The Thirtieth Anniversary of the Schengen Agreement: Retrospective and Perspective in Light of the Migrant Crisis
By Anna Kiefer*

As the Schengen Agreement celebrates its thirtieth anniversary this year, its future has never been so uncertain. On this occasion, Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, declared that "[t]he creation of the Schengen area is one of the greatest achievements of the EU, and it is *irreversible*."[1] However, as the media has turned their attention to the unprecedented migrant crisis,[2] it has become clear that the Schengen area is under high pressure. It is facing threats including migration, terrorism, and the use of the area as a tool for populist politics.[3] Focusing on the high influx of migrants and its implication on the Schengen area in the politics of the European Union (EU), the question that arises is whether the Schengen area will be able to overcome this crisis. Opinions differ and some politicians are happy to use this crisis to drown the Schengen Agreement, drawing on national identity threats and populists trends.[4]

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[1] *Schengen Area*, EUROPEAN COMM'N (June 12, 2015) (emphasis added) http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm. Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, stated:

> This year we are celebrating 30 years of Schengen, but also 20 years of the abolishment of internal border controls. Europeans make over 1.25 billion journeys within the Schengen area every year. A Europe without internal borders brings huge benefits to the economy as well, which shows how tangible, popular and successful the Schengen achievement is and the importance it has for our daily lives and for our societies. We need to preserve and reinforce this common achievement. The creation of the Schengen area is one of the greatest achievements of the EU, and it is irreversible.

Id.

[2] OECD, *Is this humanitarian migration crisis different?,* OECD MIGRATION POLICY DEBATES (Sept. 2015), http://www.oecd.org/migration/Is-this-refugee-crisis-different.pdf.

[3] Video Conference Interview by Paul Hackett with Sergio Carrera, Center for European Policy Studies, Viviane Reding, Former Vice-President of the European Commission, and Marc Pierini, Carnegie Europe [hereinafter Paul Hackett], http://ec.europa.eu/dgs/home-affairs/e-library/multimedia/videos/index_en.htm#080126248f9d9a63/c (last updated June 11, 2015) (focusing on comments by Marc Pierini of Carnegie Europe).

[4] *See* Philippe Maystadt, *Euro et Schengen: l'avenir de l'Europe se joue!,* LE VIF (Sept. 26, 2015) http://www.levif.be/actualite/international/euro-et-schengen-l-avenir-de-l-europe-se-joue/article-opinion-420789.html ("Premier ministre hongrois réclame le droit pour chaque Etat de 'protéger sa

The media often uses the term "migrant crisis" when referring to the flow of people trying to reach Europe, but it is not the most appropriate term.[5] We must be aware of the implications of the terms used, as there is a distinction between "migrant" and "refugee." A refugee is defined by the 1951 Refugee Convention as a 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.[6]

A refugee will receive international protection and will not be sent back to his country of origin.[7] A migrant, on the other hand, is someone moving from one country to another who does not qualify as a refugee; in other words, a migrant is not necessarily in danger of persecution in his own country.[8] He will therefore not benefit from international protection and can be deported.[9] Most of the persons arriving in Europe come from countries at war (Syria, Afghanistan) or dictatorship (Eritrea) and thus have good chances of qualifying as refugees.[10] The term migrant is therefore not suitable. Because they have not yet received the status of refugees, the most appropriate term would be "asylum seekers;" therefore the situation would be better qualified as a "refugee" or "asylum crisis."[11] However, people coming from countries regarded as "safe" will most likely not qualify as refugees.[12] The term migrant is then appropriate.

The EU is facing an unparalleled flood of asylum seekers due to its relative proximity to the Middle East's conflict zones and to its economic attractiveness. It

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composition ethnique et culturelle' et voit dans la crise actuelle "la possibilité pour l'idéologie nationale-chrétienne de regagner sa domination.'").

[5] OECD, *supra* note 2, at 4.

