

ADVISORY LETTER

THE FUTURE OF SCHENGEN

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Members of the Advisory Council on International Affairs

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Annexe Request for advice

Foreword

By letter of 28 January 2016 from its President (Annexe I), the House of Representatives of the States General requested the advice of the Advisory Council on International Affairs (AIV) about 'the future of Schengen'.¹ The House requested advice on three specific issues: the European Commission's recent proposals regarding border management, the relationship with free movement of persons and goods within the European Union, and the possible creation of a 'mini-Schengen'. These questions have arisen from widespread underlying concerns regarding the functioning of European migration policy. By way of introduction, the AIV will provide an outline of this context, followed by an overview of the system of rules and agreements that is denoted by the collective term 'Schengen'.

1 The AIV appointed a Joint Schengen Committee chaired by Professor E.M.H. Hirsch Ballin (AIV), who also chairs the Human Rights Committee. The joint committee's other members were J.N.M. Richelle of the Development Cooperation Committee, Professor A. van Staden (AIV), who also chairs the European Integration Committee, and Professor L.A.J. Senden of the European Integration Committee; P.H. Sastrowijoto served as executive secretary. The joint committee was also supported by the intern P.N. Kaandorp. As civil service liaison officers at the Ministry of Foreign Affairs, C.W.J. Devillers and K.J.A.J. Cath were also involved in drafting the advisory letter, which the AIV adopted at its meeting of 4 March 2016.

I The context: humanitarian crises elsewhere, migration crisis here

The continuing wars and violent conflicts in the Middle East and North Africa, most notably in Syria, have generated a humanitarian crisis of extraordinary magnitude. This situation will not improve in the near future. Even if diplomatic and political negotiations on the complex civil war in Syria produce results, reconstruction is still a remote prospect. Civil wars are raging in Yemen and Libya, and Da'esh (IS) still controls large swathes of Iraq. The situation in Tunisia, in spite of the optimism regarding progress towards democracy following the Arab Spring of 2011, is extremely volatile. The influx of people seeking a safe future in Europe will not diminish as long as the region lacks in peace and security and people have no economic prospects. The same applies to the countries in sub-Saharan Africa and the Horn of Africa. The migration issue can therefore not be reduced to an issue of border management: the answer must be embedded in a coherent foreign policy.

Although the refugee crisis has been placed on the political agenda again and again, neither the member state governments nor the institutions of the European Union have succeeded in framing a real solution that can diminish the flow of refugees and cope with it in an orderly way. When Jean-Claude Juncker became President of the European Commission in July 2014, he expressed his intention, in response to the flow of refugees entering the EU through Italy, to set up a system for legal migration while safeguarding Europe's borders by expanding the border management agency Frontex. The aim was to limit the uncontrolled influx of migrants. Now, almost 18 months later, the Commission's message seems finally to be receiving attention, but only after a year of uncoordinated measures and a strident debate about the redistribution of genuine asylum-seekers. First came a voluntary agreement to resettle 40,000 asylum seekers, followed less than three months later by another to resettle a further 120,000 through a binding quota system (which has, however, scarcely been implemented to date). In any case, these numbers represented only a small proportion of the asylum seekers who reached the EU during the summer and autumn of 2015 without meticulous registration and controls on the external border. This influx prompted agreements to create 'hotspots' in Italy and Greece and to redistribute the asylum seekers. Some member states temporarily reintroduced border controls of various kinds, erected fences on their internal borders, and criticised the lack of controls on the EU's external borders. The confrontations about these measures between the European Commission and the European Council and/or the Council of the European Union, and also between the so-called Visegrad Group and the member states of Western Europe, have left deep scars in European cooperation. Asylum, after all, is always a sensitive domestic political issue.

Meanwhile, a fierce debate has erupted. Some have declared 'Schengen' to be dead now that a number of countries have implemented permissible temporary restrictions and reintroduced internal border controls. Some member states are openly discussing the idea of a 'mini-Schengen', from which Greece, for instance, would be excluded. On 25 January 2016, the informal meeting of the JHA Council on migration requested an extension of the temporary, six-month suspension of Schengen by a further two years.² This is made possible by invoking threats to public policy and internal security, but only if it has been established that a problem exists on the external borders.

2 Article 23 of Regulation (EC) no. 562/2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

II The significance of ‘Schengen’

‘Schengen’ refers to a system in which the signatory states facilitate the internal free movement of persons by abolishing controls along their mutual borders (‘internal borders’) and by applying uniform criteria for access to the common area thus formed. This system was initially regulated by treaties concluded in 1985 and 1990 between the Benelux states, Germany and France. Other states have joined since then, initially through supplementary treaties, and since the Treaty of Amsterdam (1997) in the framework of the European Community/European Union. Ireland and the United Kingdom successfully negotiated exemptions and do not belong to the Schengen system.³ Bulgaria and Romania are also outside Schengen for the time being, in accordance with the arrangements agreed at their accession to the EU, as is Croatia, the EU’s newest member state. Under the terms of a kind of merger treaty with the Nordic Passport Union, which pursues similar objectives, Iceland and Norway also belong to the Schengen system. Switzerland is likewise a member, under the terms of a separate treaty. The Schengen system also includes, whether *de jure* or *de facto*, all of Europe’s micro-states with the exception of Andorra.⁴ The territories of the member states that lie outside Europe are largely excluded from the Schengen system.

Article 77 TFEU constitutes the core provision regarding the Schengen system. This article states that the Union shall develop a policy with a view to:

- (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders;
- (b) carrying out checks on persons and efficient monitoring of the crossing of external borders;
- (c) the gradual introduction of an integrated management system for external borders.

