

Bachelor thesis

Pushing Schengen to its Limits

The Franco-Italian Border Conflict about Irregular Tunisian Migrants
and its Implications for Frontier-Free Europe

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*The earth's been covered with borders, the sky
filled with flags. But there are only two nations
– that of the living and that of the dead.
Junca Sabão¹*

1 INTRODUCTION

1.1 THEME OF THE THESIS AND RESEARCH QUESTION

After the early European movement had just been able to symbolically open the barriers between European nation-states, its dream of Europe not divided by borders anymore has turned into reality for millions of people living in today's 'Schengenland' (Heckmann, 1996, p.11). By now, nearly all Member States of the European Union (EU) and even some non-EU countries have abolished border controls between them and thus implemented the Schengen Convention from 1985, named after its signing place in Luxembourg. However, this process does not mean a loss of relevance for borders in general as it also symbolizes the "relocation of border controls to the external perimeters of the Schengen area" (Zaiotti, 2011, p.2). While the area means free movement of persons for those inside, their excluding dimension for those outside is safeguarded by a common external border. So Schengen changed the perception of exclusion which lost its intra-EU meaning (Thränhardt, 2003, p.15). Migration control, "the aim and the possibility of states to control the scale and composition of its population" (Heckmann, 1996, p.12), is now mainly directed against non-EU immigration as "immigration of poor, needy and different groups" (Thränhardt, 2003, p.15). Their legal access to frontier-free Europe is strictly controlled, contrasting it with 'Fosters Europe', a common metaphor for the limited free-movement of those outside the border.

Consequently, irregular migration, an "act of migration that is carried out against legal provisions of entry and residence" (Triandafyllidou, 2010, p.2), often appears as only chance to get behind the border.² Since it is in the nature of things that irregular migrants cannot be exactly captured by statistics, their numbers within the Union are estimated between 2.8 and 6 million (Lavenex, 2009, p.6). Many of these individuals are visa over stayers or rejected asylum seekers who do not return to their home country. Yet, it is especially the image of black people in dilapidated, small boats on their way from North Africa to Schengen's Southern coastline which is present in the medial or political discourse – so also recently due to rising migratory flows over the Mediterranean Sea in the aftermath of the 'jasmine revolutions' taking place in North Africa since the beginning of 2011. Their attempt to reach Schengen-territory is not only very visible but also very dangerous. Already during the first half of 2011, the United Nations Refugee Agency (UNHCR) counted about 1.500 so-called African

¹ Heinrich-Böll-Stiftung (2009). *Border Politics. Migration in the Mediterranean. Dossier*. Berlin. p.65.

² Within EU context the term „illegal migration“ is frequently applied but since the scientific discourse and human rights organizations highlight that no human can be illegal (Triandafyllidou, 2011, p.2) the term "irregular migration" will be used by the author of this thesis.

boatpeople who had drowned in the Sea, died on hunger, thirst or choked to death in overcrowded cabins (UNHCR, 2011). For many of these people the Italian Island Lampedusa, in its southern end closer to North Africa than to Europe, seems to be the praised land, rescuing their lives and realizing dreams of a better future. But reaching the island's symbolical Porta d'Europa does not offer irregular arrivals a life in Europe as they are returned to the countries which to leave they have risked so much.

Yet, in April 2011 the question how to proceed with about 23.000 irregular Tunisian migrants, who reached Lampedusa during the first three months of the year as a result of the revolutionary turmoil in their country, escalated into a Franco-Italian border conflict, heavily shaking the Schengen system (Carrera, Guild, Merlino & Parkin, 2011 p.21). Like a burning glass this case illustrates the difficulties which irregular migration poses for the Schengen zone. While the Italian government sought to exploit the frontier free zone by granting the irregular migrants temporary visa to enable them to move to other Schengen members, France, the country most of the Tunisians tried to enter, temporarily closed its border to Italy. With their behavior Italy and France both pushed the Schengen rules and their spirit to its limits, giving a reason for commentators and scholars fear "the beginning of the end for the Schengen regime" (Zaiotti, 2011a, p.3). Thus, against the background of this case, the thesis will investigate the research questions: *What makes the Schengen system pushed to its limits and what can prevent that it will be pushed until breakdown? Is the Franco-Italian border conflict really the beginning of the end of the Schengen system?*

1.2 STRUCTURE OF THE THESIS AND WAY OF PROCEEDING

The thesis approaches the answering of its central research questions in different steps. First of all, a detailed description of the Franco-Italian border dispute as important background information for the further course of the thesis will be given. Therefore it will *inter alia* be clarified what the origin of the case was, why the influx of irregular migrants to Italy led to a Franco-Italian border conflict and how Italy and France justified their measures.

The second step then will discuss the case in its general context of European migration and border policy, the policy field to which Schengen and irregular migration issues belong to. Initially, answering the first research question – *What makes the Schengen system pushed to its limits* – is on the agenda. It will be analyzed why Italy and France acted in the way they did and which motives drove their measures. Their behavior will hence be investigated regarding the two dominant conflict lines of European migration and border policy, the area of tension within which both operate. This will also allow concluding how the border conflict roots in the European migration and border policy and to identify which challenge of this policy field is revealed by the border dispute. Next, the discussion will explore possible solutions for the identified challenge of European migration and border policy in order to address the

second research question - *What can prevent that the Schengen system will be pushed until breakdown?*

As third and last step the concluding remarks will bring the thesis to its end and combine the findings made so far while also finally assessing the case's implications for the future of frontier-free Europe by answering the last research question - *Is the Franco-Italian border conflict really the beginning of the end of the Schengen system?*

This thesis is the results of a desk research based on primary and secondary sources. Due to the relatively short period of time between the emergence of the border conflict and the presentation of this thesis, there are only two scientific papers dealing with this topic, one published by Carrera, Guild, Merlino and Parkin (Carrera et al., 2011), focusing on a legality check of the events regarding EU law, and one by Zaiotti (Zaiotti, 2011a), looking back on past conflicts which arose around Schengen. For the present research this means that the detailed description of the Franco-Italian border dispute includes beside these two papers also newspaper articles as sources of information. In order to answer the research questions, the case is set into relation with present concepts of migration and border studies' literature like the conflict lines of this policy field upon the EU-level (e.g. Tomei, 2001; Bendel, 2011) or the externalization approach as the Union's strategy to prevent irregular migration (e.g. Boswell, 2003; Parkes, 2010). Where appropriate, the thesis also refers to legal provisions such as the Schengen Conventions or to the European Commission's "Communication on migration" from Mai 2011.

The aim of this thesis is thereby to lead to a better understanding of the Franco-Italian border conflict and to work out possibilities to protect the Schengen zone against similar conflicts in the future. An important limitation of the present thesis is that there is nothing waiting like a cure-all solution. Instead, different measures will be presented which, based on the finding of this thesis, might contribute to the stabilization of the Schengen system while a guarantee cannot be given.

2 THE FRANCO-ITALIAN BORDER CONFLICT

In order to come closer to the research questions this thesis seeks to investigate, the following chapter gives a detailed overview of the Franco-Italian border conflict. The origin of the influx of irregular Tunisian immigrants to Italy and the bilateral dimension of coping with this phenomenon as an Italian-Tunisian matter is described. Moreover, it is investigated why the Schengen system makes migration a European issue as well and why the irregular Tunisian migrants in Italy triggered a conflict within the European Union or rather between the Member States. Afterwards, the chapter explains why the European conflict about the irregular Tunisians escalated into a Franco-Italian conflict leading to a closure of their common border and

why the measures of Italy and France push Schengen to its limits while a last step describes the further development after the border closure.

2.1 ORIGIN OF THE TUNISIAN INFUX: A CLOSED MIGRATION ROUTE REOPENS

After one month of political unrest and mass demonstrations with thousands of people on Tunisia's streets, the country's long-standing dictator Zine el-Abidine Ben Ali left the North African state in January 2011 (Wieland, 2011).³ However, Ben Ali is not the only Tunisian who, since then, had turned his back on his home country. Whilst the dictator had to bow to the pressure of the democratic revolution movement, many others leave Tunisia due to entirely different reasons.

In the aftermath of the revolution, especially young Tunisian men started out to thousands to make the short but often dangerous trip across the Mediterranean Sea to the small Italian island of Lampedusa. Since this island lies just about 120 km off the Tunisian coast, these migrants see it as their 'gateway' to a better life in Europe - away from a lack of economic prospects and an instable political situation in their country of origin (Netzwerk Migration in Europa (NME), 2011, pp.1). Yet, for *Baldwin-Edwards* (2006, p.317), Tunisia is no traditional country of departure for migrants taking the North African route to Europe with Lampedusa as one main point of arrival.⁴ Before the recent refugee movements from Tunisia to Italy, such influx from the North African neighbor were prevented by a close cooperation between the governments of the two countries in the field of migration control (Bundesagentur für Migration und Flüchtlinge (BAMF), 2011, p.18). In 1998 Italy and Tunisia reached a readmission agreement, in which Ben Ali's government committed to the readmission of Tunisian nationals, who irregularly reach Italian territory (Finotelli & Sciortino, 2009, p.124; BAMF, 2011, p.18). Moreover, Tunisia agreed to increase its border controls and allowed common patrols with the Italian frontier police (BAMF, 2011, p.18). As a consequence, there had long been no considerable migration movements between the South European and the North African country (NME, 2011a, p.1). Generally, in 2008 just every sixth irregular migrant in Italy came from an African country, while most arrived from Rumania and Albania (Riedel, 2011, p.20). This status quo changed significantly with the fall of Ben Ali's old regime. Due to the following situation of political new-orientation, the state apparatus worked just in a limited manner (BAMF, 2011, p.12). Hence, the Tunisian frontier to the Mediterranean was hardly controlled, a crack in the Italian protective shell, which enabled those, willing to migrate, to set sail to Lampedusa. Already 6.200 Tunisian boatpeople arrived there till the end of February (BAMF, 2011, p.12). Till the beginning of April, their number was four times as large with

³ Ben Ali led the authoritarian regime in Tunisia for 23 years. On 14 January 2011 he went into Saudi Arabian exile.