[6] Convention relating to the Status of Refugees art. 1A(2), July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees art. 1(2), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

[7] Convention relating to the Status of Refugees, *supra* note 6, at art. 32, 33.

[8] Somini Sengupta, *Migrant or Refugee? There Is a Difference, With Legal Implications*, N.Y. TIMES (Aug. 27, 2015), http://www.nytimes.com/2015/08/28/world/migrants-refugees-europe-syria.html?ref=world&_r=0.

[9] *Id.*

[10] *Asylum in the EU*, EUROPEAN COMM'N (2015), http://ec.europa.eu/dgs/home-affairs/e-library/docs/infographics/asylum/infographic_asylum_en.pdf.

[11] OECD, *supra* note 2, at 4.

[12] The EU Commission proposed creating a common list of "safe countries of origin" that would include the West Balkans and Turkey. For now, twelve states have individual lists of "safe countries of origin." *See* Steve Peers, *'Safe countries of origin': Assessing the new proposal*, EU LAW ANALYSIS (Sept. 14, 2015), http://eulawanalysis.blogspot.com/2015/09/safe-countries-of-origin-assessing-new.html; *An EU 'Safe Countries of Origin' List,* EUROPEAN COMM'N, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_safe_countries_of_origin_en.pdf (last visited Oct. 20, 2015).

received more than 600,000 asylum applications in 2014, amounting to 43% of worldwide asylum applications.[13] The number of applicants continues to rise with an "85% increase in second quarter of 2015 compared with the same quarter of the previous year."[14] Tensions have emerged between EU member states as applications are unevenly distributed amongst them. Five states (Germany, Sweden, Italy, France, and Hungary) received more than 70% of applications in 2014.[15] In addition to this discrepancy, states with borders that form the exterior of the Schengen area are facing a greater challenge, as they are first in line to rescue, welcome, and accommodate asylum seekers.[16] Those countries, especially Greece, Italy, and Hungary, do not have adequate means to face this massive arrival of asylum seekers, and EU assistance has proven to be insufficient.

As a result, some states have decided to take measures to stop the influx of asylum seekers. The most emblematic measure comes from the anti-immigration prime minister of Hungary, Victor Orban, who decided to build a 175 kilometer barbwire wall along the Serbian border.[17] Other states that do not have exterior Schengen borders, such as Germany, reintroduced border controls as it felt that the amount of asylum seekers entering the country was beyond control and needed to be monitored.[18] Indeed, floods of asylum seekers tried to reach Germany after Angela Merkel announced that the country would allow refugees to apply for asylum in Germany regardless of the country through which they first entered the EU.[19] This goes against the rule set in Dublin III, a piece of EU legislation that determines which country is responsible for an asylum application.[20] Unlike with Hungary, the purpose of the border controls in Germany is not to stop, but to identify people entering to better coordinate the flow of people.[21] However, politicians and observers disagree as

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[13] *Asylum in the EU*, *supra* note 10.

[14] *Asylum quarterly report*, EUROSTAT (Sept. 28, 2015), http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_quarterly_report.

[15] *Asylum in the EU*, *supra* note 10.

[16] "The most affected Member States are Greece, with over 213,000 refugees, Hungary, with over 145,000, and Italy, with over 115,000." Jean-Claude Junker, *State of the Union 2015: Time for Honesty, Unity and Solidarity*, EUROPEAN COMM'N PRESS RELEASE DATABASE (Sept. 9, 2015), http://europa.eu/rapid/press-release_SPEECH-15-5614_en.htm.

[17] *Qui est Viktor Orban, le premier ministre qui veut arrêter les migrants en Hongrie?*, LE MONDE (Sept. 4, 2015) [hereinafter *Qui est Viktor Orban*], http://www.lemonde.fr/europe/article/2015/09/04/hongrie-viktor-orban-heraut-de-la-politique-anti-immigration_4746275_3214.html.