This makes it clear that the system includes third-country nationals in its target group and thus goes beyond guaranteeing the fundamental right of European citizens ‘to move and reside freely within the territory of the Member States’.⁵ The Charter of Fundamental Rights of the European Union alludes to the possibility of third-country nationals being granted freedom of movement and residence, but does not prescribe it.⁶

In the view of the AIV, the right created by Schengen that allows people to travel from one member state to another without any checks is first and foremost of great individual importance to the development of cross-border initiatives and activities on the part of citizens in whatever capacity: whether as inhabitants of border regions or as consumers, employees, providers/recipients of services, entrepreneurs, tourists, students, etc.

3 Currently regulated in Protocol 19 to the Treaty on the Functioning of the European Union (TFEU). It should be noted that this does not imply that there is no right to the free movement of persons in relation to these countries.

4 Liechtenstein, Monaco, San Marino and Vatican City.

5 Article 20, paragraph 2 (a) TFEU, and article 45, paragraph 1 of the Charter of Fundamental Rights of the European Union.

6 Article 45, paragraph 2.

Directive 2004/38/EC of the European Parliament and of the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (the 'Citizenship Directive') further provides that administrative formalities can be prescribed only if an EU citizen wishes to remain in another member state for more than three months. This represents a major achievement of the European integration process; its importance to the way in which the EU is perceived by its citizens should not be underestimated. Secondly, freedom of movement without internal border controls is also of great collective importance, since it is crucial to the workings of the single market as a whole; it has made the free movement of goods and services much easier and more cost-effective. The importance of Schengen to Dutch industry should therefore not be underestimated. According to the Communication of 4 March 2016 of the European Commission and recent publications, the end of Schengen would cause immense cumulative damage.⁷ In this Communication, the Commission sets out a road map with a view to repairing the serious flaws in the Schengen system that were identified in February 2016, in particular along the external borders of Greece and the Mediterranean region.⁸

7 The Commission estimates that the immediate direct costs for the EU economy would be between €5 and €18 billion annually (COM (2016) 120 final, § 2). 'Overall, the Schengen Area's GDP would be reduced by 0.8 points, equivalent to more than 100 billion euros.' See 'The Economic Cost of Rolling Back Schengen'. France Stratégie, la note d'analyse, February 2016, no. 39. 'For Germany alone, lower growth might be expected to produce cumulated [sic] losses of at least 77 billion euros between 2016 and 2025. In a more pessimistic scenario, losses could amount to as much as 235 billion euros. For the EU as a whole, they would be likely to reach 470 billion'; see 'End to Schengen could mean a dramatic decline in growth for Europe', Bertelsmann Stiftung, 22 February 2016.

8 See the Council decision of 12 February 2016 with recommendation to Greece in response to the Commission's report of 2 February 2016 and the Commission's decision C (2016) 1219 of 24 February 2016.

III Problems in the way the Schengen system functions

The EU's current problems in adequately tackling the reception of migrants are not caused solely by the large numbers of migrants and the diversity of their situations and resulting definitions (i.e. refugees or economic migrants). They also derive to a large extent from the way in which the Schengen system has been developed, in conjunction with European asylum policy.

The migrants who have been applying for asylum since last year in far greater numbers, most notably in Germany, but also in Sweden, Austria, the Netherlands and neighbouring member states, are perceived in widely different ways. In reality too, their personal situations differ widely. Besides people who have fled, in fear for their lives, from the violence of war and persecution, there are many who, although no longer in the danger zone, have no tolerable prospects of life for themselves and their children and have possibly already experienced a desperate lack of education and employment. Mingling with the asylum seekers, though in far smaller numbers, are individuals with malicious intentions (e.g. terrorism or fraud). In addition, substantial numbers of individuals from safe countries in the Balkans and North Africa are also known to have joined the flow of asylum seekers heading for Western Europe. All in all, then, Europe is dealing with what is known in the international jargon as 'mixed migration flows'.

The internal free movement of persons without controls along the internal borders implies the necessity to maintain firm controls at the external borders and measures for those wishing to enter the Schengen area. Article 77, paragraph 2 TFEU currently provides that the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning:

- (a) the common policy on visas and other short-stay residence permits;
- (b) the checks to which persons crossing external borders are subject;
- (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period;
- (d) the gradual establishment of an integrated management system for external borders;
- (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

Visas and border management

The concrete provisions adopted to this effect relate first and foremost to cooperation in the realm of law enforcement – in particular the exchange of data, including (since the Prüm Treaty of 2005) DNA and vehicle registration numbers – and surveillance of the external borders. Nationals of states that have not been granted a visa exemption must obtain a Schengen visa from the consulate of one of the Schengen states prior to entry. Further rules are laid down in Regulation (EC) no. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas. In exceptional cases, states may still issue national visas; in that case, the visa applies only for that specific country and the holder is not permitted to travel to another Schengen country, although this is hard to monitor. Besides being enforced at the external borders, the visa requirement is also enforced by ships and airlines with destinations within the Schengen territory, which are not permitted to allow a passenger without the necessary visa to board. Passengers in transit at airports do not need

visas, unless they possess the nationality of one of the 12 designated countries from which large numbers of asylum seekers originate. The latter measure is intended to prevent people from applying for asylum while in transit. This explains why most asylum applications within the Schengen area are submitted by people who have somehow succeeded in reaching the territory of one of the Schengen states.

Asylum policy

Another system was set up separately from Schengen for allocating responsibility for asylum applications. This too was initially laid down in a separate treaty, which was concluded in Dublin in 1990 (but which did not enter into force until 1997). In 2003 this was replaced by an EU Regulation. On 1 January 2014, the Dublin III Regulation entered into force, which – with the exception of Denmark – applies to all member states (that is, including the United Kingdom and Ireland).⁹ Iceland, Norway and Switzerland also signed up to Dublin III through separate agreements, as did Denmark, which had an opt-out. The Treaty provision underlying this Regulation (since the entry into force of the Lisbon Treaty) is article 78 TFEU: ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.’ This policy must be in accordance *inter alia* with the Geneva Convention on Refugees.

