rise of nativism and racism throughout Europe” (Totah 2003, 1504),^x was denounced by the UN for its lack of provisions regarding asylum despite such a right being granted by Article 10 of the *Constitution of the Italian Republic* (hereinafter referred to as the “Italian Constitution”)^{xi} (Totah 2003, 1492-1493), and for putting immigrants in risk of mistreatment and death by allowing the Italian navy to utilize its police power to stop and inspect any ship believed to carry illegal immigrants (Totah 2003, 1498).

In 2009, Italy reiterated its rigid stance on immigration through *Law 194/09 concerning public security* (hereinafter referred to as “Clandestine Law”, being “*clandestino*” the Italian noun to refer to irregular immigrant), which criminalizes irregular immigration by imposing a fine of up to €10,000 and a penalty of up to 4 years of imprisonment to immigrants who are on the Italian soil without a legal status. The ECJ has recently condemned the detainment penalty stipulated by the law as incompliant with the European immigration norms (Cavallieri 2011).

Given this nefarious background, it is not difficult to picture the conditions of hardship the thousands of asylum seekers fleeing North Africa during the spring of 2011 were subjected to, upon their arrival to Lampedusa.

It is estimated that, from January to July 2011, 40-50 thousands of boat-immigrants have reached the island’s shores (Breda 2011). Accordingly, during that same semester, 10,860 asylum applications were lodged in Italy, representing an increase of 132% compared to the previous semester, July – December, 2010 (UNHCR 2011). The majority of newcomers were fleeing either Tunisia or Libya. Immigrants from Tunisia hardly qualified for the status of refugee, since in their country of origin the insurgencies came rapidly to an end without entailing brutal repercussions

toward rebels (Bonanini 2011a). The situation was much different for people coming from Libya, especially when Colonel Muammar al-Gaddafi's regime was still in place.

For decades Libya has been a destination country for over one million of African economic migrants attracted by the country's oil-rich economy, as well as for asylum seekers who, fleeing persecution in Eritrea, Somalia, and Sudan, hoped to cross Libya to reach Europe.

Italy was then one of the easiest targets, given its geographical proximity.

In order to reduce the flows of immigrants, in 2008, then Italian Prime Minister, Silvio Berlusconi, and Colonel Gaddafi agreed upon a *Treaty on Friendship, Partnership, and Cooperation* (hereinafter referred to as the "Friendship Treaty"), which entailed extensive Italian investment in Libya in exchange for a joint naval patrol in Libyan territorial waters. The agreement resulted in the deployment of hundreds of boats back to Libya, a country that is not party to the Geneva Convention and whose human rights' violations are notorious. Since migrants returned to Libya were, more often than not, abused, the Friendship Treaty can be said to be in appalling non-compliance with the principle of non-refoulement. The European Court of Human Rights' judgment is currently pending in this regard.

In any case, given this "amicable" relationship between the two countries, Colonel Gaddafi was not pleased when Italy joined NATO's intervention in March 2011. In retaliation for such a betrayal, he started to send boats filled with Africans toward Lampedusa, threatening to "turn Europe black" (Wheeler and Oghanna 2011).

As of October 2011, of the 34,000 people who departed from Libya, approximately 27,000 reached Italy, whereas 1,500 never made it. 5,500 other individuals, who possess a legitimate entitlement to international protection, are still stuck in Egypt or Tunisia which left

their borders open as civil war erupted in Libya (Wheeler and Oghanna 2011). The destiny of these people is unknown. They cannot remain for an undetermined period of time in Egypt or Tunisia, as these states are now facing the social and economic consequences of their own upheavals. They cannot return to their countries of origin because of war or risk of persecution. And they certainly cannot move back to Libya where, given Gaddafi's large employment of Sub-Saharan mercenaries during the civil war, black migrants and refugees are believed to be part of the loyalists' ranks, and are thus abused – when not killed – by the rebels.