[18] *See Vorübergehende Wiedereinführung von Grenzkontrollen*, BUNDESMINISTERIUM DES INNERN (Sept. 13, 2015), https://www.bmi.bund.de/SharedDocs/Kurzmeldungen/DE/2015/09/grenzkontrollen-an-der-grenze-zu-oesterreich-wiedereingeführt.html.

[19] Mihret Johannes, *Angela Merkel welcomes refugees to Germany despite rising anti-immigrant movement*, THE WASH. TIMES (Sept. 10, 2015), http://www.washingtontimes.com/news/2015/sep/10/angela-merkel-welcomes-refugees-to-germany-despite/?page=all.

[20] Council Regulation 604/2013, art. 13, 2013, O.J. (L 180) 31, 59 (EU) (regulation of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person).

[21] Alexander Haneke & Helene Bubrowski, *Sind Grenzkontrollen eigentlich erlaubt?*, FRANKFURTER ALLGEMEINE ZEITUNG (Sept. 14, 2015), http://www.faz.net/aktuell/politik/fluechtlingskrise/wie-die-aussetzung-des-schengen-abkommens-funktioniert-13803053.html.

to the legality of the measure in light of the Schengen rules.[22] Some go so far as declaring the end of the Schengen area.[23] In his speech to the European Parliament, Jean-Claude Junker declared that "[t]he first priority today is and must be addressing the refugee crisis."[24] As governments try to find a solution, one question arises: is the Schengen Agreement capable of overcoming this crisis?

The idea of free movement in Europe was first mentioned in the Rome Treaty in 1957, but it was not until 1985 that five states (France, Germany, Belgium, the Netherlands, and Luxembourg) launched an intergovernmental initiative outside the European Community to suppress border control.[25] The Schengen Agreement was signed in the small town of Schengen in Luxembourg between the French and German borders, which then gave its name to the Schengen Area.[26] The Schengen Agreement was incorporated into the Amsterdam Treaty, making it EU law, and came into force in 1999.[27] The Agreement is celebrating its thirtieth anniversary this year, and its twentieth anniversary of implementation.[28] Today, twenty-six countries are part of the Shengen area, which comprises of twenty-two EU member states (excluding the United Kingdom, Ireland, Bulgaria, Romania, Croatia, and Cyprus) and four non-members states (Norway, Switzerland, Iceland, and Lichtenstein).[29] More than 400 million people are living in the Schengen area which extends over four million square kilometers.[30]

The Schengen area is regarded as one of the most ambitious realizations of the EU. The Agreement had a major impact on the countries, which suppressed internal border controls, creating a free zone of movement. As a consequence, the Schengen states had to strengthen their external border controls and create tools to maintain security through law enforcement cooperation, such as the Schengen Information System (SIS).[31] Another major evolution was the competence given to the EU to create unified visa, asylum, and migration policies.[32] A Common European Asylum System (CEAS) was created in 2000 to harmonize states' legislation by drafting minimum standards on asylum.[33] The Dublin Convention was signed with the goal

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[22] Eric Conan, *Espace Schengen: la maîtresse a triché,* MARIANNE (Sept. 27, 2015), http://www.marianne.net/espace-schengen-maitresse-triche-100237046.html.
[23] *Cf. id.*
[24] Junker, *supra* note 16.
[25] *The Schengen area and cooperation*, EUR-LEX (Aug. 3, 2009) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33020.
[26] *Id.*
[27] *Id.*
[28] *Schengen Area*, EUROPEAN COMM'N (June 12, 2015) http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm.
[29] *Shengener Übereinkommen*, AUSWÄRTIGES AMT (Dec. 12, 2013), http://www.auswaertiges-amt.de/DE/EinreiseUndAufenthalt/Schengen_node.html#doc350334bodyText.
[30] *Schengen Area*, *supra* note 28.
[31] *The Schengen area and cooperation*, *supra* note 25.
[32] *Id.*
[33] *Common European Asylum System*, EUROPEAN COMM'N (June 23, 2015) http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm. *See also* Council Regulation 603/2013, 2013 O.J. (L