⁴ Baldwin-Edwards refers to three migration routes to Southern Europe. The North/East African route is complemented by the West African route to the Spanish island of Fuerteventura and the Eastern Mediterranean route, which mainly uses Turkey as transit country to Italy, Cyprus or Greece (2006, p.317).

about 23.000 Tunisian migrants (Bachstein, 2011). The question is, whether these people can stay in Italy or not.

2.2 BILATERAL DIMENSION OF MIGRATION: A ITALIAN-TUNISIAN MATTER

The Tunisian refugees are regarded as *economic migrants*, to whom asylum, which only few of them have applied for, is not granted. As such, they “do not find legal access to the northern part of the Mediterranean, thus they fall under the so called [...] ‘illegal’ or ‘irregular’ immigrants” (Bendel, 2011a) who do not have a right to stay in Italy. Nevertheless, Italy cannot just send the irregular arrivals back home, since the Tunisian interim government did not continue the old readmission agreement, which further promoted the refugee influx (NME, 2011, pp.1). In this situation, the Italian minister-president Silvio Berlusconi (Forza Italia) spoke of a “human tsunami” (Bachstein, 2011), expressing a negative perception of migrants as dangerous, flooding his country and causing damage.

A way to dam this influx was found on 5 April 2011, when bilateral negotiations between Rome and Tunis came to an agreement and the Tunisian side accepted readmission of refugees (Carrera, Guild, Merlino & Parkin (Carrera et al.), 2011, p.5). In turn, Italy should have assured Tunisia a loan of about 300 million Euros, money that, *inter alia*, should improve the Tunisian border controls (NME, 2011, p.2). Nevertheless, this agreement had a catch for the Italian government, as its Tunisian counterpart limited the readmission to Tunisian migrants, who reached Italy after 5 April 2011 (NME, 2011, p.1). In order to cope with the remaining 20.000 irregular immigrants (Bachstein, 2011), Italy asked the European Union and the other Member States for solidarity, expressed by an EU-wide distribution of the Tunisian refugees (Busse, 2011). Therewith, a conflict within the European Union was initiated and the bilateral argument was transferred to its European dimension.

2.3 EUROPEAN DIMENSION OF MIGRATION: A SCHENGEN MATTER

The European dimension of the recent refugee debate has its origin in 1985, when Schengen, a small town in Luxembourg, became the signing place of an agreement between five Member States of the European Community: Germany, France and the Benelux countries. The *1985 Schengen Convention* (Schengen I) provided for the establishment of a frontier-free area with a common external border in lieu of internal frontier checks (Lavenex, 2001, pp.87).⁵ In order to implement this plan, the *1990 Schengen Convention* (Schengen II) joined the *Schengen Acquis*. This second agreement focused mainly on “a re-confirmation of the function of borders for state sovereignty and security” (Lavenex, 2001, p.94). Thus, it estab-

⁵ The term ‘internal borders’ refers to “the common land borders of the [Schengen states], their airports for internal flights and their ports for regular ferry connections [...] within the territory of the [Schengen states] [...]” (Art. 1 Schengen I), ‘external borders’ mean the “land and sea borders and their airports and sea ports, provided that they are not internal border” of the Schengen states (ibid).

lished so called “compensation measures” (Foerster, 1996, p.29), meaning an intergovernmental cooperation in the fields of crime, policing and migration.

In this vein, it created a system to manage refugee flows between the Schengen countries - but not in the way demanded by Italy in the current case. The direction of distribution was not from the country of first entry to the other Convention states. It worked exactly the other way round, guaranteeing that just one Member is responsible. Persons, not eligible to a visa, have to be returned by the country of first entry to the Schengen zone. Regarding processing an asylum claim, the country, which the asylum seeker reaches first, is usually responsible as well (Hagen, 2006, pp.35). If an asylum seeker applies for asylum in another Schengen Member State, he or she will be returned to the responsible country. Hence, the responsibility is generally transferred to *one* country instead of distributing it *across* the Convention states. The same principle was transferred to all Member States of the European Community by the *Dublin Convention* (Tomei, 1996, p.94). In 1990, all twelve EC countries at that time became signatories to this international treaty. The *Treaty of Amsterdam* from 1997, then, included the Schengen Conventions into the EU’s legal framework as the *Schengen Acquis* became communitarised (Chalmers, Davies & Monti (Chalmers et al.), 2010, p.28). However, EU membership does not automatically mean belonging to ‘*Schengenland*’. On the one hand, the Amsterdam Treaty opened the way for country specific opt-outs, used by Ireland and the United Kingdom (Chalmers et al., 2010, p.29). On the other hand, Rumania, Bulgaria and Cyprus are not included because a positive unanimous decision of the Member States is missing.⁶ Today, the Schengen zone comprises 22 EU countries plus the four non-EU countries Norway, Iceland, Switzerland and Lichtenstein (Carrera et al., 2011, p.3).⁷

This implies for the European Union that some Member States, especially those at the Southern and Eastern margins, turned into the Union’s external borders, such as e.g. Italy regarding its sea frontier with North Africa. In this situation, an Italian decision to grant a non-EU national a visa or asylum, directly affects nearly all other Member States, since the person concerned has access to a frontier-free zone, where his or her movements are hardly to control. De facto, the Italian border belongs also to Germany, Poland or all other Schengen states. Thus, Italy, in this case, is not only responsible for its own immigration control, but also for that of all Schengen countries. Consequently, a high mutual trust in each other’s decision to allow or deny entry to the EU and therewith the territory of most Member States is essential for the system’s functioning. To develop this trust the need for a harmonization of national policies among the Member States regarding non-EU nationals arose.

⁶ On the Justice and Home Affairs Council meeting on 11-12 April 2011, the interior ministers of Germany, France and the Netherlands voted against the inclusion of Rumania and Bulgaria into the Schengen zone and demanded further steps combating organized crime. Cyprus can only become a full Schengen Member after the Turkish-Cypriot conflict has been solved.

⁷ For the evolution of the Schengen area see Appendix (A1, A2).

Therefore, the Treaty of Amsterdam emerged as a catalyst because it integrated migration and border policy into the EU's supranational first pillar (Nuscheler, 2004, p. 180). Since then the policy field became one of the "most active ones in the European Union" (Bendel, 2009, p.6), leading to a high output of legally binding EU legislation, especially regarding border controls and irregular migrants (Bendel, 2011, p.15). Yet, the supranationalization was limited by a five year lasting transition period within which the intergovernmental Council of the European Union, thus the national ministers in the fields of justice and home affairs, decided by unanimity and without the European Parliament (Parusel, 2010, p.54). Nevertheless, just after the entry into force of the Lisbon Treaty in the end of 2009 all aspects of European migration and border policy, e.g. also legal migration and integration, are subject to qualified majority voting within the Council, which now needs to find an agreement with the European Parliament (co-decision procedure) (ibid.).⁸ However, with regard to the irregular Tunisian migrants it is important what the European migration and border policy can offer Italy to cope with the situation.

2.4 EUROPEAN CONFLICT ABOUT DIFFERENT PERCEPTIONS OF SOLIDARITY

During the *Justice and Home Affairs Council* meeting in Luxembourg on 11-12 April 2011 different views on burden-sharing or solidarity along the EU Member States became apparent. On this occasion the national Justice and Home Affairs ministers discussed common measures regarding the management of migration from the Southern Neighborhood (Council of the European Union, 2011, p.1). For the Italian government the promised support through financial means of the *European Refugee Fund* (EFR) and an operation of the *European Agency for Management of External Borders* (Frontex) before the Italian coast was not enough (Busse, 2011; Peters, 2011). The Italian interior minister Maroni (Lega Nord) entered into the negotiations with a clear aim: an EU-wide resettlement program for the irregular Tunisians. He demanded to activate an absolute exception provision: the *Temporary Protection Directive (2001/55/EC)* (Ternieden, 2011). This Directive aims at allocating displaced persons between the Member States, offering protection for one year (Art. 4), but only in the exceptional case of a mass influx. To activate this provision, the Council of the European Union has to agree on it by qualified majority voting (Art. 4.2, Art. 5) but an agreement was never reached before.

This once voting on the Directive's application did not happen. The only support for the Italian initiative came from Malta, a county confronted with high migration from North Africa as well (Busse, 2011). Especially Germany, Austria, France, the United Kingdom, Sweden, Poland and Slovakia showed no appetite for resettlements (Busse, 2011). While Maroni spoke

⁸ The co-decision procedure, also known as ordinary legislative procedure since the entry into force of the Lisbon Treaty (Art. 294 TFEU), provides for the Commission to issue a legislative proposal and for the European Parliament and the Council of the European Union to be equally engaged in the following legislative process, finding an agreement on the proposal. See also the flow chart in Appendix (A4).

of a “biblical exodus” moving towards Italy (Bachstein, 2011), the majority of his counterparts, as well as the EU Home Affairs Commissioner Cecilia Malmström, could not see a mass influx over the Mediterranean (Winter, 2011). Compared with the world’s third, fourth and fifth largest recipients of asylum claims during 2010, France (47.800), Germany (41.300) and Sweden (31.800) (UNHCR, 2011a, p.26, UNHCR, 2010, p.7), the Tunisian influx from about 23.000 people to the big Italy seemed far from an emergency case to most Member States (Winter, 2011).⁹ Adding the estimated other 4000 people, who have reached Lampedusa so far, mainly from Libya, Somalia, Sudan or Eritrea, does not change the picture very much (Haimerl, 2011). Hence, for Italy the way to reach a relocation of the 20.000 Tunisians in accordance with the other EU Member States was blocked.

