

Chapter 1

Introduction

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The increase in the numbers of people applying for asylum in Europe since 2010, with a sharp rise since the spring of 2015,¹ has created a sense of crisis. Refugee law, which is a component of a solution to any refugee crisis, concerns three basic questions. First, *who* is entitled to protection? Secondly, *what* should that protection entail – merely allowing the presence of refugees in the territory, or allowing access to the labour market and health and welfare systems? Thirdly, *where* should refugees receive protection – in the first country in which they arrive after fleeing their home country, or elsewhere? Our analysis below shows how these three issues are closely intertwined.

In order to start thinking about solutions, the causes of the increasing number of asylum applications should first be analysed. More specifically, we start in section 2 by analysing the situation of Syrian refugees and examining why the influx into Europe rose so steeply last year. We argue that after the outbreak of the war in Syria, a policy of prohibiting refugee movement, the absence of a credible resettlement policy, and the lack of acceptable reception and living conditions and prospects in the region combined to bring about the increase.

The European Union (EU) has considerable competencies on asylum and migration, and has developed an extensive body of law. In section 3 we analyse why the Common European Asylum System (CEAS) has proved incapable of dealing with this influx. The measures adopted and proposed by the European Commission (the Commission) and other institutions over the past twelve months are also unlikely to make the situation more manageable.

In search of the beginning of an answer to the refugee issue, we then turn, in section 4, to the past and specifically to the drafting of the Refugee Convention, which was adopted in order to address a far greater refugee crisis than the current one. We also consider later measures and policies addressing subsequent refugee problems, such as the problems triggered by the Yugoslav civil war in the 1990s. Against that background, we then offer some thoughts, in section 5, as to the way ahead.

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1. Eurostat, 'Asylum and first time applications by citizenship, sex and age, Annual aggregated data (rounded) 2008-2015', <http://appsso.eurostat.ec.europa.eu/nui/show.do>, last accessed 27 April 2016.

Chapter 2

Syrian refugee crisis: prohibition of refugee movement²

A conflict has been raging in Syria since 2011 and has resulted in the forced movement of half of the Syrian population, most of them (some 7.5 million) inside Syria ('displaced persons'),³ while others (some 4.8 million) have fled to territories outside Syria ('refugees').⁴ The number of registered Syrian refugees has developed as follows:

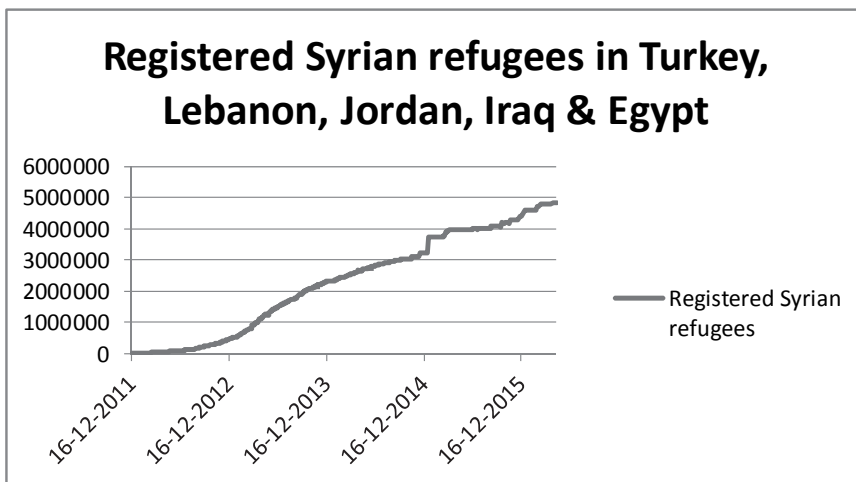


Figure 1. Source UNHCR (<http://data.unhcr.org/syrianrefugees/regional.php>), last update 25 April 2016

Over one million Syrians are currently registered as refugees in Lebanon, while 630,000 are registered in Jordan, 2.7 million in Turkey, 118,000 in Egypt and 246,000 in Iraq.⁵ Compared to the number of inhabitants of these countries

2. This analysis follows the line of argument developed in M. den Heijer, J. Rijpma & T. Spijkerboer, 'Coercion, Prohibition, and Great Expectations. The Continuing Failure of the Common European Asylum system', *Common Market Law Review* 53 (2016), 607-642, available at <http://thomasspijkerboer.eu/migrant-deaths-academic/coercion-prohibition-and-great-expectations-the-continuing-failure-of-the-common-european-asylum-system-with-maarten-den-heijer-and-jorrit-rijpma-2016/>, last accessed 27 April 2016.
3. www.unhcr.org/pages/49e486a76.html, last accessed 23 February 2016.
4. <http://data.unhcr.org/syrianrefugees/regional.php>, last accessed 23 March 2016.
5. *Ibid.*