The primary rule of the Dublin III Regulation is that the member state in which an asylum application has been submitted must first establish whether the responsibility for examining the asylum application lies with another member state. This may be – in the following order – a member state in which members of the person’s immediate family or (for minors) other relatives are legally present, a member state that has issued the person with another residence permit or a visa, or the member state in which the asylum seeker entered the EU. The member state examining an asylum application is authorised to return the asylum seeker concerned to the member state concerned, which will therefore often be the country of entry. If this is impossible or it cannot be established where the person entered the EU, the responsible member state is the one through which the asylum seeker has travelled, or in the final eventuality the one that is assessing the application. It is therefore a consequence of the combination of the Schengen system and the Dublin III Regulation that asylum applications submitted in EU member states by persons who have not applied for a visa in advance should in principle be submitted at the external borders. Schiphol and the port of Rotterdam constitute such external borders, but since travellers are checked before boarding, this is of little quantitative significance. The large-scale entry of asylum seekers is therefore concentrated along the external borders that are reached either overland or by irregular – and often extremely hazardous – sea crossings.

The recast Directive of the European Parliament and the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (2013/32/EU) uses the terms ‘safe third country’, ‘European safe third country’ and ‘safe country of origin’; these provisions were implemented as from 20 July 2015 in the Aliens Act 2000. In cases where one of these terms is applicable, an asylum application can be declared inadmissible or manifestly ill-founded.

9 Regulation no. (EU) 604/2013 of 26 June 2013, *Official Journal of the European Union* 2013, L 180/31.

In spite of the emphasis that article 80 TFEU places on ‘the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States’ as the basis for both external border controls and the common asylum policy, the current system has the effect of placing a disproportionately heavy burden on the states along the external borders, such as Greece, Italy and Malta.¹⁰ Thus, the current set-up and implementation of European legislation do too little to put the spirit of solidarity into practice. This also relates closely to another fundamental political choice that the member states made with regard to controls along the external borders. Although article 77 TFEU provides, as already noted, for the ‘gradual introduction of an integrated management system for external borders’, in reality this system has not been set up within a European framework but has rather been left to the responsibility of individual member states. This choice can be traced back in part to constitutional considerations and, in particular, to fears of the loss of signs of ‘sovereignty’ that would accompany a truly integrated system.¹¹ Although there have been periodic evaluations, the member states’ adequate performance of this task has been taken on trust.

Even though it had long been obvious that in practice the management of the external borders was not working properly, as long as the flow of refugees remained limited, the member states essentially accepted the situation and saw no urgent need to introduce a more European approach. Furthermore, in many cases it was almost impossible to send people back to the country of entry because it could not be established with sufficient certainty which country that was. In most cases in recent years, Cyprus, Greece and Italy have not applied the rules on registration and inclusion in the common fingerprint database Eurodac that would have made this possible.¹² But even had they done so, in the current circumstances, asylum seekers could not be returned to Greece, because the conditions in that country’s reception centres – according to a judgment handed

10 Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, *Enhancing the CEAS and Alternatives to Dublin*, Study for the LIBE Committee of the European Parliament, 2015. See: <http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf>; ECRE report *Dublin II Regulation: Lives on Hold*, 2013; Valsamis Mitsilegas, ‘Solidarity and Trust in the Common European Asylum System’, *Comparative Migration Studies* 2014, vol. 2, no. 2, pp. 181-202; E. Brouwer, ‘Europees asielbeleid: van onderling wantrouwen naar gedeelde verantwoordelijkheid’ (European Asylum Policy: from mutual distrust to shared responsibility), forthcoming in *NederlandsTijdschrift voor Europees Recht* 2016, no. 2.

11 C.J.C.F. Fijnaut, ‘Pleidooi voor de vorming van een Schengen II: Versterking van de controle aan de buitengrenzen en van de politiële en justitiële samenwerking in het binnengebied van de Europese Unie’ (A call for the formation of a ‘Schengen II’: Strengthening border controls on the external borders and enhancing police and judicial cooperation within the EU’s borders), in *WBS jaarboek Europa*, forthcoming in the spring of 2016.

12 Table: Eurodac registrations of border crossings in Greece, Malta, Spain, Cyprus and Italy in 2015. When set against the Frontex figures, the ‘under-registration’ becomes visible. Source: Ministry of Security and Justice.

	Greece	Malta	Spain	Cyprus	Italy
Registration of border crossings in Eurodac code 2	228,159	0	5,478	1	57,342
Actual border crossings (Frontex)	885,709	106	8,038	1,416	153,840
Difference (degree of under-registration)	657,550	106	2,560	1,415	96,498

down by the European Court of Human Rights at the beginning of 2011 – were deemed to be degrading.¹³ The other member states effectively resigned themselves to this situation. From the time that the number of asylum seekers started to soar, from 2014 onwards, and Greece and other states were unable to cope, the consequences were passed on from one country to the next that could be reached overland, most notably to Germany. In 2015, Germany abandoned any further attempts to send people to other member states by invoking the Dublin Regulation. This was not so much a change of policy on Germany's part as an acknowledgement that such transfers were unfeasible.