2.5 CONFLICT ESCALATION INTO FRANCO-ITALIAN BORDER CLOSURE

According to the Italian interior minister Maroni, the Union has not acted in solidarity, that is why Italy could withdraw its attitude of solidarity as well (Kornelius, 2011). Thus, he announced to use the Schengen-zone to ‘export’ the irregular Tunisian further northwards. Most of them sought to leave Italy as soon as possible, to join family and friends in a country where they understand the language: France. To make this possible, Italy wanted to turn all irregular Tunisian migrants into regular ones, by granting them visa allowing them to move freely within the frontier-free Schengen area (Bachstein, 2011). In this case, the France government threatened with the reactivation of border controls at the French-Italian border to prevent the migrants from entering (ProAsyl, 2011).

Then, just a few days after the *Justice and Home Affairs Council* meeting, the conflict about the Tunisian refugees escalated into a full-blown French-Italian border dispute. On 16 April 2011, Italian authorities started to grant national temporary permits to 120 Tunisians, waiting in the small Italian border town Ventimiglia to reach the French city Menton by train. Only 24 hours later, the France government closed its border with Italy on that place. The so-called ‘*train of dignity*’, transporting Tunisian migrants and NGO representatives over the frontier, was stopped and the cross-border train service closed for hours (Kläsger, 2011). But how does the behavior of the Italian and French side fit in the *Schengen Acquis*, putting responsibility on both countries - on the one hand for coping with the irregular Tunisian arrivals and on the other hand for guaranteeing free movement within its borders?

⁹ South Africa was 2010 for the third year main destination of asylum seekers with 180,600 new asylum claims. The world’s second largest recipient, the United States of America, had 54,300 asylum claims, less than one third of the South African numbers (UNHCR, 2011a, p.25). See also the list of the top ten recipient countries of asylum claims during 2010 in Appendix (A3).

2.6 TWO SIDES PUSHING SCHENGEN TO ITS LIMITS

In the Schengen Zone, Italy, as the country of first entry for the Tunisians, has the obligation to protect the zone's internal security by sending them back, if they do not fulfill the requirements for a legal entry. Yet, one exception is possible, based on the EU *Returns Directive* (2008/115/EC) (Carrera et al., 2011, p.8). Notably, Article 6.4 states that every Member State can, based on *humanitarian reasons*, grant a residence permit to a third-country national staying illegally on its territory. Hence, Italy applied this clause via a national decree to the Tunisians, which allowed granting them a six-month temporary residence permit, although they did not fulfill the usual requirements for a visa (ProAsyl, 2011a). However, only North Africans, who arrived between 1 January and 5 April 2011 – exactly the group not covered by the new readmission agreement with Tunis – were included (Carrera et al., 2011, p.5). Besides that, the Italian decree puts emphasis on the document holder's automatic right to move freely across the Schengen zone (Carrera, et al., 2011, p.6). This view is challenged by France, which had taken apart its barriers to Italy due to the Schengen process.

The French government did not see the need for humanitarian motivated access to its territory and thus demanded of the Tunisians to fulfill the normal requirements for a visa, which are usually checked in the country of first entry. Problematic for most Tunisians might be the demanded "sufficient means of subsistence for the duration of the intended stay and for the return to their country of origin" (Art. 5.1, Schengen Border Code (SBC)). In practice, this means that France asks for 31 Euros per person and per day, adding to a minimum of about 900 Euros a month (Carrera et al, 2011, p.16). Nevertheless, internal border controls were abolished by Schengen but without them France had no chance to prevent the North Africans from entering. Thus, how did France justify blocking the 'train of dignity' on the French-Italian border line?

The only way to temporary reinstall internal border checks within the framework of the *Schengen Acquis* is provided by Article 23 of the *Schengen Border Code*, which only applies to a serious threat to a Member State's "public policy or internal security" (Art. 23 SBC). This Article has been used several times after the official abolition of internal borders in 1995, for instance, as a safety measure around the 2010 NATO summit in Portugal. A train with about one hundred Tunisians, seeking to enter France, might be doubted to be such a serious threat (Zaiotti, 2011, p.8). However, the French interior minister Guérant justified the blockade of the train and the checks on the passengers with the unauthorized demonstration that migrants and about 200 human rights activists had planned for their arrival in France (Kläsgen, 2011). The Italian government heavily criticized the French border closure and called it

an illegal measure (Kläsger, 2011; Zaiotti, 2011, p.8), resulting in only the second border dispute in more than fifteen years of a frontier-free Europe.¹⁰

It is controversial which side is right or if there is even one side acting in a fully legal way (Carrera et al., 2011). Also the position of the European Commission in this case expresses this dilemma. On the one hand Cecilia Malmström, the responsible Commissioner, said about Italy granting residence permits: "Of course can Italy do so" (Peters, 2011). On the other hand the Commission also seems to support the French authorities in controlling the compliance of Tunisians with the first-entry conditions which is hardly possible without re-installing internal border controls (Carrera et al., 2011, p.7) Nevertheless, one thing has become clear: both Italy and France are pushing Schengen to its limits.

2.7 AFTER THE BORDER CLOSURE

After weeks of diplomatic row, the Italian President Silvio Berlusconi and his French counterpart Nicolas Sarkozy met in Rome in the last week of April to end their conflict over the Tunisian migrants. Whilst the internal border has remained open after the conflict had escalated in blocking the '*train of dignity*', the French authorities continued to control the financial means of the Tunisians, who were still arriving from Italy, with spot checks (Bremer, 2011). This situation seems to have turned into an acceptable status quo for both parties since on the summit they did not continue the discussion about who is right and who not but focused on preventing such a conflict in future. In accordance, Italy and France proposed, among others, to rework the Schengen regime to allow temporary re-installment of internal frontier checks, if there is a situation of exceptional difficulties in the management of the common external border, while also stressing the need for solidarity (Mahony, 2011).

Moreover, numbers from UNHCR indicate that the Tunisian influx to Lampedusa has not continued after the old readmission agreement between Rome and Tunis had been reintroduced for all Tunisians reaching Italy after 5 April 2011, which are now returned to Tunisia. Additionally, Tunisian border controls, supported by an Italian donation of 6 motorboats, 4 patrol boats and 100 off-road vehicles (Carrera et al., 2011, p.5) and a Frontex mission before the Italian-Tunisian sea-border seem to have closed this route of irregular migration to the Italian island of Lampedusa and the Schengen zone. Nevertheless, the migrant influx to Italy has neither slowed down nor stopped. According to UNHCR, more than 40.000 migrants reached Lampedusa from the North African coast line during the first six month of 2011 (UNHCR, 2011). Yet, the 18.000 new boatpeople who have arrived at Lampedusa during the last weeks started in from Libya (UNHCR, 2011). Other than the Tunisians, they are no irregular migrants. Most of them are Libyan nationals, who have fled the war in their country,

¹⁰ The other conflict arose between France and the Netherlands after France delayed its lifting of internal borders in 1995 due to concerns about the Dutch policy on drugs (Carrera et al, p. 2, p. 23).

or refugees from sub-Saharan African, seeking international protection and asylum (UNHCR, 2011) and no conflict about hosting them emerged within the European Union.

However, the detailed overview of the Franco-Italian border conflict conducted in this chapter makes clear that it can be labeled as serious crisis of the Schengen system as the measures of both countries endangered its very foundation with unclear implications for the future of frontier-free Europe. For the reason that this case has overcome the inhibition threshold of national measure acting potentially against the Schengen rules it even might constitute the beginning of the end of the Schengen zone unless it can be analyzed what makes Schengen pushed to its limits and what can be done to prevent that it is pushed until breakdown.

3 LESSONS FOR EUROPEAN MIGRATION AND BORDER POLICY

After it is now clear what happened in the Franco-Italian border conflict the necessary foundation is built for assessing the case's implications for the future of the Schengen system. Therefore, the case is discussed in its general context of European migration and border policy "which regulates foreigners' access to the [Schengen and EU] territory and their stay on it" (Tomei, 2001, p.25) and includes the Schengen rules as well as policies regarding irregular migration. The first part of this chapter analyzes what makes the Schengen system pushed to its limits. It therefore investigates why Italy and France acted the way they did, resulting in the identification of a challenge for European migration and border policy as underlying cause of the border conflict. In doing so it becomes clear that the border conflict constitutes a lesson for the European policies in this field. The chapter's second part then concentrates on discussing possible measures to address this challenge, preventing that Schengen is pushed until breakdown.

3.1 IDENTIFYING THE CHALLENGE OF EUROPEAN MIGRATION AND BORDER POLICY

In order to understand the motives which drove France and Italy to their measures it is essential to have a closer look on European migration border policy which has to balance between four ends of a coordinate system, making up two dominant conflict lines regarding migration and border issues. While the first axis relates to a conflict of goals between humanitarianism and repelling, the second links to a struggle for competences in making migration policy between national sovereignty and Europeanization. The classification of the behavior by France and Italy within this area of tension shows that their border conflict has an effect like a burning class, revealing the challenge of European migration and border policy within which the vulnerability of the Schengen zone roots.

3.1.1 HUMANITARIANISM VERSUS REPELLING

On the one hand, European migration policy is driven by an *humanitarian* ideal, believing in an specific European way of life which is expressed by offering hospitality to foreigners and those in need (Chalmers et al., 2010, p.493). This view point is particularly represented by the high standing of the *1951 United Nation Convention Relating to the Status of Refugees* (Geneva Convention) in EU-law on third country nationals. All those, whose life and freedom is ‘threatened on account of race, religion, nationality, membership of particular social groups or political opinion’ (Geneva Convention, Art. 33 (1)) have a right to receive asylum within the Union’s borders.¹¹ For them, Europe can become the safe and protecting harbor, the shelter which the Greek word ‘asylon’ literally means. However, *Chalmers et al.* found out that the humanitarian character and hospitality is mainly limited to the human rights request such as asylum (2010, p.493).