With respect to these displaced persons, international organizations such as the UNHCR and NGOs such as Amnesty International have raised their voices and solicited EU countries to absorb the relative small number of asylum seekers still in Tunisia and Egypt with a slight increase of their annual resettlement quotas, and to admit on humanitarian grounds those already on the European soil (Amnesty International 2011). The response, however, has been trivial: only eight European states have consented to collaborate, collectively offering only 800 slots. A political strategy is concealed behind this patent ungenerousness: the fear of setting precedents motivates European countries to maintain a tough stance against today's migrants as a signal to tomorrow's potential newcomers. As scholars have sharply noticed,

[w]hile there are many ways to deter potential asylum seekers to reduce their numbers – including visa restrictions, carrier sanctions, reduction in welfare benefits, and list of “safe” third countries of transit – a low recognition rate signals to potential asylum seekers that the chance of their asylum claim becoming accepted are low. A low recognition claim expose potential future asylum seekers to the risk of being sent

back to their country of origin or to other countries of transit that are not their chosen country of destination. Whatever the motivation for leaving one's country of origin in the first place, being sent back or deflected to undesired third countries not only defeats the initial purpose but is also likely to leave the person worse off than in the initial situation, given that scarce financial and other resources have been spent. In cases in which people had fled from genuine persecution in their country of origin, the risk of being imprisoned, tortured, or killed can well increase if their asylum claim is rejected and they are forced to return, drawing additional attention to them. It is exactly for this reason that *non-refoulement* [...] is at the heart of the 1951 Geneva Convention (Neumayer 2005, 48).

Not only EU countries turned a deaf ear to Amnesty and UNHCR's solicitations; but also, as soon as the question of resettlement was brought under the attention of the EU, immediate tensions among states arose. The Lampedusa impasse is a stark example in this regard.

As mentioned before, Italy was not organized to manage such massive inflow of migrants. Financial resources and personnel were scarce; and the workload of filtering those who, among the arrivals, were entitled to protection became heavier and heavier, thereby affecting the precision of the classification. With respect to this, it has been noticed that "there [was] much ambiguity and error involved with sorting the arrivals, as well as a fear that immigrants seeking asylum and undocumented migrants [were] being confused, thereby denying asylum-seekers the right to protection" (Pacella 2011, 360). In one word, Italian government, by failing to develop a substantial public system of reception, has demonstrated that the few existing asylum norms are

not being adequately implemented. Evidence of this trend is the fact that overwhelmed reception centers in Lampedusa were shut down for days during the period of maximum emergency.

Unable to address this situation alone, and convinced that extended migratory fluxes represent a challenge for the whole EU, in February 2011, Italy asked Europe to intervene and demonstrate in practice the principles of “solidarity” and “burden sharing” embedded in EU asylum laws (Boeri 2011).

In accordance to the *Council Regulation 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union* (hereinafter referred to as the “Frontex Regulation”, being Frontex the agency responsible for mobilizing collaboration among member states in managing external borders, which are usually guarded by individual states), the EU responded to Italy’s claim by promptly setting up *Hermes 2011*, a Frontex operation aimed to support Italy in patrolling its coasts.

In addition, during the fiscal year 2010-2011, the EU provided Italy with a substantial portion of the EU’s External Border Fund (€38 million, approximately \$51 million, out of a total of €129 million). Such funding aimed, *inter alia*, to increase the number of vehicles and observation equipment used to patrol borders, improving satellite communication capacity on Navy vessels, and so on. Finally, the EU cooperated with Italy’s effort to reach an agreement with Tunisian authorities in matter of borders control (Bonanini 2011a; Ginori 2011a).

Although appreciated, for Italy this was not enough. The most pressing issue, indeed, concerned the possibility to redistribute among member states part of the asylum seekers disembarked in Lampedusa – in particular, approximately 24,000 people prevalently coming from Tunisia. In this regard, on April 7, 2001, Italy asked the EU to implement the principle of

“mandatory solidarity” via the entry into force of the *Council Directive 55/2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* (hereinafter referred to as the “Mandatory Solidarity Directive”).

Clearly motivated by empathy and by the opportunity to benefit as well by the implementation of the Mandatory Solidarity Directive, Greece, Cyprus, and Malta backed the Italian claim. Conversely, France, Germany, and the Northern countries opposed it, emphasizing how 23,000 out of the 24,000 people targeted by this provision were, in effect, economic migrants coming from Tunisia rather than asylum seekers. By the same token, the remaining 1,000 aspirant refugees must have acted according to the provisions enshrined by Dublin II. They were, in fact, supposed to lodge their asylum claim on the country of first entry, in this case Italy (D’Argenio 2011; Ginori, 2011a; Cadalanu 2011).