of determining which state would be responsible for asylum applications to ensure that applicants would receive a fast and objective processing of their application, to prevent "asylum shopping," [34] and to impede applicants from making asylum demands in different countries.[35] It is based on the principle that "the responsibility for examining an application should primarily lie with the Member State which played the greatest part in the applicant's entry into and residence in the territories of the Member States, with some exceptions designed to protect family unity."[36] The Dublin Convention was then transformed in 2003 into a regulation (Dublin II) and amended in 2013 (Dublin III).[37] Eurodac, a system to register and compare the fingerprints of asylum applicants, was created to support the Dublin policy.[38]

On the paper it seems as if the situation was unified; however, major discrepancies exist in the treatment of asylum seekers. Rates of refugee status awarded greatly differ, even for applicants of the same country of origin, depending on where the application is made. For instance "97% of Somalis were granted protection in Italy at first instance in 2013 and just 17% in France, 41% of Russian nationals were successful in their claims in the UK, 2% in Germany." [39] These discrepancies are due to differences in national asylum laws that the CEAS, even alongside the EU Qualification Directive, the Asylum Procedure Directive, and the Reception Condition Directive, did not manage to erase. Another critique of the Dublin system is the high burden it puts on countries with external borders.[40] The rule that the state responsible for examining an asylum application is the first state in which the person arrived (if no family reasons can be invoked)[41] goes against the

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180) 1, 30 (EC) (on the establishment of Eurodac for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013: "A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, seek international protection in the Union.").

[34] *Contra* RICHARD WILLIAMS, BEYOND DUBLIN: A DISCUSSION PAPER FOR THE GREENS/EFA IN THE EUROPEAN PARLIAMENT 7 (2015).

> Some research indicates a correlation between recognition rates and the number of asylum seekers in a particular country. Other research shows that economic considerations do influence those asylum seekers who are in a position to choose their country of destination (which usually means they have sufficient funds to pay the agent's fee), but there is little evidence of widespread 'asylum shopping' based on differences in welfare systems. The evidence is that many asylum seekers have little choice over their destination.

Id. at 7.

[35] *Commission Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person*, at 3, COM (2008) 820 final (Dec. 3, 2008).

[36] *Id.*

[37] WILLIAMS, *supra* note 34, at 7.

[38] Council Regulation 603/2013, *supra* note 33.

[39] WILLIAMS, *supra* note 34, at 4.

[40] *See* Elspeth Guild et al., *Enhancing the Common European Asylum System and Alternatives to Dublin*, EUROPEAN PARLIAMENT DIRECTORATE GENERAL FOR INTERNAL POLICIES 9, 18, 23 (2015), http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU(2015)519234_EN.pdf.

[41] Council Regulation 604/2013, *supra* note 20, at art. 13.

right to free choice of asylum seekers.[42] The UNHCR's Executive Committee has recommended that the refugee's intentions "as regards the country in which he wishes to seek asylum . . . should as far as possible be taken into account."[43] Thus, some states such as Italy, Greece, or Hungary are faced with an unprecedented number of migrants and asylum seekers, and despite EU help, they do not have the resources and the capacity to accommodate applicants and still meet the requirements of the Reception Conditions directive arrival conditions.[44] This system is supposed to be based on solidarity, but in fact distributes responsibilities unequally.

There are different possible reactions to this asylum crisis. The first of them could be that states withdraw into themselves. Some politicians, using euroscepticism and populist rhetoric, would like to put an end to the Schengen Agreement, or at least renegotiate it to reinstitute their sovereignty by giving states more flexibility with their border controls.[45] The Schengen Borders Code does not completely prohibit internal border controls, but provides for their temporary reintroduction "where there is a serious threat to public policy or internal security"[46] for a duration that shall not exceed what is strictly necessary to respond to the serious threat.[47] This mechanism is very burdensome so as to prevent arbitrary border controls.[48] The state must notify the other Member States and the European Commission four weeks in advance, justify the reason for the reintroduction of border controls, submit this information also to the European Parliament and to the Council, and enable consultations. The Commission can then issue an opinion.