Yet, at first glance, Rome seems to act on humanitarian grounds since the residence permits granted to the Tunisians are officially based on this reason. Therewith, Italy goes beyond what is necessary according to its international and European human rights obligations as most people concerned neither applied for asylum nor seem to fulfill normal visa requirements. Thus, Rome appears to demonstrate the hospitality *Chalmers et al.* connect with humanitarianism.

Nevertheless, as already indicated, the Italian government’s main motivation might have been to “get rid” of the Tunisian arrivals (Bachstein, 2011). Otherwise it would be difficult to understand why Rome has highlighted an automatic right to leave the country in direction of other Schengen states and why permits were just granted after all other ways for an EU-wide relocation were blocked. Against this background, the national policy atmosphere towards the North African immigrants is also striking. The *Lega Nord*, party of Italy’s interior minister Maroni, is known for its anti-immigration and xenophobic discourses. By way of illustration, two of its politicians recently proposed to protect the country with weapons against the, in their view, ‘Tunisian invasion’ (Carrera et al., 2011, p.10).¹² The actions of the Italian government would then stronger relate to *repelling* as the other policy goal of migration policy (Bendel, 2011a; Castles & Miller, 2009, p.188). In this context, *Thürmerhardt* stressed the intention of Western national states to limit or even stop migration (2003, p.8). This view can be driven by concerns about welfare abuse or competition with nationals on the labor market (Parkes, 2010, p. 5, Geddes, 2005, p. 790). A cultural level is added to this economic one by *Thürmerhardt* who emphasized “migrants as constant screen for the reconstruction of a nation’s

¹¹ Art. 78(1) TFEU: “The Union shall develop a common policy on asylum, subsidiary protection and temporary protection [...]. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.”

¹² In the last parliamentary election from 2008 the ‘Lega Nord’ reached 8.1% and formed a coalition with Silvio Berlusconi’s ‘Popolo della Libertà’. Its party members frequently make anti-immigration statements. Referring to migration from North Africa, party leader Umberto Bossi said 2003 that the navy should shoot on boats with immigrants, trying to reach Italy illegally.

own being" (2003, p.15). Migrants, especially non-Western ones, for instance from Tunisia or Libya, might be perceived to expose this self-definition to potentially conflicting values, even endangering the foundation of Western liberal democracies (Lucassen, 2005, p.1). In all these cases migrants are seen as threat for the hosting society, evoking a repulse reaction. Knowing this, it seems to be unlikely that the permissions now granted by Maroni are real acts of humanitarianism. Instead, behind this façade the motivation to repel the migrant by exporting them to France and thus the threatening side of migration as described by *Thränhardt* and others above might have dominated.

On the French side of the border the government has not seen a need for humanitarian motivated actions to relinquish the visa requirements in favor of the Tunisians as well. On the contrary, measures were taken to check these requirements on the internal border in order to overtake the external border's function to deny irregular migrants any access to the Union's territory – especially to France. Therewith, French authorities tried not to be exploited by Italy as hosting country for the Tunisians. With the border closure the French government showed a repulse reaction, sending a clear message to those waiting to leave North Africa. This measure is in accordance with the national government's declaration of the 'fight' against irregular migrants living in France as core policy priority which already resulted in the removal of about 25.500 irregular migrants by French authorities in the first three month of 2011 (Carrera et al., 2011, p.11).

Hence, both Italy and France need to be placed close to 'repelling' on the axis of policy goals they seek to realize. Generally, it seems that Italy and France are participating in a 'race to the top' concerning restrictive measures. In this race both countries try to increase their own repulse capacities as much as possible – Italy by inviting the migrants to travel further North, France by reinstalling border controls. In doing so, Rome and Paris seem to declare restriction to their highest national interest in this affair, leaving little room for honest humanitarian considerations towards those affected by their measures.

3.1.2 NATIONAL SOVEREIGNTY VERSUS EUROPEANIZATION

"Borders represent the very essence of statehood [...] and one of its most visible embodiments" (Zaiotti, 2011, p.2), hence the right of states to control their borders and the movement of foreigners in-between them is an essential expression of *national sovereignty* (Tomei, 2001, pp.24). Since immigration might "challenge the basic of 'national' social and political cohesion upon which the integrity of the nation-state ostensibly depends" (Collision in Tomei, 2001, p.27), migration control is a vivid interest of the state. Nevertheless, the perception of how to enable or to prevent migration thereby differs among the EU Member States due to varying political cultures and migration traditions (Bendel, 2011, p.13). This makes migration policy a sensitive domestic issue, where national sovereignty is, as *Bache* and *Geddes* pointed out, "jealously guarded" (2011, p.13).

Yet, migration has a European dimension as well. Without cooperation, the denial of asylum by one Member State, for instance, automatically shifts the responsibility to other states, probably also belonging to the Union.¹³ Thus, due to close geographical positions and strong interdependences among the Union's Member States, especially through Schengen, their migration policy mutually affects each other's performances in migration control (Tomei, 2001, p.36). Today, the political arrangement of immigration is no longer the sole right of the nation state since the increasing involvement of the European Union, especially after the Treaty of Amsterdam, the starting point for legally binding EU law in this field. Against this background, the term '*Europeanization*' is important. It basically means "enlarging the scope of the relevant unit of policy-making" from the national sphere to the European one (Knodt & Kohler-Koch, 2000, p.22). In like vein, the term refers to the process of an increasing delegation of national competences up to the EU-level but Europeanization literature also uses it to describe the repercussion of this development on the national level (Conzelmann, Knodt & Kohler-Koch, 2004, p.176).¹⁴ Both meanings are relevant here, since the transmission of policy making competences on migration and border issues to the EU as well as its legally binding output limit the Member States national sovereignty in determining their own migration policy. Hence, the Franco-Italian border dispute is more than a clash of interests between EU Member States'. The question is, whether Italy and France have put their national interest above the EU cooperation, even risking a violation of EU law.

As discussed above, both Italy and France pushed Schengen to its limits, seeking to cut the influx of Tunisian immigrants to their territory. It is just possible, that one or even both of them finally overstretched these limits and violated the Schengen rules and thus EU law, based on the Europeanization of migration and border issues. *Carrera et al.*, for example, question the lawfulness of the French and Italian measures (2011, pp.9). On the one hand, Italy might not have had the legal power to grant the Tunisians an automatic right to free movement across the Union's territory (Carrera et al, 2011, p.8). On the other hand, the proportionality of the French '*train of dignity*' blockade is doubted as well as compliance with Schengen's spot check rules regarding border controls since at least 400 extra border guards patrolled close to the border in search for Tunisians (Peters, 2011).

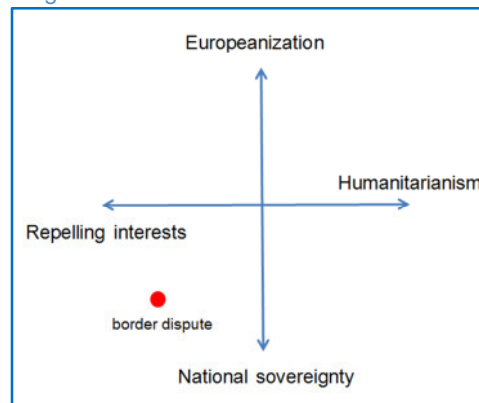
However, this is not the place to finally assess the Member State's compliance with the Union's legal provisions. The most important thing to conclude from this discussion is the fact that Rome as well as Paris risked acting against these rules. Even if they did not break EU laws, they seem to be prepared to do so. Schengen and the EU law on non-EU nationals usually mean that the Member States no longer can act as freely as they would like to due to

¹³ After a tightening of the German asylum law in 1993, e.g., the Netherlands received a significantly higher number of asylum claims (Tomei, 2001, p. 33).

¹⁴ See e.g. Faist, T. & Ette, A. (2007). *The Europeanization of national policies and the politics of immigration. Between Autonomy and the European Union*, Basingstoke; Geddes, A. (2003). *The politics of migration and immigration in Europe*, London.

the binding character of these rules. This principle now appears to have been shaken, since the actions taken by France and Italy seem no longer to be limited by the spirit of Schengen and its legal provisions. Both governments underlined that migration policy is a “stronghold of national sovereignty” (Hunger, Aybek, Ette & Michalowski, 2008, p.10) and acted as stated by *Bache* and *Geddes* above: they jealously guarded their national competences. Therewith Italy and France needs to be placed close to the end of ‘national sovereignty’ on the axis of competence conflicts. Italy and France seem to do what suits them best, competing in a ‘race to the bottom’ regarding Europeanization (Carrera et al., 2011, p.21), following the maxim: the winner circumvents the Schengen rules as favorable for its national interests as possible (Carrera et al, 2011, p.19). National sovereignty interests seem to have outstripped Europeanization so that the two of them risk not only an open bilateral conflict but also to undermine the Schengen zone as one of the Union’s most crucial elements

Figure 1: The Conflict Lines and The Case



Source: own design

3.1.3 REPELLING SEEKS FOR NATIONAL SOVEREIGNTY

The investigation of the French and Italian measures against the background of conflicts in European migration and border policy shows that both governments sought to repel the irregular Tunisians from their territory and contested the established Europeanization regarding the competences for doing so. Accordingly, the serious crisis of the Schengen system which Europe has witnessed during the last weeks is likewise a failed capacity test for the Union’s migration and border policy to manage the recent irregular migratory flows due to the ‘Arabic spring’.

