

Facilitating Mobility and Fostering Diversity Getting EU Migration Governance to Respect the Human Rights of Migrants

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No. 92 / May 2016

Abstract

Migration towards Europe has surged over the past few years, overwhelming government authorities at the national and EU levels, and fuelling a xenophobic, nationalist, populist discourse linking migrants to security threats. Despite positive advances in the courts and worthy national initiatives (such as Italy's Operation Mare Nostrum), the EU's governance of migration and borders has had disastrous effects on the human rights of migrants. These effects stem from the criminalisation of migrants, which pushes them towards more precarious migration routes, the widespread use of administrative detention and the processing of asylum claims under the Dublin system, and now the EU-Turkey agreement. Yet, with the right political leadership, the EU could adopt different policies in order to develop and implement a human rights-based approach to migration that would seek to reconcile security concerns with the human rights of migrants. Such an approach would enable member states to fully reap the rewards of a stable, cohesive, long-term migration plan that facilitates and governs mobility rather than restricts it at immense cost to the EU, the member states and individual migrants.

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François Crépeau and Anna Purkey*

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Introduction

To say that the migration movements of 2015 have fundamentally altered the political landscape in Europe is an understatement. The arrival of over a million asylum seekers and migrants within the EU has triggered an identity crisis for Europe, forcing member states to reflect on what it means to be European, what the EU stands for and what their obligations are to foreigners, to each other and to the world. The EU and its member states have taken the measure of the challenge, but have not yet risen to it.

The real crisis facing Europe, however, is not a crisis of capacity but one of political leadership. Instead of providing a foundation for renewed solidarity and for the development of a comprehensive common approach to migration, migratory pressures have sown divisions and exacerbated existing tensions among states. Faced with an unprecedented number of incoming migrants, the EU's ideal of free movement is crumbling as ever more member states apply unilateral controls at their internal borders. Instead of collaboration, we find recrimination; instead of responsibility sharing, we find responsibility shifting. The response in the EU to high levels of migrants has included some bright expressions of humanity. Among them have been Sweden's decision to accept all Syrians as refugees as early as 2012, German Chancellor Angela Merkel's decision to set aside the Dublin system and to institute an open-door refugee policy, the outpouring of support for asylum seekers from European civil society, as seen at train stations in Budapest and Vienna, and in the offers of food, material assistance, shelter and support by individuals and groups across Europe.¹ Nevertheless, as time wears on and migrants continue to arrive, there is a serious risk that tensions will continue to worsen and goodwill will be all but replaced by security concerns, fear, racism and xenophobia.

Before addressing the situation in the EU, we need to change our collective mindset and reframe the various issues at stake. We must recognise that migration itself is a natural part of human existence; it is not a crime, it is not necessarily a problem and it even has the potential to be a solution. According to this conception then, migration governance is not about closing off borders, shutting gates and keeping people out, but about opening secure, legal pathways for migrants. By governing migration, instead of restricting it through the use of strategies like interception and detention, we move from a zero-tolerance attitude to one of harm reduction, thereby undercutting the criminal organisations responsible for human smuggling, addressing European security concerns and ultimately saving lives.

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¹ See Louise Osbourne, Pedro Espinosa, Dan Nolan, Laura Secci, Patrick Kingsley, Harriet Grant and Maryline Baumard, "Give me your tired, your poor...the Europeans embracing migrants", *The Guardian*, 3 August 2015 (www.theguardian.com/world/2015/aug/03/europeans-who-welcome-migrants).

Based on the 2013 report of the UN Special Rapporteur on the Human Rights of Migrants, in a 2014 article entitled “Managing migrations at the external borders of the European Union: Meeting the human rights challenges”,² the authors called upon the EU to emphasise mobility rather than closure, to adopt a human rights-based framework to migration and to develop an enhanced, common policy response to migratory pressures. Despite some positive developments, the human rights issues raised in that article largely persist today. The continued ineffectiveness and paradoxes of EU border management policies and the lack of a coherent, human rights-based approach to migration were vividly demonstrated by the deaths of migrants in the Mediterranean Sea in early 2015 and the scenes of hundreds of thousands of migrants making their way through Europe, seeking both protection and a better life, yet struggling to find food, shelter and assistance.