The measures now being proposed by the EU and by member states to restrict the numbers of new asylum seekers should be viewed in this context. These measures seek either to limit the number of arrivals in the country concerned or within the Schengen territory as a whole, or to achieve more solidarity (e.g. by sharing tasks and expenses) in the management of the external borders and reception facilities. Below, the AIV will explain why it takes the view that elements of both these types of response should be combined with policy geared towards diminishing the reasons for seeking asylum. Simple deterrence or discouragement is not the right response, however, because this leaves people who are genuinely fleeing from persecution to endure yet more misery, because it saddles other countries with an impossibly heavy burden – such as Lebanon, for instance, where Syrian refugees account for a quarter of the population¹⁴ – and because it does nothing to curb devious forms of abuse.

13 European Court of Human Rights, 21 January 2011 in the case of M.S.S. v. Belgium and Greece (App. no. 30696/09).

14 'Conditions of Syrian refugees in Lebanon worsen considerably, UN reports', 23 December 2015, consulted on 29 February 2016. See: <http://www.un.org/apps/news/story.asp?NewsID=52893#.VtQ6N1JvFoc>. Lebanon now hosts more than one million Syrian refugees, representing 25% of the population. This is the world's highest number of refugees per inhabitant. Information derived from 'Vulnerability Assessment of Syrian Refugees in Lebanon, 2015'.

IV The need for a comprehensive approach

The AIV recognises that acute situations call for swift action. At the same time, it wishes to emphasise that it is essential to guard against jeopardising major achievements that directly affect the public, including the international legal order, asylum law, and the freedoms of the single market. This must be the basis for any proposal for a political solution. The AIV further takes the view that managing the problems in the longer term calls both for a comprehensive approach and for enhanced cooperation based on solidarity within the Schengen framework. Both these principles are explained below.

To start with, only a comprehensive approach can offer the prospect of an effective policy. The significance of border controls is relative, since these can only reduce the scale of the problems; the main point is whether humanitarian crises such as the present crisis in Syria can be prevented or temporarily managed. Asylum is not the 'solution' but a fall-back position aimed at sparing people the worst suffering. The arrival in Western Europe of large numbers of asylum seekers from the former Yugoslavia in the early 1990s took place *before* Schengen and Dublin were in place. It was not until 1995, after four abortive attempts at a solution between 1992 and 1994, that this influx was followed by effective European and US military and diplomatic intervention to end the suffering and bloodshed.

The EU policy of the past few decades has been geared towards creating order and allocating tasks, although this has not been supported or implemented widely enough. Such 'order' includes a preference for reception of refugees in the region, often with the assistance of the UNHCR. The ceaseless drain on its resources has given the UNHCR a near-impossible task. The level of funding by what is effectively a small number of UN member states and donors has slumped further and further below the minimum required, which is leading *inter alia* to a lack of educational services and encouraging people to seek protection elsewhere. So while such reception facilities do provide a degree of physical safety (notwithstanding increasing violence in the large camps), they leave many people in situations of hopelessness. The EU member states (which are among the most prosperous countries in the world) try to restrict the number of asylum seekers entering the Union, for instance by requiring visitors to obtain a visa before boarding a ship or aircraft, and by designating a belt of surrounding countries 'safe'. Even so, growing numbers of people have tried to cross these hurdles in recent years. The hopelessness of the situation in war-ravaged Syria, in particular, has driven more and more people to head for Europe. Even perils such as the risk of drowning have not deterred them. In addition, there are other people who are not refugees at all, but who have – perhaps understandable – reasons for wanting to reach Europe. To prevent overburdening the system any further, it is important to make rapid use of the existing instruments for effectively removing the latter group of migrants. Another question is whether we could offer alternative prospects for people in areas afflicted by war and social upheaval, people whose labour would be welcome somewhere in Europe. We could prevent the abuse of the asylum procedure and relieve the burden on the Schengen system by putting in place an effective system of legal economic migration for cases involving reciprocal needs. The AIV wishes to emphasise the importance of introducing better channels for regular (and possibly temporary) migration. It would suggest taking steps to introduce a European 'green card' system that would go further than the present 'blue card' issued for the purposes of highly qualified employment, as provided for by Directive 2009/50/EC.

Asylum applications must be processed responsibly. This responsibility applies both in relation to the refugee – in accordance with the standards of the guidelines of the European Asylum System (EAS) – and in relation to the receiving society, in order to prevent abuse of the asylum procedure. Large numbers make this task more difficult, but do not reduce the obligation to exercise due care. The AIV would note in this regard that the reality of sizeable mixed migration flows also makes it necessary to take effective measures at national level, in particular to strengthen all the links in the immigration system. This includes police aliens supervision, which is carried out by the Royal Military and Border Police and the National Police, partly in the border regions and partly in areas where suspected illegal employment takes place. This supervision must be carried out – naturally without stigmatising people on account of their appearance or origins – on the basis of information about, and evidence of, abuse of the asylum procedure, as in the case of Kosovo nationals mingling with the flow of asylum seekers from Syria, Iraq and Eritrea.

Heeding the adage that prevention is better than cure, the EU and its major powers should present themselves far more as stabilising powers in the region. Early warnings must be taken seriously: millions of Syrians were already in camps ‘in the region’ while the rest of the world continued to look the other way. The expectation that Turkey as a safe country can receive many more refugees than are already staying there is wholly unrealistic. Furthermore, account should be taken of the possibility that the hostilities in southeastern Turkey will give rise to a flow of refugees within and from Turkey itself.