(Lebanon: 5.8 million inhabitants,⁶ Jordan: 8 million,⁷ Turkey: 77.7 million,⁸ Egypt: 82.5 million,⁹ Iraq: 32.5 million¹⁰), the percentage of registered Syrian refugees is as high as 20% in the case of Lebanon (and estimated at 30% if non-registered refugees are included¹¹).

These are the numbers shown in Figure 1. In Europe, however, the number of Syrian asylum seekers has followed a different pattern. Until the first half of 2015, Syrians barely moved to Europe. Even though increasing numbers of Syrians arrived in Italy in 2013 and 2014,¹² they did not start moving from the region (i.e. Syria's neighbouring countries) in any significant numbers until early summer 2015, by which time the Syrian refugee crisis had already been underway for several years and the number of Syrian refugees registered in the neighbouring countries had reached four million. As can be seen in Figure 2, the number of Syrian refugees in Europe has not yet reached 1 million, in a population of 508 million inhabitants.¹³ These numbers have to be treated with some caution, however. The number of registered Syrian refugees in the region is inaccurate because the neighbouring countries have now closed their borders, as will be explained below, thus making it impossible for new arrivals to register. The number of asylum applications stated for European countries may also be artificially low because some countries have problems in even registering asylum applications, and this backlog may hide a substantial number of asylum applications. The actual absolute numbers, therefore, may be higher. It is likely, however, that the graphs presented here give a good impression of the trends in the development of the numbers of Syrian refugees and asylum seekers, both in the region and in Europe.

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6. https://en.wikipedia.org/wiki/Demographics_of_Lebanon, last accessed 23 February 2016. With due apologies, we use Wikipedia as a source for demographics of non-European countries because the relevant pages are up to date and well sourced.
 7. https://en.wikipedia.org/wiki/Demographics_of_Jordan, last accessed 23 February 2016.
 8. On 1 January 2015, source Eurostat, <http://appsso.eurostat.ec.europa.eu/nui/show.do>, last accessed 27 April 2016.
 9. https://en.wikipedia.org/wiki/Demographics_of_Egypt, last accessed 23 March 2016.
 10. https://en.wikipedia.org/wiki/Demographics_of_Iraq, last accessed 23 March 2016.
 11. Newspapers report the presence of 1.5 million Syrian refugees in Lebanon, comp. https://en.wikipedia.org/wiki/Syrians_in_Lebanon, last accessed 27 April 2016.
 12. UNHCR, *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity* (2014).
 13. On 1 January 2015, source Eurostat, <http://appsso.eurostat.ec.europa.eu/nui/show.do>, last accessed 27 April 2016.

Evolution of Asylum Applications

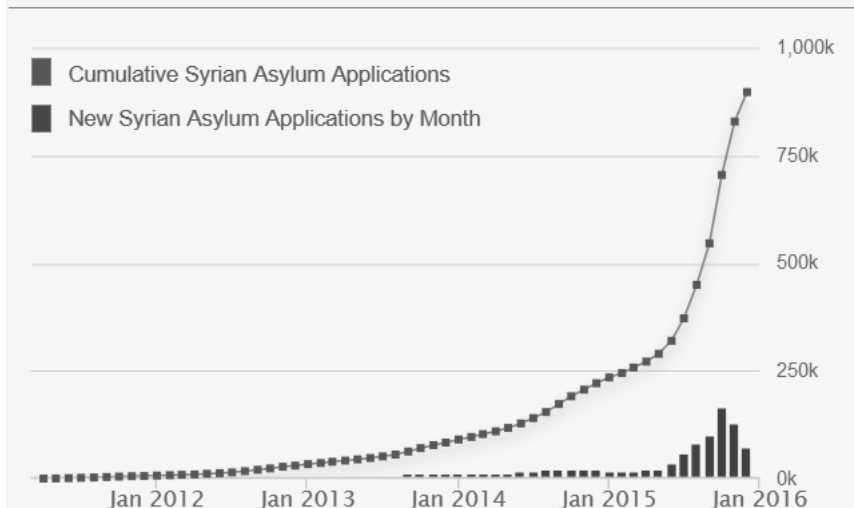


Figure 2. Syrian asylum seekers in Europe (incl. Balkans) 2011-2015, source UNHCR¹⁴