Given the EU’s share of global resources and wealth of substantive normative standards, recent deaths at sea, the suffering seen at all stages of migration and other human rights issues have to be understood as the result of not some kind of powerlessness, but of political will and policy choices. The suffering of so many, the tendency for migration to take place clandestinely and the rise of inter-state tensions are symptoms of systemic failings within the EU border management system: the region is losing control of some mobility routes despite sustained investment in ‘securing’ or ‘securitising’ borders. These failings also cut deeper and speak of how the EU, its member states and its populations respond to difference and diversity.

At the same time, the costs associated with attempting to sustain the status quo are huge. The human costs continue to escalate as migrants die at sea and suffer on a large scale at borders, within the EU, as well as in neighbouring countries. Furthermore, the resources lost through investing in an ineffective system and not maximising the opportunities to benefit from organised migration are significant.

Written as a follow-up to the article on managing migration, this paper is also based on one of the reports of the Special Rapporteur.³ It seeks to explore how migration policies in the EU and underlying concepts can be shifted to develop a human rights-based approach that will enable the EU to adopt a long-term strategy and to bank on mobility over the next 20 to 25 years, thereby increasing its capacity to respond to the significant demographic, economic and social challenges that lie ahead for Europe as a whole.

To this end, this paper is divided into three sections. First, the changes that have characterised migration to the EU since the 2013 report are examined, with an emphasis on the steep rise in the number of migrants making the journey to Europe and the variety of increasingly dangerous migration routes used. It also looks at the commensurate increase in xenophobic and nationalist, populist discourse in response to security concerns and recent terrorist attacks in Paris. Positive efforts are also outlined, including certain judgments of the European Court of Human Rights and the expansion of the rescue-at-sea missions Triton and Poseidon in

² See François Crépeau and Idil Atak, “Managing migrations at the external borders of the European Union: Meeting the human rights challenges”, *European Journal of Human Rights*, 2014/5, 2014, pp. 591-622, based on UN Human Rights Council (HRC), *Regional study: Management of the external borders of the European Union and its impact on the human rights of migrants*, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/23/46, HRC, Geneva, 24 April 2013.

³ See UN Human Rights Council (HRC), *Banking on mobility over a generation: Follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, A/HRC/29/36, HRC, Geneva, 8 May 2015.

response to a disastrous death toll following the termination of Italy's Operation Mare Nostrum.

Second, a critical analysis is offered of the EU's governance of migration and border control in relation to the human rights of migrants. This section focuses more specifically on certain key features that define the EU's response to migratory pressures and pose particular risks to the human rights of migrants, such as the criminalisation of migration (which in turn pushes people towards more precarious migration routes), the widespread use of administrative detention and the processing of asylum claims under the Dublin system. Additionally, an overview is offered of the specific legislative and policy initiatives that have been adopted in 2015 in response to the migration 'crisis'.

Finally, this paper discusses certain initiatives that have been, or could be taken by the EU in order to develop and implement a human rights-based approach to migration that would seek to balance the EU's security concerns with the human rights of migrants. Such an approach would enable member states to fully reap the rewards of a stable, cohesive, long-term migration plan that facilitates and governs mobility rather than restricts it at immense cost to the EU, the member states and individual migrants.

1. Overview of migration since 2013

Before 2015, despite the ever-growing number of people on the move, a sustained increase in overall migration to Europe from third countries had not been observed. Indeed, the OECD estimates that in 2012, the EU experienced a 12% decline in migration involving non-EU nationals.⁴ This relative stagnation in flows to the EU was reflective of the fact that the region has broadly deemed migration from third-country nationals to be undesirable and has dramatically reduced opportunities for regular migration.

The direct secondary effects of this approach can be seen in the exponential increase in irregular migration and asylum claims, which has emerged as a clear trend since 2013. In the third quarter of 2015, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU (Frontex) reported that irregular migration was at the highest level (617,412 irregular crossings) since 2007, when data started to be shared in the context of the Frontex Risk Analysis Network (FRAN). At the same time, the International Organization for Migration (IOM) announced that the number of migrants and refugees crossing into Europe in 2015 had exceeded a million.⁵

Meanwhile, asylum claims have also significantly increased. Having peaked in 1992 (670,000) and again in 2001 (424,200), the number of asylum applications within the EU fell to just below 200,000 in 2006.⁶ From that relative low point, there was a gradual increase in the number of applications until 2012, after which the rate of change quickened considerably as the number of asylum seekers rose to over 400,000 in the third quarter of 2015 alone.⁷ With an estimate of over 60 million people displaced, the world is currently experiencing the highest levels of

⁴ See OECD, "Is migration really increasing?", *Migration Policy Debates*, OECD, Paris, May 2014(b).