V The need for enhanced cooperation based on solidarity in Schengen

Since mid-2015, the sharp increase in the number of asylum seekers entering the European Union without any controls or registration has led several member states to reintroduce certain controls and barriers along their internal borders. As a temporary measure, the European Commission has concluded that this measure is permissible within the Schengen system.¹⁵ Since article 77, paragraph 1 (a) TFEU is formulated as a policy objective, it does indeed leave scope for the reintroduction of internal border controls in exceptional circumstances. Although Ireland and the United Kingdom do not participate in the Schengen system, they are wholly bound by the principle of the free movement of persons.¹⁶

However, the precise meaning of the ‘closure of the borders’ that is sometimes advocated is not entirely clear. Before the advent of the Schengen area, national border controls between the Benelux states and Germany and France were confined to the most important border crossings. That situation was very different from the more or less hermetically sealed borders that once existed between East and West Germany. Almost no one yearns for the reintroduction of closed borders of the latter kind, with fences or walls and the accompanying border guards. Border controls do however have a role to play in limiting the negative effects of sizeable mixed migration flows.

The question therefore arises of how beneficial and desirable it would be to resume more systematic internal border controls and to proceed to create what is referred to as a ‘mini-Schengen’ area. In the view of the AIV, the simple reintroduction of border controls is not a real fall-back option as referred to in the request for advice, but is possibly an undesirable consequence of the collapse of the Schengen system. This would have extremely obstructive effects on the operation of the common market, quite apart from the discontent it would foment in the border regions. In addition, setting up the required infrastructure of fencing and border control posts along with the necessary staff would be enormously expensive. But proceeding on the assumption that the member states to which the majority of asylum seekers are travelling do not wish to build fences and walls in the style of totalitarian regimes, the administrative closure of the Dutch border, for instance, would also have little effect. People who, driven by necessity or by the urge to seek better prospects, brave hazards such as sea crossings in unseaworthy vessels will not be deterred by such measures. The number of asylum seekers can be influenced, however, as past experience has shown, by their perception of their prospects of building a future in the country concerned.

15 European Commission, 23 October 2015, on the necessity and proportionality of the controls at internal borders reintroduced by Germany and Austria pursuant to article 24 (4) of Regulation No. 562/2006 (Schengen Borders Code). See: <http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/borders-and-visas/general/docs/commission_opinion_necessity_proportionality_controls_internal_borders_germany_austria_en.pdf>.

16 The conclusions of the European Council of 18 and 19 February 2016 provide solely for changes to certain modalities regarding social security and family formation.

Certain measures are conceivable that – perhaps temporarily, as the Schengen Borders Code permits – could lead to controls along the internal borders. Selective internal border controls may help to reduce onward flows, either before or after mandatory registration in the country of entry. Such controls can also help to prevent those who have been ordered to leave from simply moving to a different part of the Schengen area. However, border controls cannot change the reality that an alien who is checked and found to be without a residence permit still has to stay somewhere. Other Schengen states will only accept a person's expulsion to their territory if they are obliged to process (or to continue processing) that person's asylum application, and the same applies to a safe third country. Syria's neighbours are already bearing an exceedingly heavy burden (with refugees accounting for far higher percentages of the population than in Europe¹⁷). It is sometimes pointed out that Saudi Arabia and the Gulf States could do far more, but a great deal would need to happen before these countries could be called both safe and cooperative.

The reintroduction of internal border controls will therefore have to be combined with redistribution and/or the creation of reception facilities in the countries in which asylum seekers are being stopped, such as Greece and the Balkan member states. Both measures require much more financial and organisational solidarity on the part of the EU member states than has been displayed thus far; the decision to achieve a relatively modest redistribution of asylum seekers¹⁸ has scarcely been implemented at all. In addition, while it is plausible that the measures will discourage people from undertaking the long and hazardous journey to the centre of the European Union, some asylum seekers will simply set out along different routes.

The need for stronger – closer – cooperation

The sharp increase in asylum applications that Germany, Sweden, Austria, the Netherlands and a number of other countries are facing and the resulting shortages in the capacity for reception, application-processing, and (where asylum is granted) temporary or permanent assimilation in society, is partly linked, as noted above, to the dysfunctionality of the Schengen system and the poor application of the Dublin Regulation in member states on the Mediterranean external border. In some member states, corruption and other abuses, as well as negligence and capacity problems in that state's essential justice and migration responsibilities, constantly undermine the scope for agreeing common policies on migration and internal security: the Schengen system is undermined by these problems, too. The creation of an area of freedom, security and justice, in accordance with the ambition enshrined in the Treaties, is an essential condition for a well-functioning European asylum system.

Had more attention been paid to the failings and needs of these border states, the problem might not have grown to its present extent. Displaying solidarity by contributing (financially and otherwise) to the necessary infrastructure for the reception of migrants and the processing of asylum applications is therefore also in the interests of other member states. The same applies to achieving a fair distribution of the responsibilities among member states in terms of receiving refugees. But plans for distribution and allocation are doomed to fail now that it has become clear that the redistribution

17 In the EU Syrian refugees account for 0.25% of the population, in Turkey they account for 3%, in Jordan 10% and in Lebanon 25%.

18 European Council of 25-26 June 2015, JHA Council of September 2015. See: <<http://data.consilium.europa.eu/doc/document/ST-12098-2015-INIT/en/pdf>>.

agreements already made within the EU are simply not being properly implemented.

The burden of fulfilling obligations in relation to asylum applications cannot be placed exclusively on the border states, nor indeed on the few member states – at present mainly Germany – who have proved willing to bear much of the burden on behalf of the rest. What is needed is far more solidarity in both directions and administrative action that reflects this solidarity. If this cannot be achieved with all the current Schengen states – as unfortunately appears to be the case at present – it is necessary to opt for closer cooperation among those member states that are able and willing to participate, if possible with the involvement of some of the non-EU Schengen states.