How is it possible that Syrians initially stayed in the region? And why, in summer 2015, did they begin moving to Europe in much greater numbers than before? A crucial element in this respect is the prohibitionist approach that has been adopted to forced migration: refugees and asylum seekers are not allowed to travel to Europe legally. This prohibitionist approach was initially implemented by harmonizing European visa policies. The first (unpublished) common visa list was adopted in 1993, based on the intergovernmental Schengen framework.¹⁵ Since 2001, Regulation 539/2001 has specified the third countries whose nationals are required to have a short-term visa when crossing external borders, and those whose nationals are exempt from this requirement.¹⁶ Nationals from all refugee-producing countries are subject to a visa requirement and therefore cannot legally enter the EU.¹⁷ Simultaneously, the dramatic improvement in the technical quality of documents has made it much more difficult to travel on forged documents. The Schengen Implementing Agreement also harmonized the externalization and privatization of the visa requirement by means of carrier sanctions.¹⁸

Whereas airlines' successful enforcement of the harmonized visa policies closed off one possible route to Europe, asylum seekers and refugees were still able to

14. <http://data.unhcr.org/syrianrefugees/asylum.php>, last accessed 27 April 2016.

15. Decision Executive Committee, 14 December 1993.

16. OJ L 81/1, 21.03.2001. This list is periodically updated. The first communitarian visa list entered into force on 3 April 1996, Regulation 2317/95 of 25 September 1995, OJ L 234.

17. S. Mau, F. Gülzau, L. Laube & N. Zaun, 'The Global Mobility Divide. How Visa Policies Have Evolved over Time', *Journal of Ethnic and Migration Studies* 2015/41, pp. 1192-1213.

18. Art. 26 obliges the signatory states to require carriers (such as airlines) to ensure that passengers are in possession of the required documents (including visas) and to impose fines on carriers who fail to do so. Under Art. 4 Directive 2001/51, the minimum fine will not be less than EUR 3,000 and the maximum not less than EUR 5,000 per passenger. For more details, see T. Rodenhäuser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control', *International Journal of Refugee Law* 2014/26, pp. 223-247.

travel to countries bordering the EU, and to try to enter European territory from there. As part of the Schengen process, however, European states then began harmonizing their safe third country policies. These policies had their roots in the German and Dutch asylum policies of the late 1970s (see below), with the central notion being that if asylum seekers were returned to third countries for their claim to protection to be assessed, they would realize that it was pointless to travel to Europe and would therefore stop coming. This notion of automatic return without individual assessment was at the core of the 1993 German constitutional reform.¹⁹

During the past 40 years, application of the safe third country principle on a scale of any significance has been prevented by third countries' obstruction or outright refusal to readmit asylum seekers and refugees. An exception in this respect is the cooperation between Spain and the North and West African countries, which seems to have resulted in a radical drop in the number of people trying to reach Spain from these countries by boat (and the subsequent increase in the numbers of such people trying to reach Italy by boat).²⁰

Apart from trying to return asylum seekers and refugees to third countries, European states have also sought to cooperate with neighbouring countries in order to prevent departures from there to Europe, and to prevent the entry into these countries of people who might subsequently try to travel onwards to Europe. Until 2011, Italy sought to cooperate with Libya, with the measure of success varying according to the negotiation tactics used by the Libyan government.²¹ Since the outbreak of the armed conflict in Syria, visa requirements for Syrians have been introduced by Algeria, Egypt,²² Libya, Morocco and Tunisia,²³ most likely under pressure from the EU. This made it harder for Syrians to access the well-functioning route from the Libyan coast to Italy, and may have resulted in a shift of Syrian refugee migration from the central Mediterranean route to the eastern Mediterranean route (Turkey-Greece).²⁴

19. See *inter alia* K. Hailbronner, 'Asylum Law Reform in the German Constitution', *American University International Law Review* 1994/9, pp. 159-179; R. Marx & K. Lumph, 'The German Constitutional Court's Decision of 14 May 1996 on the Concept of "Safe Third Countries" – A Basis for Burden-Sharing in Europe', *International Journal of Refugee Law* 1996/9, pp. 419-439. A harmonized version of the safe third country concept is laid down in Arts. 35, 38 and 39 of EU Directive 2013/32.