In the meanwhile, although the Commission’s decision concerning the Mandatory Solidarity Directive was still pending - perhaps in the attempt to anticipate a favorable outcome or, more realistically, trying to get rid of a “burden” - Italy issued six-months temporary residency permits to many of the Tunisian economic migrants who had arrived to Lampedusa. In the opinion of the Italian government, by virtue of the Schengen Agreements these people would have been allowed to circulate freely throughout the territories of the Agreements signatories.

Unsurprisingly, neighboring countries thought differently. France – a natural destination for the typically young, well-educated, French-speaking Tunisians who were looking for a job in Europe – refused to recognize their temporary permits as valid. They were thus sent back on the

basis of the 1997 bilateral *Treaty on Trans-borders Cooperation* stipulated with Italy in Chambery (hereinafter referred to as the “Chambery Treaty”) and on a different interpretation of the Schengen Agreements.

For the sake of the argument, I cannot omit to pinpoint that the Schengen Accords make freedom of movement for third-country nationals conditional upon possession of valid documentation and of means of subsistence, which these fresh-off-the-boat migrants clearly lacked. Hence, France and Germany denounced the inconsistency of the Italian permits with the spirit of Schengen, and asked the Commission to review the Agreements in order to allow member states to re-establish stricter borders’ controls in emergency situations. Additionally, many Landers went as far as threatening to suspend the Schengen Accords once and for all (Bonanini 2011a; Cadalanu 2011; Ginori 2011a; Ginori 2011c; Wheeler and Oghanna 2011).

However, such a retaliatory measure was soon proven to be unnecessary since, on April 11, 2011, the Commission rejected Italy’s request to activate the Mandatory Solidarity Directive, and sentenced those permits to be valid solely on the Italian territory. Italy’s disheartenment was so profound that the country menaced to leave the Union (Bonanini 2011b).^{xii}

From this episode it emerges that, despite the reiterated rhetoric statements on the necessity to act cooperatively with the aim to share the burden, in practice each EU member state acted selfishly, by attempting to shift the burden. Therefore, what clearly started out as a humanitarian issue quickly became a political diatribe. Both Italian former Prime Minister, Silvio Berlusconi, and France current President, Nicholas Sarkozy, were all too worried to maintain a rigid stance towards immigrants in order not to lose electoral preferences *vis-à-vis* their respective national far-right wing parties (i.e. the Northern League in Italy, and the *Fronte*

Nationale in France) (D'Argenio 2011; Ginori 2011a).^{xiii} As the eminent philosopher Tzvetan Todorov stated during an interview released on April 10, 2011,

[w]e live in a status of perpetual inconsistency: on the one hand, we have the euro and Schengen; on the other hand, as soon as one member state has a problem, we fall into national egoism. I find this to be a very deplorable shortcoming, an emblem of the fact that our political élites are not truly European. Immigration is a problem that concerns the Union as a whole (Montefiori 2011).^{xiv}

More importantly, *this* case study has demonstrated that, besides being shoddy and ethically unacceptable, this solipsistic attitude is not far-sighted either. In fact, fluxes of immigrants reaching the EU have increased from 2% to 7% in the last 10 years and will not likely stop (Breda 2011).

In sum, what explained in the legal analysis and in the case study highlights the necessity of a harmonized as well as fair and open, rather than more restrictive, refugee policy in the EU. Every member state, Italy *in primis*, would enormously benefit from such a standardized policy. In this regard, it has been observed that

a common European Union immigration policy [...] would enable [Italy] to share the burden of policing and patrolling its extensive borders with neighboring EU Member States. The EU institutions of binding measures to handle immigration would also make Italy responsible for compliance on a European level, thereby exerting pressure on the Italian government to successfully implement immigration control measures. It

is also likely that the presence of xenophobia would eventually diminish as the immigration problem would be efficiently regulated through collaboration among similarly situated States (Pacella 2011, 344).

The ultimate goals of such standardization are, on the one hand, the removal of inequality of treatment across Europe and, on the other hand, the establishment of a more efficient management of incoming asylum seekers.