The Europeanization of this policy field is a compensation measure for the abolition of internal borders (Foerster, 1996, p.29) and should make the external border an effective barrier “distinguishing between [...] inside and outside” (Baumann, 2006, p.22), filtering those who are included from those who are not. Although the Union’s policies regarding border and migration should keep those people labelled as ‘unwanted’ away from the national territory and community (Zaiotti, 2011, p.72), the recent case has shown that the EU is not capable to offer Italy and France the degree of repelling they regard as necessary. The Union could not

prevent the Tunisians from irregularly reaching the Italian island of Lampedusa; consequently Italy had to cope with the arrivals from North African who did not fall under the scope of the new readmission agreement with Tunisia. On the other side of the 'border' France as member of the Schengen zone could not fully put its own repelling impulse into practice as well. As a result, both Member States searched recourse to measures implementing their own repelling interest which were driven by nationalism and an attitude which egoism probably expresses best. At this stage the relationship between the above described 'race to the bottom' regarding Europeanization and the 'race to the top' regarding repelling interests becomes quite clear. Hence, the reason why Italy and France pushed Schengen to its limits was that, from their perspective, European cooperation and the Schengen rules appeared as obstacles for repelling the irregular Tunisians. Consequently, they tried to circumvent these obstacles in order to strengthen their national sovereignty which seemed to offer better repelling capacities. By way of illustration, Silvio Berlusconi even publically doubted the added value of being a Member State of the European Union because this restricts Italy's national sovereignty when it comes to coping with the irregular Tunisian immigrants (Peters, 2011). To conclude, the French and Italian repelling interests led to a situation highlighting the challenge of European migration and border policy to align its repelling capabilities with national government's demands since this tradeoff is what made Schengen pushed to its limits. Consequently, to prevent that Schengen will be pushed until breakdown by nationalistic and egoistic measures, the repelling of irregular immigrants by means of European migration and border policy needs to be increased in a manner stabilizing the system instead of further destabilizing it.

3.2 ADDRESSING THE CHALLENGES OF EUROPEAN MIGRATION AND BORDER POLICY

Part one of this chapter identified the challenge to increase repelling capacities as lesson for European migration and border policy from the Franco-Italian border conflict. The following second part of this chapter now concentrates on addressing this challenge and thus on analyzing what measures might prevent that Schengen is pushed until it breaks down. First of all, reforming the Schengen system in a way that offers its Member States more security against irregular immigration is discussed. After investigating this 'internal dimension' of reforming European migration and border policy, it is analyzed how the 'external dimension', referring to the EU's cooperation with migration sending regions, in this case North Africa, might need to be reformed.

3.2.1 REFORMING THE SCHENGEN SYSTEM

"Border management is part and parcel of the EU's policies to combat illegal migration [...]" (Ilies, 2009, p.5), for this reason the Schengen system is an important factor involved in the Union's repelling capacities. As the border conflict showed additional requirements in the

way the frontier-free zone manages irregular migration, this section analyses two different and prominent proposals for reforming the Schengen system, the one arguing for strengthened national sovereignty, the other for more Europeanization within the system.

3.2.1.1 *Strengthening National Sovereignty*

As one potential answer to their border conflict the French President Nicolas Sarkozy and his Italian counterpart Silvio Berlusconi developed a proposal for a Schengen reform on their bilateral meeting in Rome on 26 April 2011 which they sent in a joint letter to Herman Van Rompuy, President of the European Council, and Commission President Jose Manuel Barroso. On this summit, both leaders defended themselves against the critique of destabilizing Schengen or the 'spirit of Schengen'. Instead, Berlusconi and Sarkozy presented themselves as 'rescuer' of the system as they stressed: "we want Schengen to survive, but to survive Schengen must be reformed" (Mahony, 2011). While the statement's former part seems to be a declaration of belief in Schengen and its added value for the European Union, the latter emphasizes that they do not see today's '*Schengenland*' fulfilling all tasks it is concerned with – here probably meant as a reference to its capacity to prevent irregular immigration. Hence, in their joint letter the two of them stated the need for actions reinforcing security in the Schengen zone and demanded "the possibility to temporarily re-establish internal border controls in case of exceptional difficulties in the management of common external borders" (Carrera et al., 2011, p.21).

But how would this proposal reinforce security in the Schengen area with regard to unwanted immigrants? With their reform Berlusconi and Sarkozy want to complement an even now existing safety clause: article 23 of the *Schengen Border Code*. This article already offers the Member States a measure for safeguarding their security within the Schengen zone in situations of "serious threat to public policy or internal security" (Art. 23 SBC). As discussed earlier, this provision has been applied by the French authorities to close the border for the '*train of dignity*'. Concluding, even yet there is a measure which "leaves wide margins of appreciation to the Member States" (Pascouau, 2011 p.1). Although an action based on this article is subject to procedural requirements and has to be, for example, in line with the principle of proportionality or fundamental rights (Carrera et al., 2011, p.21), the measure is mainly in the hands of national authorities. The Commission only "may issue an opinion" (Art. 23(2) SBC) without affecting the Member States' sovereignty¹⁵ to safeguard internal security.¹⁶ However, according to the Italo-French plan, provisions should be added to the rules "to restore inter-

¹⁵ See Article 23(2): "The Commission may issue an opinion without prejudice to Article 64(1) of the Treaty" and Article 72 TFEU (ex. Art. 64(1) TEC): "This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

¹⁶ The European Court of Justice (ECJ) has the competence to assess the legality of border closers. Thus, e.g. a measure of French national legislation, allowing police authorities to check the identity of any individual 'not at the border' but within an area of 20 km to the border of another Schengen state, was declared as a unlawfully border control (*Melik* case, C-188/10).

nal border controls due, not only to a threat to public order, but also to yet-to-be-defined exceptional circumstances” (Pascouau, 2011a, p.2). Such a situation might occur when a Schengen member is not able anymore to protect its borders – and simultaneously the external borders of the whole zone. Then, other Member States affected by this loss of control should, according to the proposal, unilaterally reinstall controls at the internal frontiers (Mahony, 2011). Thus, the reform idea’s core implication is, also underlined by Berlusconi and Sarkozy during their joint press conference, to make it even easier to close internal borders within the theoretically frontier-free area (Pascouau, 2011a, p.2). In the Italo-French row, France would then potentially have been allowed to close its borders because of the influx of the Tunisians and not just as an urgent action due to a threat to internal security caused by an unauthorized demonstration. Hence, it seems that the reform increases the repelling capacities of Schengen signatories since, in case that their neighboring Schengen country is not able to fully control access to its territory, it would give them an option to “protect themselves behind their own borders” (Pascouau, 2011a, p.2).

However, such a measure would not increase the capacities of the *whole* Schengen zone. Instead, although Berlusconi has emphasized the validity of the principle of solidarity among the Member States (Zaiotti, 2011a, p.9), this proposal seems to build internal protective walls within ‘Fortress Europe’ rather than helping the partners whose external ones fall down. Hence, this proposal “does not rely on mutual trust and solidarity but rather on mutual distrust” (Pascouau, 2011a, p.2). The measure would widen the scope for nationalistic and egoistic maneuvers of the Member States and for this reason increase repelling capacities on costs of Schengen’s further destabilization. Thus, the question is: Is there an alternative? Which measures are able to increase ‘*Schengenland’s*’ ability to repel irregular migrants not leading “to a complete reversal of the Schengen philosophy” (Pascouau, 2011a, p.2) or a “major step back in European integration” (Carrera et al., 2011, p.22)?

3.2.1.2 Strengthening Europeanization

Generally, a reform of the current Schengen system is not possible without a revision of the *Schengen Border Code*, an action which needs a formal legislative proposal from the European Commission and agreement under the co-decision procedure. And yet, not only for Berlusconi and Sarkozy, but also for the European Commission it is possible that “a particular portion of the external border comes under unexpected and heavy pressure due to external events” resulting in “critical situations” (COM, 2011, p.8)¹⁷. Thus, with its *Communication on Migration* published on 4 May 2011, just a few days after the bilateral Franco-Italian meeting, the Commission and its Directorate General for Home Affairs picked up the idea of a reintroduction mechanism for internal borders.

¹⁷ Commission Communication on Migration, COM(2011) 248 final, Brussels, 4.5.2011

However, this proposal differs significantly from the Franco-Italian one, since “the response is a rejection of the attempts [...] to ‘renationalize’ some parts of the Schengen system” (Pascouau, 2011, p.1). Home Affairs Commissioner Cecilia Malmström even commented on her document “to defend Schengen ‘with teeth and nails’ (Zaiotti, 2011a, p.10). While the current mechanism to re-establish internal borders as well as the one proposed by France and Italy place the Member State at the starting point of the process, the Commission plans a “community-based response” which should “reduce recourse to unilateral initiatives” (COM, 2011, p.8). The measure envisaged in article 23 SBC admits the Member States to be at the heart of the procedure. Because public order is mainly an issue of national sovereignty reservations, the competences of the Commission are limited, for instance to just issuing opinions on national border closures. With its own proposal, the Commission now points to differences between protecting public order and managing the Union’s external borders, which is an EU-issue (Art. 77 TFEU). Thus, as *Pascouau* stressed “any difficulties arising in this field [of border management] should be dealt with at EU level” (2011, p.2). The same is concluded by the Commission, demanding a “decision at the European level” (COM, 2011, p.8) when it comes to exceptional difficulties in the management of common external borders. This would be likely to reduce the applicability of such a safety clause to truly critical situations, since the EU-level would probably mean a stronger role for the Commission or agreement of the other Member States. Accordingly, the clause would not offer an opportunity to make border closures even easier such as intended with the Franco-Italian approach and the *Schengen Border Code* would not be “revised on the basis of nationalistic and opportunistic reactions” what *Carrera* (2011, p.8) strongly warns about and fears for both proposals. Instead, it becomes not really easier for the Schengen countries to hide behind internal borders and because a Member States cannot be sure that the safety clause will be used to its favor or when, the necessity to stabilize the whole zone in a “spirit of solidarity” (COM, 2011, p.8) remains present. Thus, the Commission proposal offers Schengen more repelling capacities regarding irregular immigration while strengthening the Union’s role regarding border closures and not risking further destabilization of the Schengen system.