⁵ See International Organization for Migration (IOM), "Irregular Migrant, Refugee Arrivals in Europe Top One Million in 2015: IOM", Geneva, 22 December 2015 (www.iom.int/news/irregular-migrant-refugee-arrivals-europe-top-one-million-2015-iom); see also Frontex, "FRAN Quarterly: Quarter 3 - July-September 2015", Frontex, Warsaw, 2015 (frontex.europa.eu/assets/Publications/Risk_Analysis/FRAN_Q3_2015.pdf).

⁶ See UN High Commissioner for Refugees (UNHCR), *World at War: Global Trends, Forced Displacement in 2014*, UNHCR, Geneva, 2015(a) (unhcr.org/556725e69.html).

⁷ See Frontex (2015), op. cit.

displacement since the end of World War II.⁸ Within that global context, the proportion of those displaced by humanitarian emergencies seeking refuge in the EU is still relatively small, even though that number has reached a record million.⁹

1.1 Facing the challenges

In the face of such movements, migration trends in the EU are diverging, with some EU member states under substantially more pressure than others. With respect to regular migration, countries such as Germany, Finland and France saw increasing flows in 2013, while Italy, Spain and Portugal experienced a decrease in inflows of permanent immigrants at that time.¹⁰ Trends in asylum claims also show divergence. Eurostat figures for the last ten months of 2015 show Germany as having received 421,940 applications, while Liechtenstein only received 125.¹¹ Similarly, according to Eurostat, the proportion of applications being processed by Germany, France and Italy went from approximately 42% in 2010 to 69% in 2015.¹²

In making the journey to the EU, migrants face numerous risks. While some migrants seek to reach Europe by travelling over land, the vast majority arrive via precarious sea-based routes.¹³ The most commonly used routes in 2015 were the Eastern Mediterranean route and the Western Balkan route.¹⁴ The dramatic increase in the use of these two routes has tragically resulted in large-scale loss of life. The UN High Commissioner for Refugees (UNHCR) estimates that 5,393 migrants died or went missing at sea in 2015, with 70% of these fatalities occurring in the Mediterranean. Given that in January 2016 alone 284 migrants died making the journey to the EU, there is every indication that the use of these routes and the associated avoidable deaths of migrants continue at an alarming pace.¹⁵

The trials faced by migrants do not end once they arrive safely in EU countries. Against the backdrop of a poor post-crisis economic climate, the rise of nationalist populist parties, the horrendous terrorist attacks in Paris (including the Charlie Hebdo killings at the beginning of 2015 and the coordinated Bataclan attacks of November 2015) and the high number of migrant arrivals in the second half of 2015, xenophobia and hate speech have proliferated and even become a normalised feature of public discourse. In Germany, a country that has opened its doors to record-setting numbers of migrants, over 747 crimes against the country's refugee accommodations were recorded in 2015, including 222 cases where individuals could have

⁸ See UN High Commissioner for Refugees (UNHCR), "2015 likely to break records for forced displacement", UNHCR, Geneva, 18 December 2015(b) (www.unhcr.org/5672c2576.html).

⁹ See "Migrant crisis: Migration to Europe explained in seven charts", BBC, 18 February 2016 (www.bbc.com/news/world-europe-34131911).

¹⁰ See OECD (2014b), op. cit.; see also OECD, *International Migration Outlook*, chapter 1, OECD, Paris, 2015 (www.oecd-ilibrary.org/social-issues-migration-health/international-migration-outlook-2015_migr_outlook-2015-en).

¹¹ See Eurostat (appsso.eurostat.ec.europa.eu/nui/show.do).

¹² Calculations based on figures from Eurostat (ec.europa.eu/eurostat/statistics-explained/index.php/File:First_instance_decisions_by_outcome_and_recognition_rates_3rd_quarter_2015.png and ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database).

¹³ The IOM reports that since January 2015, 1,086,271 out of 1,121,662 migrants (almost 97%) have arrived by sea (migration.iom.int/europe/).