Policy Recommendations

As of today, European countries have succeeded in standardizing some aspects of their asylum procedures, as the previously reported historical recap has demonstrated. However, as emerged in the subsequent parts of *this* essay, much still needs to be accomplished in order to ensure both commonality and fairness. In particular, two are the recommendations that, in my opinion, should be implemented.

Firstly, asylum standards should be set at a higher level in line with the UNHCR's interpretations of the Geneva Convention, thereby nullifying the potential exclusions generated by Dublin II. In order to achieve this goal, the EU could temporary suspend Dublin II until the standards are harmonized. Alternatively, it could develop a system wherein asylum seekers, whose application has been denied in a particular state, are granted a second chance in a different country.

Secondly, supranational institutions should be strengthened. An increased role of the ECJ would be enormously beneficial in terms of guaranteeing a more uniform interpretation of EU refugee laws which, as mentioned above, are oftentimes subjected to variegated interpretations that lead to diverse methods of implementation at the national level. Furthermore, a greater

influence of the European Council and Commission would serve the purpose of dictating to member states what the standards concerning asylum must be, thereby preventing them to act solely on the basis of their national interest.

The ethical reasons why such harmonization is needed are before everyone's eyes. Firstly, EU member states ought to embody, in their legislation and actions, the values that inspired the international and European conventions they ratified, such as the Geneva Convention, the ECHR, and the Torture Convention.

Secondly, Western Europe is often involved in the creation of the conditions from which the need to migrate from other areas arises in the first place. Therefore, EU countries must embody an attitude of solidarity against oppression towards "people from particular parts of the world where they have been influential in maintaining or supporting regimes which abuse human rights or preside over economic policies which systematically impoverish certain sections of their population" (Black 1996, 71).

Peculiarly in the case of Libya, the support given to Gaddafi's regime, before, and the military intervention on Libya's soil, subsequently, emphasize how shameful Europe's inadequate response to the problem of refugees is. In this regard, Niels Franzen, a refugee law specialist at the University of Southern California, avers: "It's obscene. Under NATO auspices you've got this massive military response to protect civilians in Libya and once those civilians step foot on a boat, NATO isn't using its resources to aggressively protect them like they would if they had just stayed in Misurata" (Wheeler and Oghanna 2011).

Whereas these moral reasons are generally well-known, politicians often forget the realpolitik advantages such standardization entails. Firstly, since migration of asylum seekers is

usually conflict-related, looking the other way by raising barriers is likely to result in further conflict which, in its turn, will generate increased flows of migrants (Richmond 1994).

Secondly, given the high level of interdependence among EU members state, one state's (egoistic) national rules on refugees are likely to have undesired repercussions on other states, as the Lampedusa case has clearly shown.

Thirdly, standardization would end the practice of asylum shopping, thereby limiting the review of multiple applications submitted by the same individual. In this way, the EU could better manage its resources and allocate them to protect the most vulnerable applicants. Moreover, as it has been noticed, “all asylum claims would be processed more quickly because applicants with valid claims would be granted protection where they first apply, eliminating the need to go from state to state in search for a favorable decision” (Morrill 2010, 104-105). In sum, harmonizing refugee policies would enable the EU to increase efficiency alongside with justice.

Last but not least, immigrants in general represent a healthy boost on European economy. The EU has a low birth rate and its population is aging; therefore, it needs young foreign workers to overcome labor scarcity, especially in the unskilled sector of the economy (Islam 2007).

Conclusion

Throughout *this* paper I have tried to demonstrate that a standardized European refugee policy is needed in order to fulfill the two objectives - one ethical and one political - for which international cooperation concerning asylum seekers emerged in the aftermath of World War II: namely to ensure a multilateral protection to people fleeing persecution; and to share responsibilities in order to alleviate the burden of countries particularly subjected to massive

migratory fluxes. I have proceeded *per absurdum*, showing how should harmonization lack, the result cannot but be ethically deplorable and politically inconvenient.

As a final remark, I would like to emphasize how, alongside the common market, the common value, the Common Agricultural Policy and so on, a common refugee policy would cooperate in strengthening the federalist component of the EU, and it would do so in an inclusive rather than exclusivist manner. Indeed, one of the major criticism Euroskeptics address toward the Union is the fear of an eventual external projection of the federal logic. In other terms, according to some, a supranational authority is likely to reproduce the “otherizing” mechanism inherent to nation-states, and magnify it in the international arena, thereby generating what some have called an “Orwellian nightmare” (Rosamond 2000, 30), and others a “global apartheid” (Richmond 1994, 15).