Nevertheless, as already said, this measure offers stronger repelling capacities only as “a last resort” (COM, 2011, p.8) in a difficult and controversial to define situation of an extreme case, exactly like the *Temporary Returns Directive* for a redistribution of migrants across the Union’s Member States, which Italy failed to activate regarding the Tunisians. For this reason, it still remains possible that Schengen members might fall back on national measures, potentially acting against Schengen rules, if these exceptional clauses are not applied in their favor and do not officially allow them to relocate irregular immigrant to other Schengen members or to close their internal border. It becomes clear that such a reform alone is not enough to increase repelling capacities in order to stabilize Schengen against such events like the

Franco-Italian border conflict in future. Additionally to the development of safety clauses, it would be important to decrease migration pressure on the external borders and therewith to reduce conflict potential within the Schengen zone.

3.2.2 REFORMING PATTERNS OF COOPERATION WITH NORTH AFRICA

Decreasing migration pressure on Schengen's external borders requires cooperation between the Union and North African migration sending and transit countries, which the European Commission currently plans under the heading of "migration, mobility and security" (COM, 2011, p.16). So, the following section investigates two different patterns of cooperation which are recently contrasted in the literature, the externalization-approach and the triple-win-approach, in order to find out what kind of cooperation is suited to increase repelling capacities of European migration and border policy.

3.2.2.1 *The Externalization-approach: Building a 'protective barrier'*

The reduction of migration pressure on Schengen's external border is not new on the EU agenda and emerged after confrontation with huge migration flows from the former Eastern bloc during the early to mid-1990 (Boswell, 2003, p.621).¹⁸ Since then the Union's migration relations with most third countries have focused especially on a forward shifting of the external border through expanding own police and control methods beyond its territory (Boswell, 2003, pp.619, Parkes, 2010, p.19). By means of a carrot-stick strategy¹⁹ neighboring countries became engaged in EU's "*externalization of migration control*" (Parkes, 2010, p.117). In practice, this strategy made dictators such as Zine el-Abidine Ben Ali in Tunisia or Muamar-Al Gaddafi in Libya to "Europe's Gendarmes" (Mattes, 2006, p.1). Provided with expertise, financial, technical and even militarized means by the EU or a Member State they established a "protective barrier" (Parkes, 2010, p.117) around the EU (Lindstrom, 2005, p.529; Bilgin, Lecha & Bilgic, 2011, p.5). For instance, within the framework of this approach the EU and Italy planned prior to the civic war in Libya to finance a 300 million € expensive border control system along the country's 400 km long land border in order to prevent transit migration through Libya to Europe (proAsyl, 2010, p.22). Besides, for migrants who were nevertheless able to irregularly reach the Union's territorial waters or its mainland, readmission agreements between the EU or Member States and third countries change back their border crossing since signatories readmit all those who have irregularly reached the counterpart's territory also if they are not their own nationals (Boswell, 2003, p.622).²⁰ Beyond that, the

¹⁸ In 1993 the refugee influx reached its highest point with 320.000 refugees from Bosnia seeking protection in Germany only during this year (Thränhardt, 2007, p.688).

¹⁹ The literature refers to a practice linking cooperation in combating irregular migration with increasing or decreasing development aid or inclusion of measures against irregular migration into trade agreements (Parkes, 2010, p.117; Lindstrom, 2005, p.592).

²⁰ The EU has conducted readmission agreements with Russia, Ukraine, the Former Yugoslav Republic of Macedonia, Serbia, Montenegro, Bosnia and Herzegovina, Albania, the Republic of Moldova, Georgia Pakistan, Hong-Kong, Macao and Sri Lanka and is negotiating with Morocco, Tunisia and Turkey.

European Agency for Management of External Borders (Frontex), established in 2005, even coordinates border control operations conducted on the territorial waters of non-EU Member States so as of North African states (Bilgin et al., 2011, p.8). For this reason, Frontex can be described as agency of externalization and as one of the most visible aspects of the “border’s forward shifting” (Bendel, 2011, p.17). How important readmission agreements are for this practice show declining rates of migratory movements for the Frontex mission ‘Nautilus’. One year after Libya and Italy had agreed on readmission in 2009 to “turn boats back to the latter” (UNHCR, 2010, p.9) Frontex could present a minus of 65% for Italy and even 98% for Malta in migration movements from Libya.²¹ Thus, this “restrictive and control-oriented approach” (Boswell, 2003, p.622) seems to have efficient repelling capacities at its disposal which also recently contributed to stop the influx of the irregular Tunisians to Italy. Yet, the externalization strategy can probably be better described with ‘*security, security, security*’ rather than ‘*migration, mobility and security*’.

Nonetheless, *Bendel* pointed out that if the focus centers “so much around one pole – the repelling and control aspect of migration – it raises in fact important challenges for the other pole – humanitarian and human rights aspects” (2011, p.16). This is particularly true if repelling interests lead to cooperation with authoritarian regimes in North Africa such as Tunisia, Libya and Morocco, where “policy brutalities towards immigrants, including shootings, are documented” (Bilgin et al., 2011, p.9). Moreover, human rights organizations report detention, maltreatment and even abandonment in the desert of those seeking to reach European territory (Preuß & Winter, 2010; Kopp, 2011). Libya even expelled UNHCR from the country (Kopp, 2011, p.23). Also, Frontex is heavily criticized and accused to push back boats which could have asylum seekers on board which would violate the *non-refoulement* principle of international and European refugee right (Bendel, 2011, p.17; Kopp, 2011, p.23). The current Frontex mission in Italian waters might also hinder asylum seekers from reaching Lampedusa who seek to follow the 4000 refugees who reached the island from Tunisia before the mission started. While this strategy focuses on EU’s security it means insecurity for migrants and clashes with the humanitarian goal of European migration and border policy, endangering its legitimacy with view to fundamental rights as important foundation upon which the European Union is build.

Additionally, scholars also relativize the security which the approach offers and it’s repelling capacity, stating that attempts to completely seal off sending and transit countries has driven irregular migrants and refugees to find new, often times more dangerous routes to Europe (Boswell, 2003, p.619). Thus, after the migration route via Gibraltar was controlled, a postponement of movements to the Canary Islands took place (Kreienbrink, 2008, p.7). And how soon a controlled route can reopen vividly illustrates the recent situation in Tunisia, were Eu-

²¹ See map on http://www.frontex.europa.eu/hermes_2011_extended/background_information/

rope – at least temporarily – lost its “gatekeeper” (Kopp, 2011, p.21). Hence, the North African protection wall around ‘Fortress Europe’ already crumbles and is even assumed to crumble more if the perceived doubling of the Africa population from 906 million in 2005 to 1.937 million in 2050, combined with continuing socioeconomic and ecological challenges, increase migration potential in future (Bade, 2010, p.5; Mattes, 2006, p.2).

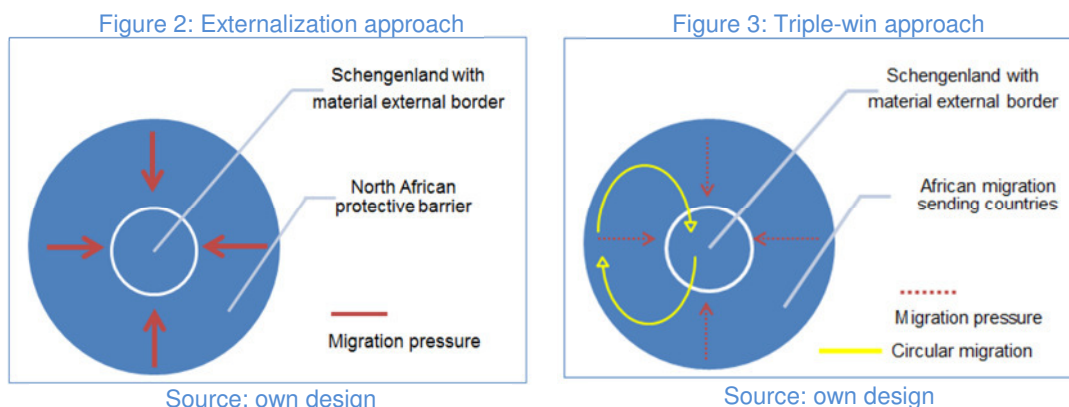
Besides, a repelling strategy is just successful, if it offers the Union a degree of permeability aligned to its needs. Since Europe is heading to times of population decline and rising demands for a qualified and also less qualified workforce, resulting in a “demand-scenario” for migration (Parusel, 2010, p.196), the future sustainability of an unilateral concentration on repelling through the externalization approach is doubted (Zerger, 2011, p.50; Thränhardt, 2005, p.8). But how could the EU address the shortcomings of this cooperation strategy?

3.2.2.2 The Triple-win-approach: Utilizing migration’s potential

Although the externalization approach characterizes migration as threat, there is potential for a “triple-win-situation” (Thränhardt, 2007) streaming from those on the move, beneficial for all parties involved – migrants, sending and host countries (Parkes, 2011, p.119). An approach taking this into account focuses more on *mobility* of migrants, while this does not automatically mean to undermine *security*.

Basically, the approach builds upon the concept of “circular migration” (Zerger, 2011, p.49) which describes “the phenomenon of temporary migration of persons, who leave their country of origin in order to pursue an occupation in another country and who, after a certain time, return to their home country” (Zerger, 2011, p.49). Since migrants channel back material and non-material resources to their countries of origin (Thränhardt, 2005, pp.6; Hunger, 2005, p.15) they may “become a tool of development” (Parkes, 2011, p.116). Today, migrants’ remittances, money and goods sent to family and friends still at ‘home’, “far outweigh the amount of bilateral aid from the world’s richest countries” (Willies, 2008, p.213). Moreover, returning to their home countries migrants transfer another “beneficial currency – job-related knowledge” (Parkes, 2010, p.119). Hence, due to a “migration-development nexus” (Lavenex & Kunz, 2008, p.439), a migrant can unwittingly or purposefully be beneficial for his or her sending country, overtaking a “development-friendly function” (Parkes, 2011, p.119). The migrant then would gain skills and economic benefits from his or her stay. However, this does not need to lead to a zero-sum game, where the hosting country loses due to not respecting its security or repelling interests. Rather might the migration-development nexus result in a reduction of migration pressure, because development in the country of origin might “mitigate the ‘push-factors’ for economically motivated [irregular] migration” (Parkes, 2010, p.118) like the lack of economic perspectives in the country of origin. To address the “root-causes” (Boswell, 2003, p.624) of migration seems to be particularly important for repelling capacities with view to the mentioned rising migration pressure on the African continent,

while additional engagement by means of development assistance might significantly increase the positive effect. Furthermore, the triple-win approach offers hosting countries a second advantage as circular migration enables them to profit from “immigrants while they are economically active but [they] would not have to bear the costs associated with welfare, family reunification or economic inactivity” (Parkes, 2010, p.119). Thus, the triple-win approach expresses a more differentiated understanding of repelling than the externalization strategy and through recognizing the value of migration its pressure can be reduced without neglecting humanitarian goals or migration demand of host countries.