A state can "on an exceptional basis, immediately reintroduce border control" without prior consultation.[49] The state must nonetheless fulfill the notification requirement and justify its measure.[50] However, some consider that reintroducing border controls because of an influx of migrants does not fall under either of the above exceptions due to article 26 of the Schengen Borders Code, introduced in 2013, which created a "specific procedure where exceptional circumstances put the overall functioning of the area without internal border control at risk."[51] This article applies

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[42] One of the critics of the Dublin system is that it relies on coercion, as it forces asylum seekers to apply in a country that they have not necessarily chosen. *See* Guild, *supra* note 40, at 8; WILLIAMS, *supra* note 34.

[43] UNHCR Executive Committee, Refugees Without an Asylum Country, EXCOM Conclusion No. 15 (XXX)–1979 (1979), http://www.unhcr.org/3ae68c960.html.

[44] *See* Guild, *supra* note 40.

[45] *See, e.g.*, *Qui est Viktor Orban*, *supra* note 17; Alexis Théas, *Schengen, le début de la fin*, LE FIGARO (Sept. 16, 2015), http://www.lefigaro.fr/vox/societe/2015/09/16/31003-20150916ARTFIG00102-schengen-le-debut-de-la-fin.php.

[46] Council Regulation 562/2006, art. 23-27, 2006 O.J. (L 105) (EC) (consolidated version of 2013 establishing a Community Code on the rules governing the movement of persons across borders).

[47] *Report from the Commission to the European Parliament and the Council, Seventh bi-annual report on the functioning of the Schengen area,* at 6, COM (2015) 236 final (May 25, 2015).

[48] Council Regulation 562/2006, *supra* note 46, at art. 23.

[49] *Id.* at art. 25.

[50] *Id.*

[51] *Id.* at art. 26.

in case of "persistent serious deficiencies relating to external border control."[52] Under this provision, states cannot unilaterally and at their own discretion reintroduce border controls; it is the Council that must make a recommendation to the state based on a proposal from the Commission, but the state can request the Commission to submit such a proposal.[53] States must therefore overcome important hurdles before they can legally reintroduce internal border controls. Accordingly, there is a risk that states will disregard the procedure and simply unilaterally decide to reintroduce border controls. That risk became a reality as Hungary, Germany, Austria, Slovakia, and the Netherlands decide to reintroduce border controls.[54] Germany appealed to article 25 of the Schengen Borders Code, saying that it was a case "requiring immediate action," and the Commission replied that the situation "prima facie, appear[ed] to be . . . covered by the rules."[55] Easing the procedure for border controls in case of migrant crisis, without completely nullifying the Schengen Agreement. could thus be an option.[56] Indeed as Germany has pleaded, controls can be necessary to oversee who is entering the country in order to identify asylum seekers and organize their reception when a country is faced with a high influx of migrants.[57] However, if reintroducing border controls is made easier, then there is a risk that it would be misused by states at the detriment of the freedom of movement and would thus nullify the Schengen Agreement.

Another possible reaction is to view this crisis as an opportunity for Europe to strengthen its asylum politics and make the changes necessary to respond to the critics of the Dublin Regulation. In a call for more solidarity among EU states coping with the influx of migrants, the President of the European Commission rightly reminded members of the European Parliament that "Europe is a continent where nearly everyone has at one time been a refugee. Our common history is marked by millions of Europeans fleeing from religious or political persecution, from war, dictatorship, or oppression."[58] Member states should not withdraw into themselves. On the contrary, they should realize that they need a united and coordinated action to overcome this crisis, otherwise individually they are at high risk of failure.[59] It is an opportunity to continue the construction of the Schengen area, by equipping it to

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[52] *Id.*; Haneke & Bubrowski, *supra* note 21.