In this regard, for instance, the Schengen Agreements, originated by the intention to increase cross-cultural contact (at least among EU nations), are blamed for having generated “a ‘white’ fortress in which [...] ethnic minorities are clearly more likely to be subject to random identity checks” (Black 1996, 72). Furthermore, when associated with the terms of Dublin II, as it has been the case in the Lampedusa impasse, these agreements “confirm[...] the notion that freedom of movement is not intended to be for all, even within the fortress” (Black 1996, 72).

Conversely, a standardization of refugee policies in a progressive direction would exemplify Europe’s acknowledgment of the intrinsic value of diversity as a beneficial characteristic that each society should preserve in order to overcome unilateral presumptions of superiority. In one word, the homogenization of asylum procedures could represent the

opportunity for Europe to demonstrate that reinforcing its central institutions can complement furthering justice worldwide.

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Notes

ⁱ **Geneva Convention – Art. 1(A)1**

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.

Article 1(2) of *Protocol Relating to the Status of Refugees* of 1967 (hereinafter referred to as ‘1967 Protocol’) amended this definition to omit the language “events occurring before 1 January 1951”, in order for international protection to be available regardless the dateline.

1967 Protocol – Art. 1(2)

For the purpose of the present Protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and ...” “and the words”... “a result of such events”, in article 1 A (2) were omitted.

ⁱⁱ *Non-refoulement* is a peremptory norm of international law (thus belonging to *jus cogens*). Enshrined for the first time in Article 33(1) of the Geneva Convention, it forbids the expulsion of a refugee into an area wherein the person might be again subjected to persecution. The same principle is reiterated in the 1967 Protocol (by virtue of Article 1 (1)), and in Article 3(1) of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* of 1984 (hereinafter referred to as the “Torture Convention”).

Geneva Convention – Art. 33(1)

No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

1967 Protocol – Art. 1(1)

The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined.

Torture Convention – Art. 3(1)

No State Party shall expel, return (“*refouler*”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

ⁱⁱⁱ A confirm of the fact that decentralized decision-making can discriminate certain groups of refugees comes from a study on individual asylum applications in Swiss cantons over the years from 1988 to 1996 (Holzer, Schneider, and Widmer 2000).

^{iv} The rationale is that no matter what the political orientation of the government is, the electoral success of xenophobic parties causes government to enact more restrictive asylum policies with a view to erode the ground on which xenophobic parties build their success.

^v Preliminary rulings concern those cases, regulated by Article 267 of the *Treaty on the Functioning of the European Union* (signed in Rome in 1957 and hereinafter referred to as the “Rome Treaty”) in which national courts refer to the Court of Justice to interpret EU law and verify the compatibility of national legislation with that law. Once the ECJ has analyzed the legal arguments submitted by national courts, as well as relevant case law and treaty provisions, it issues rulings that national courts must apply to the case in question.

Rome Treaty – Art. 267

The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

(a) the interpretation of the Treaties;

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay.

^{vi} **Minimum Qualification Directive – Art. 15**

Serious harm consists of:

- (a) death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

^{vii} The primary ruling issued by the ECJ in *Elgafaji v. Staatssecretaris van Justice* held that an applicant does not need to show a threat inherent to her personal circumstances to prove a serious and individual threat; and that such a threat can be considered to exist in exceptional cases wherein no individual threat is shown, but conditions are such that the person would face a “real risk of being subjected to that threat” simply by her presence in her territory.

^{viii} The Northern League (i.e. *Lega Nord*) was founded by Umberto Bossi in 1991. The party aims at promoting a federalist taxation system that would ensure increased benefits to the North area of Italy, which is already more developed and industrialized than the Center and, especially, than the South. Extremist members of the Northern League also demand for secession and the total autonomy of *Padania*, an abstract political-administrative entity with which the Northern League identifies the northern Regions –Valle d’Aosta, Piemonte, Liguria, Lombardia, Trentino Alto Adige, Veneto, Friuli Venezia Giulia and Emilia Romagna. Hostile toward Southern Italians, the Northern League is even more acrimonious toward immigrants and it is not afraid to publicize its xenophobic feelings: Umberto Bossi, the party’s notorious leader, has gone as far as publicly stating that boats carrying illegal immigrants should be fired at by cannons (Anonym 2003).