If we want the existing rules and new measures to succeed, the AIV believes that it is essential to ensure that implementation and enforcement take place at European level and to monitor compliance. Failure to achieve this will jeopardise the single market and freedom of movement, with all the inevitable economic consequences that this would entail. Redistribution agreements can only work if they are laid down in binding legislation. Above all, however, the Schengen system can only function in the context of a true ‘area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States’ (article 67, paragraph 1, TFEU). The AIV has underscored the importance of this in the past.¹⁹

This includes developing a common policy on asylum, subsidiary protection and temporary protection, having regard to the Geneva Convention on Refugees (see article 78, paragraph 1, TFEU) and a common immigration policy (article 79, paragraph 1, TFEU). If not all member states are willing to contribute to building these foundations and instruments, serious consideration must be given, as already noted, to entering into a closer partnership with a smaller group of member states that would then take the lead in developing them (Title IV, TEU). But it is unhelpful to refer to a ‘mini-Schengen’ as a group of countries that muddles along in the old way, with the sole purpose of closing off their own territory to refugees and without taking any further steps. The aim should be to strengthen Schengen and to create a new distribution mechanism to replace the Dublin arrangements with a view to devising a ‘future-proof’ system. After all, Dublin was not designed to respond to a mass influx, nor does it include a distribution system that can be used in this situation.

In this connection it should be acknowledged that wherever a border is demarcated, there will always be land that is just on the other side. No country will want to be in that position, since all failed asylum seekers and other migrants who are turned back will congregate there: this is the nightmare vision of multiple ‘Calais’ situations. It must also be borne in mind that the number of people remaining, whose asylum applications may be granted, could place an intolerable strain on the capacity of countries such as Greece and Malta. Without solidarity in terms of sharing responsibilities and burdens regarding asylum seekers who are accorded refugee status, any Schengen system, whether large or small, is untenable. Nor can the EU determine unilaterally which countries should play that role: agreements will have to be concluded ensuring that refugees are offered prospects and that burdens are shared more equitably among the member states. This will involve large sums of money. These must be raised in solidarity by all EU member states, if necessary by reducing their share of the Union’s structural funds. Closer

19 AIV advisory report, no. 87, ‘The Rule of Law: Safeguard for European Citizens and Foundation for European Cooperation’, The Hague, January 2014.

cooperation as described above will therefore need to be devised with due regard for the interests of the states along the external borders and must always allow for the possibility that other member states may join in, provided the set conditions are met.

It should be added that even without the Schengen system, the need to devise a harmonised policy for the reception of asylum seekers and the assessment of their applications would be no less great. Even then, there would be a continuing need to divide responsibilities, as laid down in the Dublin Regulation, but not – as now – without taking reception or processing capacity into account. The Dublin system will therefore need to be corrected or supplemented by a distribution system and by a fully functional European asylum system. To introduce order into these systems, changes will also need to be made along the external borders.

VI Towards improved management of the external borders

If the controls along the external borders are functioning properly, asylum applications that are either inadmissible or manifestly ill-founded can be rapidly denied and the applicants expelled where necessary. Although effective external border controls were part of the Schengen system from the outset, Greece was admitted without taking into consideration the geographic reality that the maritime borders around the numerous Greek islands in the Aegean Sea, close to the Turkish coast, are extremely difficult to patrol. It is therefore understandable that the EU is now devising measures to achieve a European approach to guarding the external borders.

With the proviso that there must be no reduction in the protection afforded people who are truly in danger, the AIV certainly considers that the management of the external borders of the Schengen region should be tightened up. The Commission's proposals and the European Council's decisions all point in this direction: they involve setting up registration centres, or 'hotspots', near places of arrival and either providing direct assistance in controlling the external borders or redefining responsibility for this task at Community level.

At the end of 2015, the European Commission proposed a Regulation of the European Parliament and of the Council to provide for border interventions with regard to asylum seekers at sea by setting up a European Border and Coast Guard (COM (2015) 671). Essentially it proposed expanding and intensifying the activities of Frontex, possibly even by using ships under NATO command. The AIV endorses these proposals, which can be regarded as a form of achieving the 'integrated management system for external borders' referred to in article 77 TFEU, but wishes to raise certain caveats. Firstly there is the question of the democratic and effective judicial oversight of the new agency's activities and the exercise of its powers. This applies in particular to the proposal relating to the situation in which a member state is unable or unwilling to manage its borders itself, in which case the Commission can intervene, after consulting the Agency, even without the consent of the member state concerned. The AIV would first recommend that clear conditions be attached to the power of the Commission and/or the Agency to deploy European Border and Coast Guard teams. In the AIV's opinion, the Commission should not be able to take such a far-reaching decision without the approval of the Council, if necessary granted retroactively. In addition, border management must be arranged such that it remains visibly clear that a person who has crossed the border is now within the sovereign jurisdiction of another state.

Secondly, it seems questionable whether the planned extra capacity of 1,500 border guards (drawn from a reserve pool created by the member states) will suffice for the effective surveillance of the sea border between Greece and Turkey. As already noted, this is a near-impossible task. The AIV advises building up such an organisation largely from national services such as the Royal Military and Border Police of the Netherlands. Where the navy or other branches of the armed forces of the EU member states are asked to contribute, such detachments should also be placed under EU command. In other words, the EU must be considered capable of fulfilling the necessary border management responsibilities without enlisting the help of NATO.

Thirdly, it should be borne in mind that although improved surveillance of the Aegean Sea may have a deterrent effect, the possibility of flows diverting to other routes must

be considered. Furthermore, in this context – as in the case of more stringent controls on land – aliens who are encountered or are rescued from the water must be taken somewhere without this amounting to *refoulement*. Given the extraterritorial applicability of the European Convention on Human Rights (ECHR),²⁰ the flag state of a ship that is participating in Frontex, for instance, must comply with the obligation to deal with each application for asylum, even if it is outside territorial waters. The only alternative would be to transfer the aliens concerned, under the terms of a special agreement, to the authorities of the closest state that complies with the safeguards of international protection; most EU member states may be assumed to do so, but no such assumption can be made, for example, in the case of Libya.