[53] Council Regulation 562/2006, *supra* note 46, at art. 26.

[54] *See Schengen: Controversial EU free movement deal explained*, BBC (Sept. 14, 2015), http://www.bbc.com/news/world-europe-13194723; Melissa Eddy & Dan Bilefsky, *Austria, Slovakia and the Netherlands Introduce Border Controls*, N.Y. TIMES (Sept. 14, 201), http://www.nytimes.com/2015/09/15/world/europe/europe-migrants-germany.html?_r=0.

[55] European Commission STATEMENT/15/5638, European Commission Statement following the temporary reintroduction of border controls by Germany, particularly at the German-Austrian border, (Sept. 13, 2015). *See also* Haneke & Bubrowski, *supra* note 21.

[56] Théas, *supra* note 45.

[57] *Vorübergehende Wiedereinführung von Grenzkontrollen*, *supra* note 18.

[58] *Id.*

[59] *See* Maystadt, *supra* note 4.

tackle an increasing number of asylum applicants and enhancing its security.[60] Angela Merkel qualified the Dublin system, stating that placing responsibility for examining an asylum seeker's application on the first state that the asylum seekers sets foot in is an obsolete rule, and called for a new procedure that would display more solidarity and would be fairer.[61] One of the critics of the Dublin system is that it relies on coercion, as it forces asylum seekers to apply in a country that they have not necessarily chosen. A study commissioned by the European parliament, *Enhancing the Common European Asylum System and Alternatives to Dublin*, has made several recommendations to tackle the defects of Dublin III, such as:

> instituting an EU Migration, Asylum and Protection Agency (EMAPA) with powers to make centralized, EU-wide decisions on asylum applications; a 'free choice' approach . . . with the advantage of reducing complexity and maximizing asylum seekers' agency and trust; the possibility of decoupling disembarkation and allocation of responsibility, suspending Dublin rules vis-à-vis coastal Member States, eliminating incentives to non-rescue; post-recognition relocation . . . as an option to mitigate ex post some of Dublin's shortcomings; or a system of distribution keys, for the distribution of persons, resources or both, aimed at enhancing the overall protection capacity of the EU.[62]

The report is full of ideas to enhance the current system which must be reformed as the crisis has brought to light its defects. States must *together* take responsibility for making the necessary reforms as soon as possible. Otherwise there is the risk that states will decide to tackle the crisis on their own by closing their borders, and thus de facto suspend the Schengen Agreement.[63]

As Jean-Claude Junker said "[t]here is not enough Europe in this Union. And there is not enough Union in this Union."[64] The EU and the Schengen area must be strengthen to face the challenges that lay before them. States must demonstrate more solidarity and act as a real Union, instead of constantly worrying about national polls. More than 65% of EU citizens believe that the Schengen area is one of the most precious things the EU has accomplished.[65] But will the Schengen area overcome the

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[60] Paul Hackett, *supra* note 3 (referring to comments by Sergio Carrera from the Center for European Policy Studies).

[61] "Seien wir ehrlich, das Dublin-Verfahren in seiner jetzigen Form ist obsolet." *Präsident Hollande warnt vor "Ende Europas",* DW (Oct. 7, 2015), http://dw.com/p/1Gk0C.

[62] *See* Guild, *supra* note 40, at 10.

[63] *See, e.g.*, *German police union chief suggests fencing out refugees from Europe,* NEW EUROPE (Oct. 19, 2015), http://neurope.eu/article/german-police-union-chief-suggests-fencing-out-refugees-from-europe/.

[64] Junker, *supra* note 16.

[65] Paul Hackett, *supra* note 3 (comment by Viviane Reding, Former Vice president of the European Commission).

challenge brought by the migration crisis and still be here in thirty years to celebrate its sixtieth anniversary? History will tell us, but as a European citizen I surely hope so.