^{ix} The right-wing coalition, led by Italy’s former Prime Minister, Silvio Berlusconi, in 2008-2011 was composed by the following parties: the People of Liberty (a union of former Forward Italy and National Alliance), the Northern League and the Movement for Autonomies. Forward Italy (i.e. *Forza Italia*, FI) was a Christian-democratic, liberal and liberal-conservative political party founded by Silvio Berlusconi in December 1993, and dissolved into People of Liberty in November 2008. FI was presented as the party of renewal and modernization, which core values were “liberty” and the “central role of the individual”. National Alliance (i.e. *Alleanza Nazionale*, AN) was a conservative political party founded in January 1995 when the Italian Social Movement (i.e. *Movimento Sociale Italiano*, MSI), the ex-neofascist party, merged with conservative elements of the former Christian Democracy (i.e. *Democrazia Cristiana*, DC) and with the Italian Liberal Party (i.e. *Partito Liberale Italiano*, PLI). Movement for Autonomies (i.e. *Movimento per le Autonomie*, MpA) is a minor regionalist Christian-democratic political party founded in 2005. MpA demands economic development and greater autonomy for Sicily, primarily, and for other regions of Southern Italy. For a description of the Northern League, see *supra*.

^x Among the reasons why the Bossi-Fini can legitimately be considered an anti-immigrant law, I would mention the followings: whereas the Turco-Napolitano allowed immigrants to enter Italy legally in search of work if a sponsor was available to hire and vouch for them, the Bossi-Fini makes admittance conditional upon having already secured a job before arriving; the law entails a controversial system of forced fingerprinting for immigrants who need to obtain or to renew their permit to stay; it requires immediate enforcement of deportation orders, thus removing the possibility of benefiting of a waiting period before being deported; it empowers the Italian authorities to detain immigrants with a criminal record for up to 60 days in detention centers, which are often under investigation for brutality charges; and it limits the possibility of family reunification.

^{xi} *Constitution of the Italian Republic*, 1947.

Italian Constitution – Art. 10

The Italian legal system conforms to the generally recognized principles of international law.

The legal status of foreigners is regulated by law in conformity with international provisions and treaties.

A foreigner who, in his home country, is denied the actual exercise of the democratic freedoms guaranteed by the Italian constitution shall be entitled to the right of asylum under the conditions established by law.

A foreigner may not be extradited for a political offence.

^{xiii} With respect to this, Roberto Maroni, former Minister of the Interior of the Italian Republic and member of the Northern League, has exclaimed: “I wonder whether it is worthy to continue to be part of the EU. If this is Europe’s response, we are better off alone than in bad company” (Bonanini 2011b).

^{xiii} In this regard, Berlusconi has publicly stated: “This situation of emergency concerning immigration put us in an uneasy place *vis-à-vis* the upcoming administrative elections. We risk to lose the 5% of the votes” [i.e. Sull'emergenza immigrazione ci giochiamo le amministrative, rischiamo di perdere anche il 5% dei voti]. On the other hand, it was commonly assumed that “Sarkò, on immigration, is betting the Elysium” [i.e. Sarkò sull'immigrazione si gioca l'Eliseo] (D'Argenio 2011). Unsurprisingly, one of the questions the French Minister for European Affairs, Laurent Wauquiez, had to respond during interviews has been: “Is France's shift on immigration policy aimed at eroding Marine LePen's success?” [i.e. La svolta sull'immigrazione del governo serve a contrastare il successo di Marine LePen?] (Ginori 2011a).

^{xiv} [i.e. Viviamo in uno stato di perenne incoerenza: da una parte abbiamo l'euro e lo spazio di Schengen, dall'altra, appena uno Stato ha un problema, ricadiamo immediatamente nell'egoismo nazionale. Trovo questo riflesso davvero deplorabile, un segno che le nostre élite politiche non sono realmente europee. L'immigrazione è un problema di tutta l'Unione].