Finally, given the geographical location of Greece and the fact that many of the refugees come from Syria, it is entirely understandable that Turkey's assistance is also being requested in relation to management of the external borders. It is both justifiable and unavoidable that in this respect parallel agreements are being made with Turkey and funds made available. However, two concerns should be raised in this connection. First, turning people back along the maritime border between Greece and Turkey is acceptable only if asylum seekers are treated in accordance with the law and in a dignified manner in Turkey. Second, it is not realistic or even conceivable that Turkey could solve the lion's share of Syria's humanitarian crisis. Why that country should be able or willing to do what members of the European Union cannot do – leaving aside its greater, but only relatively greater, geographical proximity²¹ – is unclear. This means there should be scope for the resettlement of asylum seekers from Turkey to the EU. The same applies to the countries now bearing an extremely heavy burden, most notably Lebanon.

20 See the judgment of the European Court of Human Rights of 2 October 2014, *Hassan v. United Kingdom* (App. no. 29750/09).

21 The distance between Istanbul and Damascus is roughly the same as that between Barcelona and Amsterdam.

VII Conclusions and recommendations

a. The right of asylum

There is nothing new about trying to prevent sizeable mixed migration flows from entering Western Europe. Visa checks prior to the departure of planes and ships were introduced with the same aim in mind. However, perfecting such barriers to migration becomes inhumane if victims of persecution have no alternatives to pursue. Dutch and European policy must therefore include support for other forms of reception for refugees. If necessary, it must remain possible to travel to the EU without being in possession of a visa. Those who arrive in the European Union as asylum seekers may not under any circumstances be returned to countries in which they will be persecuted or face other grave dangers. This requirement is one of the foundations of our rule of law and is enshrined not only in the Geneva Convention on Refugees but also in the ECHR, the EU Conventions, and the Charter of Fundamental Rights of the European Union. The AIV is of the opinion that better arrangements for processing asylum applications would constitute an important measure alongside developing a system of 'green cards' for (temporary) residence permits for the purpose of employment.

b. Combating abuse

Combating abuses of the asylum procedure improves the prospects of those who are in need of asylum. The management of the external borders of the Schengen area should play an important role here. The EU's policy seeks to suppress the illegal crossing of borders and the activities of people smugglers in combination with setting up registration centres for asylum seekers from outside the EU. Under the terms of article 12, paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR) and article 2 of the Fourth Protocol to the ECHR, no state may prevent someone from leaving its territory.

Applying for asylum at the external border of the EU or the Schengen area, as the case may be, is not illegal migration. However, if a person has already applied for asylum, or could have done so, in a safe third country from which he or she wishes to enter, and in which he or she will not be subjected to degrading treatment, this person may be denied entry at the border.

To put this into practice, it is necessary to obtain the cooperation of countries of origin to enable the safe return of people who are not entitled to claim asylum. However, some states effectively flout their legal obligation to take back their own nationals. In such cases, concerted political – and if necessary economic – pressure on the part of the EU member states is needed. Consultations with these countries about such matters will go more smoothly where they can be framed within a structural relationship.²²

c. Selective tightening of controls at the internal borders

The 'closure' of the internal borders between the Schengen countries is not a workable option; not only because it would require a change to the EU Treaties, but also because it would cause disproportionately severe economic and social damage, besides incurring huge costs for fences, checkpoints and border police, to the extent that this would even be practicable. Selective controls along the internal borders, based on intelligence

²² Advisory Committee on Migration Affairs, 'The strategic country approach to migration: Between ambition and reality', 25 November 2015.

concerning heightened risks, may be useful, helping to combat forms of abuse. Another change too is to be recommended: it would not inconvenience *bona fide* passengers too greatly to require all persons boarding a plane or a ferry across the Ionian Sea, for instance, to show a valid travel document. This would also prevent at a stroke the use – undesirable from a counterterrorism perspective – of plane tickets by persons other than those to whom they were issued.

d. Closer cooperation within Schengen

The current European Asylum System (EAS) is inadequate and will remain so for the foreseeable future, because the differences between the 28 member states, in all sorts of respects, are too great. Because of this, a small number of states, and in particular Germany, feel obliged to provide protection to refugees from what are currently the worst crisis areas.

The only route to a remotely adequate capacity for processing asylum applications and for the reception of refugees is through the participation of enough countries. The AIV therefore advises establishing closer cooperation within the meaning of the EU Treaty (on the basis of article 20 TEU) between those member states that are able and willing to implement Schengen *within the framework* of an effective common asylum and migration policy: strict where necessary, but at the same time humane, including in relation to family members who have remained behind. The AIV would refer here to its advisory report on differentiated integration.²³ This closer cooperation will need to embrace a fully operational common asylum system, including similar forms of reception and integration, the acceptance of distribution formulas, exchanges of intelligence on abuses in order to combat them, coordination with the UNHCR in relation to resettlement, and agreements about return and readmission with safe countries outside the EU. In other words, a truly common policy must be based – unlike the current noncommittal Reception Directive – on mutual solidarity among the member states concerned and should also, for instance, prescribe reception centres of comparable quality.

This closer cooperation should be set up with as many as possible of the member states that participate in Schengen. In terms of objectives, it should be in keeping with the common ‘area of freedom, security and justice’ (article 67 et seq., TFEU). To prevent the undesirable effects of ‘free-riding’, the non-participating states should be required to at least share the costs. This must be enforced, if necessary, by revising the allocation of resources from the structural funds.