Consequently, the externalization approach alone seems not to be a suitable foundation for future cooperation with North African countries, since “only in dialogue with sending and transit countries we [Europeans] can identify migration causes and manage migration taking into account the interests of all parties concerned” (Zerger, 2011, p.57). Yet, to turn the de facto existing phenomenon of circular migration into a strategy for state regulation of migration is not without difficulties. For example, if the return mechanism is not working this could lead to a “brain drain” (Hunger, 2000, p.7) where the “smartest heads, which could push forward the [migration sending] country’s development, are lost to other countries” (ibid). Thus, the triple-win-approach is no ‘wonder weapon’ in a fight against irregular migration with humanitarian means but a long-term-measure whose impact is promising but so far unclear (Angenendt, 2007, p.2). Hence, the question is none of replacing externalization with circular migration but one of combination to profit from both.

This conclusion is also mirrored by the Commission’s plan to offer North African countries, particularly Tunisia, Morocco and Egypt (Carrera, 2011, p.4) a “Mobility Partnership” (Com, 2011, p.16) which seeks traditional cooperation in border control *and* circular migration. Such partnerships are a relatively new cooperation tool, recently in pilot-phase with Moldavia, Cap Verde and Georgia (Zerger, 2011, p.57) and based on joint declarations between the European Commission and third country. They are legally non-binding for EU members, who can decide if and what kind of mobility they want to offer (Carrera, 2011, p.4; Parusel, 2010, p.217). Return should *inter alia* be facilitated by allowing migrants to leave the host country for a longer period of time than usual without directly losing the residence right. Therefore

third countries need to agree “to readmit irregular migrants” and “effective action aimed at preventing irregular migration” (Com, 2011, p.17).

In how far these Mobility Partnerships will help to overcome the shortcomings of the externalization approach will significantly depend upon different conditions. For instance, the European Union needs to take actions to no longer sacrifice its humanitarian ideals for repelling interests. The recent EP’s adoption of a Frontex reform, which introduces a Fundamental Rights Officer for the agency, is a first but not sufficient step to a better balance between the conflicting policy goals.²² The Union and its Member States needs to seriously take human rights consequences of their externalization projects into account to arrive at responsible measures not fostering migrant’s human rights violations in North Africa. Moreover, for a possibility to arrive at a repelling strategy taking into account the migrant’s, the sending country’s as well as the EU’s needs it is essential that the EU’s Member States are ready to deviate from the “traditional non-immigration” paradigm of repelling to (Thränhardt, 2005, p.4). Otherwise, *Carrera’s* (2011, pp.5, p.19) fear of Mobility Partnerships as new carrot-stick strategy to further engage the North African countries and especially such where the ‘jasmine revolutions’ overthrow the totalitarian regimes into the ‘old’ externalization approach without sincere efforts to offer circular migration, might come true, missing a possibility to arrive at a “more realistic, optimistic scenario” (Thränhardt, 2005, p.5) regarding repelling capacities, stabilizing Schengen.

4 CONCLUDING REMARKS

Schengen will never die
*Charles Elsen*²³

The Franco-Italian border dispute about irregular migrants from Tunisia goes beyond an anecdotal example of conflict between Schengen members. Rather it became clear that it can be described as crisis since the behavior of both governments seriously pushed the Schengen system to its limits. In this way the case highlighted, like a burning class, the vulnerability of “one of the key pillars of European Union’s political architecture” (Zaiotti, 2011, p.26). Thus, with his prediction of Schengen’s immortality, the author quoted above has leaned far out of the window, not just since history has shown time and time again that all political projects are, likewise as their creators, transitory (ibid, p.27). Due to the Franco-Italian border conflict it even appears that the end of the Schengen area could turn from a far-off and abstract possibility into an option quite closer than expected. This has motivated this thesis to ask the question: *Is this case really the beginning of the end of the Schengen zone?*

²² See <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1020>

²³ Charles Elsen was first Director General of Justice and Home Affairs at the Council of the European Union (1994-2004). The quote is from 2000 and cited in Zaiotti, 2011a, p.2.

In general, the emergence of a *crisis* alone is not dangerous for the continued existence of Schengen as it can become a *chance* to trigger a reform process, overcoming the problems destabilizing it (Carrera, 2011, p.3). Precondition for such a constructive way out of a crisis is to identify its root causes, thus to find out *what made the Schengen system pushed to its limits*. The investigation of the French and Italian measures with view to the conflict lines of humanitarianism versus repelling of immigrants as well as national sovereignty versus Europeanization showed: For the governments of both countries Schengen appears not to offer the degree of migration repelling they see as appropriate. Hence, they fall back upon national measures and act – at least – against the ‘spirit’ of Europe’s border free area. So, *what can be done to prevent that the Schengen area is pushed until breakdown* is to increase the area’s repelling of irregular migrants. Therewith, the border conflict likewise constitutes a lesion for European migration and border policy as “compensation measure” (Foerster, 1996, p.29) for the abolition of internal border controls, revealing a challenge for its repelling capacities. Yet, this does not mean that the European migration and border policy needs ‘less Europe’ since more repelling would just function with more national sovereignty. While a Franco-Italian proposal to reform the Schengen system demands easier national reintroduction of border controls in case of exceptional difficulties in the management of common external borders, the analysis of this reform idea even showed a counterproductive effect: further destabilization of Schengen instead of stabilization. Due to a ‘bail out clause’ aligned to national repelling interests the idea might undermine solidarity between the Schengen members and support a further erosion of the Schengen system. On the contrary, a community-based approach emphasizing the EU-level as the one of problem-solving for managing such a loss of control over the external border instead of the national one has the potential to increase repelling capacities while not undermining Schengen’s philosophy (Pascouau, 2011a, p.2). Though, the thesis also recognizes the insufficiency of just reforming the Schengen rules as ‘internal dimension’ of European migration and border policy since this does not reduce migration pressure on the external borders, the starting point for the Franco-Italian border conflict. Hence, also its ‘external dimension’ through cooperation with migration sending and transit regions like North Africa is essential.

As it turned out, the ‘old’ cooperation approach of externalizing border controls to North Africa, turning the region into a ‘protective barrier’ around the external borders, weakened legitimacy of European migration and border policy through significant human rights concerns. Besides, doubts emerged whether this kind of restrictive approach is appropriate for future and present situations of rising migration pressure exerted on ‘Fortress Europe’ combined with rising demands for an opening of its gates to cope with demographic changes and labor shortage within its borders. Instead, rethinking the traditional understanding of repelling in a more realistic and open way can be rewarded with a triple win approach, benefitting mi-

grants, migration sending countries as well as hosting societies. Yet, for this approach to become a tool of European migration and border policy it is inevitable to foster legal circular migration between North Africa and the EU. Accordingly, the European Commission's new concept of Mobility Partnerships with North Africa, combining aspects of externalization with legal channels for circular migration, seems to be a right step in direction of increasing repelling capacities of European migration and border policies more aligned to the Union's needs.

To conclude, the Franco-Italian border dispute *does not need to become the beginning of the end of the Schengen zone*. Instead, this *crisis* can turn into a *chance*, stabilizing Europe's frontier-free zone. By means of "more Europe" (Carrera, 2011, p.3) within the Schengen system and more balanced repelling interests in cooperation with North African countries it seems to be possible to prevent that Schengen is pushed until breakdown by nationalistic measures and to make its end again a far-off and abstract possibility.

Yet, the availability of a chance does not mean that it is taken by those to whom it is offered. Consequently, at the end of this thesis the question about the border dispute's implications for the future of the frontier-free zone remains an open and important one for scholars of both European as well as Migration Studies. Will the Member States further transfer national competences to the EU-level and to open up legal migration channels? Will the recently rising xenophobic political movements across Europe further gain influence on national and European migration and border policy? Or will it be possible to overcome the perception of migrants as "deficient human beings" (Thränhardt, 2005, p.3) and to turn migration – although the earth is covered with borders - to a process less marked with threat and conflict but with potential and responsibility regarding all parties involved?