20. D. Godenau, 'An Institutional Approach to Bordering in Islands: The Canary Islands on the African-European Migration Routes', *Island Studies Journal* 2012/7, pp. 3-18; D. Godenau, 'Irregular Maritime Migration in the Canary Islands: Externalisation and Communautarisation in the Social Construction of Borders', *Journal of Immigrant and Refugee Studies* 2014/12, pp. 123-142; A. López-Sala, 'Exploring Dissuasion as a (Geo)Political Instrument in Irregular Migration Control at the Southern Spanish Maritime Border', *Geopolitics* 2015/20, pp. 513-534.

21. See *inter alia* E. Paoletti & F. Pastore, *Sharing the dirty job on the southern front? Italian-Libyan relations on migration and their impact on the European Union* (Working Paper 29), International Migration Institute, University of Oxford 2010. So far, only claims against acts of prevention in which officials of European states were involved have been successful. Thus, the ECtHR ruled in 2012 that the blocking of a ship in the Mediterranean by Italian officials, thus preventing its passengers from invoking the protection of Art. 3 ECHR against expulsion, was at variance with that provision: ECtHR 23 February 2012, 27765/09 (*Hirsi Jamaa*).

22. *Inter alia* UNHCR has expressed concern about new restrictions for Syrian refugees in Egypt, 12 July 2013, www.unhcr.org/51e03ff79.html, last accessed 23 February 2016.

23. We established this by comparing the data of Mau et al. (*supra*) with data from IATA (www.timaticweb2.com/home) in February 2016.

24. On this shift, see C. Heller & L. Pezzani, 'Ebbing and Flowing: The EU's Shifting Practices of (Non-) Assistance and Bordering in a Time of Crisis', <http://nearfutureonline.org/ebbing-and-flowing-the-us-shifting-practices-of-non-assistance-and-bordering-in-a-time-of-crisis/>, last accessed 23 March 2016.

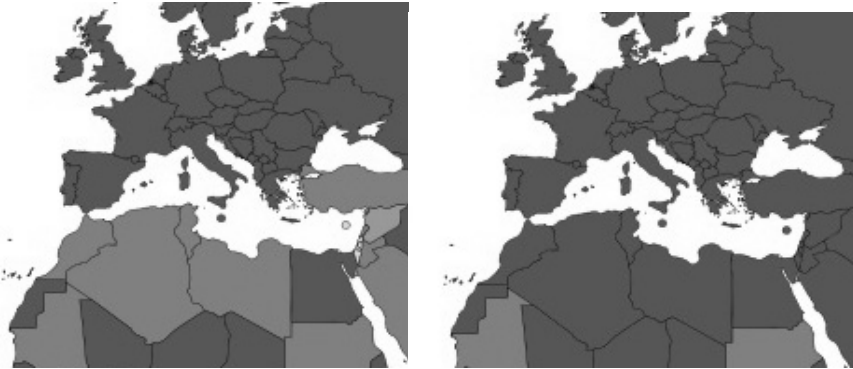


Figure 3. Visa requirements for Syrians 2010 (source: Mau et al. 2015) & 2016 (source: IATA, www.timaticweb2.com/home)

To the extent that the EU has succeeded in persuading third countries to cooperate, this has logically had onward effects in countries closer to the source countries of refugees. Lebanon²⁵ and Jordan,²⁶ for example, now refuse to admit Syrian refugees, while Turkey initially announced it will now only allow Syrians to enter directly from Syria.²⁷ Since then, reports indicate that two border crossing points in Turkey have been closed.²⁸

The effect of this policy is that private and public third parties (transport companies and third countries) prevent refugees from reaching the territories of EU countries. At the same time, the international community (including the EU) has not enabled refugees to subsist in the countries in which they are present. The UN Office for the Coordination of Humanitarian Assistance reported, for example, that only 56% of the funding required for this purpose in 2015 had been received.²⁹ This shows that the reception of Syrians in the region is underfunded, and this seems to be an ongoing trend as the UNHCR reported on 22 March 2016 that a mere 7% of the funding requirements for 2016 had so far been met, while by then 22% of the year

25. See, for example, 'Lebanon has just done the unthinkable', *Al Jazeera* 6 January 2015, www.aljazeera.com/indepth/opinion/2015/01/lebanon-just-done-unthinkable-201516114349914185.html, last accessed 23 February 2016; Syrians to face visa restrictions for Lebanon, *Al Jazeera* 3 January 2015, www.aljazeera.com/news/middleeast/2015/01/lebanon-visa-restrictions-syrians-2015131029059-563.html, last accessed 23 February 2016.

26. On 18 January 2016, the *Financial Times* reported that 16,000 Syrians were stranded in the desert at the Jordan border.