The AIV would prefer not to describe this closer cooperation as a ‘mini-Schengen’. After all, it would not end the Schengen system as such. It would, however, abandon the notion of an all-or-nothing approach to internal border controls, and steps would be taken, with those countries that are able and willing to take part, to achieve a fairer and more even distribution of benefits and tasks. Other member states can continue to take part in the ‘basics’ of the Schengen system (open internal borders in normal circumstances, shared responsibility for the external borders, and a common policy on visas), providing they cooperate in the common management of the external borders and in selective controls at the internal borders (such as verifying travel documents at airports and crucial sea ports).

²³ AIV advisory report, no. 98, ‘Differentiated integration: Different routes to EU cooperation’, The Hague, October 2015.

e. Effective management of the external borders and a standardised approach to asylum seekers

The effective management of the external borders, in accordance with the existing criteria, is urgently needed. The AIV advises setting up a system for the common management of the external borders with *all* Schengen states and adopting sound standards to this end, including effective legal remedies for those who believe that their asylum applications have been wrongly denied or declared inadmissible. This includes registration, the processing of asylum applications and reception or transfer to another receiving state.²⁴

This must be a two-phase procedure: first establishing, in a secure facility at the border, who can and therefore must immediately return to the country of origin or transit, and who is eligible to have their asylum application processed by a member state to be determined in accordance with a set formula. This formula can rely on a quota proportional to capacity, based on objective factors such as GDP, surface area and population size. It must also take account of the number of refugees who have already been received. It is inherent to this issue, however, that when the numbers exceed a certain figure, a new formula will need to be adopted.

However fervently one may wish that all 28 member states would take part in this second phase, some are incapable of doing so, in some cases because they are already experiencing the full pressure of the increased numbers in the first phase, and in others – including the Visegrad group of states – because political and social factors have given rise to an impasse. One may deplore and condemn this, but such reactions will not lead to a situation in which refugees may be expected to obtain real protection. The states that do enter into closer cooperation will therefore have to take on this task. Those that do not do so must be compelled – as already noted – to share in the costs.

Conclusion

The fact that the AIV recommends striving to achieve these far-reaching changes does not mean that it expects this approach to resolve the situation entirely. The effects will remain limited in the absence of any willingness to intervene effectively in the situations that are driving many people to seek asylum in the EU. As long as people living in a situation of hopelessness in the Mediterranean region see no alternative other than to seek a new future in certain EU member states, the need to respond to this humanitarian emergency will clash with internal tensions in those member states. The political consequences for the political climate in the EU are already extremely grave. The AIV wishes to emphasise that Turkey cannot resolve the refugee problem on Europe's behalf, even if it is given far greater financial support than has been mooted thus far. Nor can Germany be left to take on the lion's share of the response to this humanitarian emergency, since – despite its robust economy and its own need for a form of immigration – it cannot bear this burden alone.

This situation, in which millions of people are seeking to escape life-threatening emergencies in regions afflicted by today's (or indeed tomorrow's) humanitarian crises, has built up over a long period. It is rooted in many years characterised by a lack of good governance, repression involving human rights violations and the neglect of prospects

²⁴ See the ACZV advisory report 'Sharing responsibility: A proposal for a European asylum system based on solidarity' (2016), see: <<http://acvz.org/wp-content/uploads/2016/03/Sharing-responsibility.pdf>>.

for socioeconomic development, as well as the appalling brutality of movements such as Da'esh. Those leading the governments or movements concerned bear full responsibility for this. It must however also be acknowledged that, for far too long now, other countries have remained aloof or have intervened only with a view to safeguarding their own interests. No effort has been made to provide security in certain parts of Syria, by military means if necessary, during the civil war that has raged since 2011. At the moment it appears unlikely that the European countries, together with the US and in consultation with Turkey on the one hand and Russia on the other, could at this late stage succeed in creating 'safe areas' in Syria, given the sharp divisions that exist between these powers. New developments cannot be ruled out, however. In addition, whatever happens, the UNHCR must play a key role and must continue to advise on the possible onward migration of people for whom a meaningful future in their country of origin is no longer possible. The EU member states must contribute, each according to its ability to do so, and must help Syria's neighbours – particularly Jordan, Lebanon and Turkey – with the enormous burden and responsibility they are shouldering for the reception of millions of Syrians.

The AIV further recommends setting up a study in the short term, within an international framework, to devise forms of prevention and management in humanitarian crisis situations, not only those resulting from wars but also those caused by the economic, demographic and climatological conditions that may arise in the coming decades. After all, the European Union is no better prepared for such eventualities than are other countries where people may seek refuge.

Request for advice

House of Representatives
of the States General

Professor Jaap de Hoop Scheffer
Chairman of the Advisory Council
on International Affairs
P.O. Box 20061
2500 EB The Hague

Date 28 January 2016

Dear Professor de Hoop Scheffer,

On 26 January 2016, under article 30 of the Rules of Procedure of the House of Representatives of the States General, the House of Representatives resolved to ask the Advisory Council on International Affairs (AIV) for advice on the future of Schengen, specifically:

1. How the European Commission's recent proposals for a European border and coast guard relate to the future of Schengen and the alternatives for EU border control.
2. How Schengen relates to the principle of the free movement of persons and goods within the European Union, and an overview of the fallback options for safeguarding this principle if Schengen's continued existence is threatened.
3. The consequences of a 'mini-Schengen', i.e. what the detailed elaboration of this concept would mean in practice.

In light of a limited timeframe, the advice could take the form of a short advisory letter.

Yours sincerely,

Khadija Arib
President of the House of Representatives
of the States General

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- 27 Advisory letter FINANCING THE INTERNATIONAL AGENDA FOR SUSTAINABLE DEVELOPMENT, *April 2015*

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** Joint report by the Advisory Council on International Affairs (AIV) and the General Energy Council.

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