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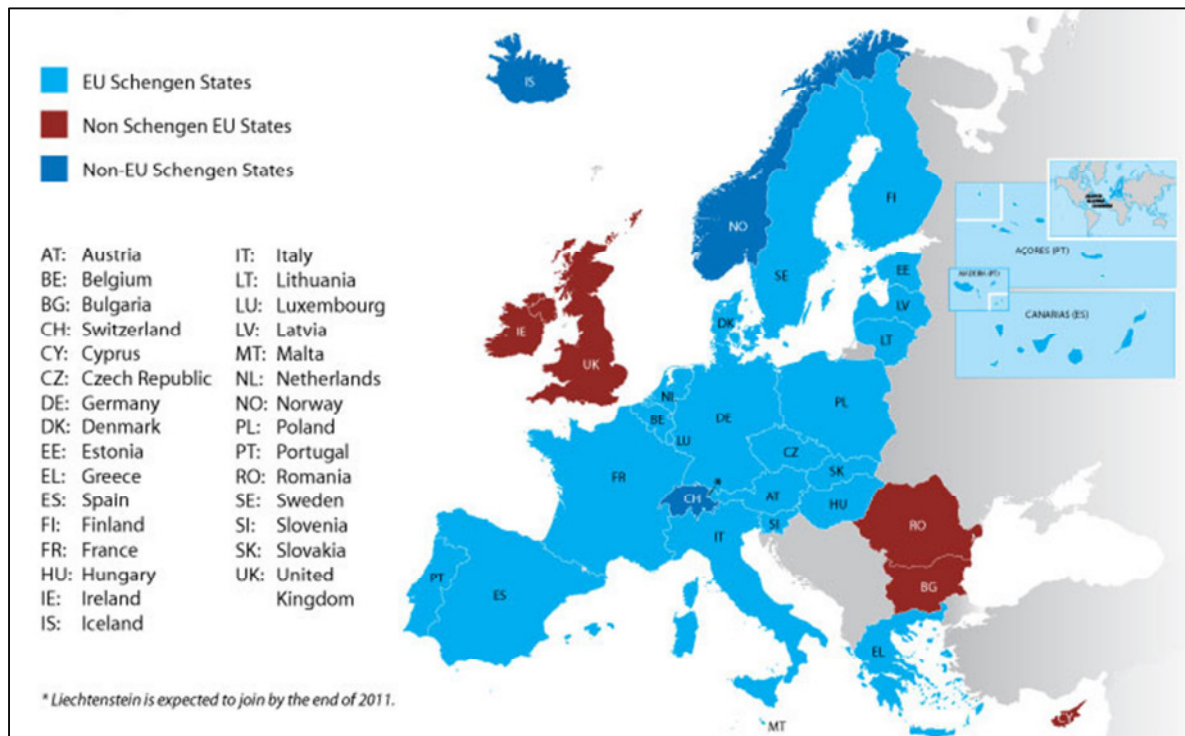
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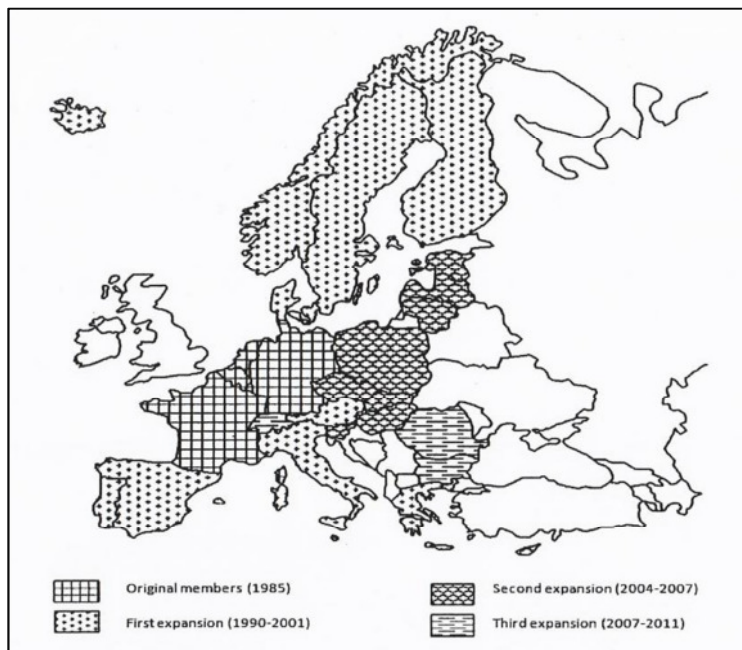
6 APPENDIX

A1: The Schengen area as of 1 Mai 2011



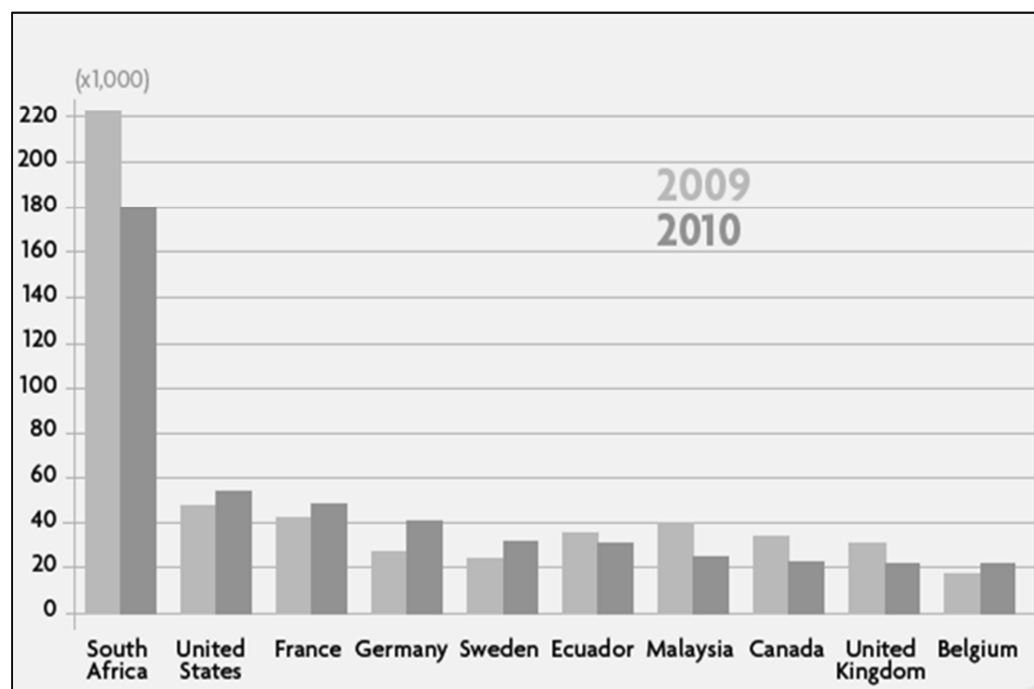
Source: http://ec.europa.eu/home-affairs/policies/borders/borders_schengen_en.htm

A2: Evolution of the Schengen area



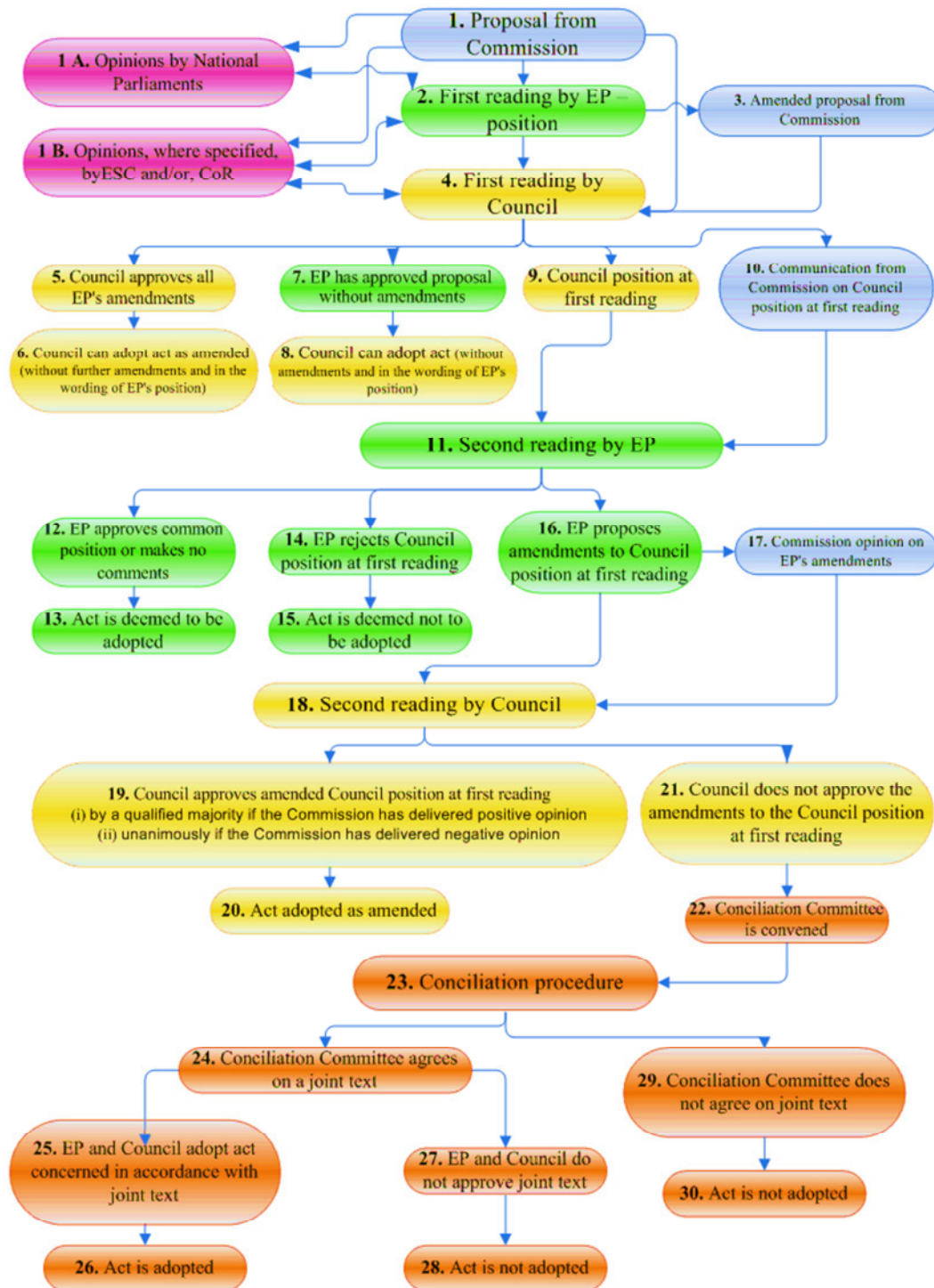
Source: Zaiotti, 2011, p.5

A3: Main destination countries for new asylum-seekers (2009-2010)



Source: UNHCR, 2011a, p.26

A4: The co-decision procedure



Source: http://ec.europa.eu/codecision/stepbystep/diagram_en.htm