27. 'Turkey: No change in visa-regime with Syria, "open door policy" goes on', *Hürriyet* 18 December 2015, www.hurriyetdailynews.com/Default.aspx?pageID=238&nID=92738&NewsCatID=510, last accessed 23 February 2016.

28. See, for example, 'Amnesty International: Injured Syrians fleeing Aleppo onslaught among thousands denied entry to Turkey', *Amnesty* 19 February 2016, www.amnesty.org/en/latest/news/2016/02/injured-syrians-fleeing-aleppo-onslaught-among-thousands-denied-entry-to-turkey/, last accessed 23 February 2016.

29. 'Total Funding to the Syrian Crisis 2015', *Financial Tracking Service*, <https://fts.unocha.org/pageloader.aspx?page=special-syriancrisis&year=2015>, last accessed 23 February 2016. The percentage went down from 70% (2012) and 72% (2013) to 58% (2014) and 56% (2015). The unmet requirements for 2015 amounted to USD 3.1 billion.

had passed. The World Food Programme has also reported ‘critical funding shortages’ that have forced it to reduce the level of assistance provided.³⁰

Resettlement of Syrian refugees in other parts of the world – which is crucial if such countries, Lebanon in particular, are to continue hosting Syrian refugees – is not occurring to any significant degree. Since the beginning of the conflict, for example, only 179,147 Syrian refugees have been resettled elsewhere in the world.³¹ This represents 3.7% of the 4.8 million Syrian refugees outside Syria, and a mere 2% of all Syrian refugees.

The most likely explanation of what happened in 2015 is that the combination of the EU’s prohibitionist approach to refugees, the lack of resettlement and the inability for refugees to establish an acceptable form of subsistence in the region prompted a rapid increase in the demand for the services of smugglers on the Turkey-Greece route. Anecdotal evidence suggests that this initially led to a sharp increase in prices charged for such services, with the resultant increase in profit margins attracting more people to the smuggling sector. This in turn led to a rapid increase in supply, which resulted in falling prices. This then triggered people other than just Syrians (including refugees such as Eritreans or Afghans, and also non-refugees) to travel to Europe. These developments could explain why not only the number of Syrians entering the EU via Turkey has increased sharply, but also the number of other nationalities.³² In this analysis, the combination of prohibition and not giving refugees a viable alternative in the region had the opposite effect of what was intended; it led to more migration, not just of Syrians, but also of migrants who would not otherwise have migrated to Europe. Although the data required to put this hypothesis to the test are currently lacking, the hypothesis is in line with dominant migration sociology³³ and provides the best explanation for the data that are available on irregular migrations to Europe since 2011.

In summary, the Syrian refugee crisis turned into what was perceived as a European refugee crisis due to the European policy of impeding refugees to travel legally to the EU. This policy was actively pursued through the imposition of strict visa requirements, complemented by measures inducing other parties to enforce this policy (i.e. sanctions intended to induce transport companies to refuse access to third-country nationals without visas) and cooperation with neighbouring countries aimed at control of their borders. This actively pursued policy of travel prohibition was combined with the almost complete absence of any policy providing refugees with an alternative to entering the Union illegally. Thus, there was no resettlement scheme of any substance, and insufficient financial or other assistance to help

30. ‘Syria Emergency’, *World Food Programme*, www.wfp.org/emergencies/syria, last accessed 23 March 2016.

31. ‘Resettlement and Other Forms of Legal Admission for Syrian Refugees’, *United Nations High Commissioner for Refugees* 18 March 2016, www.unhcr.org/52b2febafc5.html, last accessed 23 March 2016.

32. For the most recent data at the time of writing, see p. 6 of the ‘Frontex Risk Analysis report’, *Frontex Europe* published 20 January 2016, http://frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q3_2015.pdf, last accessed 23 February 2016. For a similar analysis, compare Optimity Advisors: ‘A study on smuggling of migrants. Characteristics, responses and cooperation with third countries’, Brussels: 2015 European Commission http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/emn-studies/study_on_smuggling_of_migrants_final_report_master_091115_final_pdf.pdf, last accessed 23 February 2016.

33. For an overview, see M. Czaika & H. de Haas, ‘Evaluating migration policy effectiveness’, in A. Triandafyllidou, *Routledge Handbook of Immigration and Refugee Studies*, London: Routledge 2015, pp. 34-40.

countries bordering Syria to receive the Syrian refugees. In the next section we analyse how the EU reacted to the rise in the number of asylum seekers in 2015.