¹⁴ See "Migrant crisis: Migration to Europe explained in graphics", BBC, 28 January 2016 (www.bbc.com/news/world-europe-34131911).

¹⁵ See the website of the International Organization for Migration, "Missing Migrants Project" (missingmigrants.iom.int/latest-global-figures).

been or were injured.¹⁶ Anti-migrant sentiment in Germany peaked again after some 200 complaints were filed by women claiming to have been victims of sexual assault committed mostly by men described as being of ‘North African or Arab origin’ during New Year’s Eve celebrations in Cologne.¹⁷

In addition to its more criminal incarnations, the increase in xenophobia and anti-migrant sentiment has also had political manifestations. Indeed, recent polls give the far-right Sweden Democrats party 20% of the vote, which makes it the country’s largest or second-largest party, and France’s National Front took 28% of the vote in the first round of regional elections in December 2015.¹⁸ Right-wing parties with an anti-immigration stance also hold sway in Hungary and Poland, while Hungary, Slovenia, FYROM, Bulgaria and Austria among others have erected fences along their borders in order to control irregular arrivals.¹⁹ In another example of questionable political action, recent legislation passed by Danish lawmakers giving authorities the power to seize cash, jewellery and other valuables from asylum seekers to help cover the government’s expenses invokes bitter reminders of the confiscation of Jewish assets by the Nazis during World War II.²⁰ While a rise in xenophobia against migrants has been a significant trend across Europe within recent years, the sudden influx of migrants has further contributed to the polarisation of public and political sentiment. If unchecked, this xenophobia will inevitably affect how migrants and asylum seekers are perceived in Europe and may constitute a stumbling block in the development of more progressive policies.

1.2 Positive developments

Despite the tensions caused by the surge in migration, a variety of positive developments have also taken place in relation to the protection of and respect for the human rights of migrants within the EU. At a very human level, the photograph of drowned three-year-old Alan Kurdi lying on a beach in Turkey triggered an outpouring of public support for the migrants on a scale that few people would have expected. While within days of the photo being published, Austrian rail workers were donating their time to drive trains carrying refugees and cheering volunteers lined up to greet and feed migrants arriving in Germany, political progress was somewhat more sedate.²¹

¹⁶ See “Just four convictions for refugee home attacks”, *The Local*, 4 December 2015 (www.thelocal.de/20151204/just-four-convictions-after-wave-of-refugee-attacks).

¹⁷ See “Chaos and Violence: How New Year’s Eve in Cologne Has Changed Germany”, 8 January 2016, *Spiegel Online International* (www.spiegel.de/international/germany/cologne-attacks-trigger-raw-debate-on-immigration-in-germany-a-1071175.html).

¹⁸ See “The march of Europe’s little Trumps”, *The Economist*, 12 December 2015 (www.economist.com/news/europe/21679855-xenophobic-parties-have-long-been-ostracised-mainstream-politicians-may-no-longer-be).

¹⁹ See Vanessa Gera, “Anti-migrant mood deepens in Central Europe after Paris attacks”, *The Globe and Mail*, 16 November 2015 (www.theglobeandmail.com/news/world/anti-migrant-mood-deepens-in-central-europe-after-paris-attacks/article27279723/).

²⁰ See Arwa Damon and Tim Hume, “Denmark adopts controversial law to seize asylum seekers’ valuables”, *CNN*, 26 January 2016 (www.cnn.com/2016/01/26/europe/denmark-vote-jewelry-bill-migrants/).

²¹ See, e.g. Frederik Pleitgen and Antonia Mortensen, “Refugees’ long, dangerous journey climaxes in Germany”, *CNN*, 1 September 2015 (www.cnn.com/2015/09/01/europe/refugees-munich-germany/) and Emma Graham-Harrison, Patrick Kingsley, Rosie Waites and Tracy McVeigh, “Cheering German crowds greet refugees after long trek from Budapest to Munich”, *The Guardian*, 5 September 2015 (www.theguardian.com/world/2015/sep/05/refugee-crisis-warm-welcome-for-people-bussed-from-budapest).

One particular area in which support for migrant rights is evident is in the judgments of the European Court of Human Rights and the Court of Justice of the European Union. Assorted judgments in recent years have consistently challenged externalisation practices, ‘the Dublin logic’ and immigration detention, and dealt with issues concerning access to social protection. For example, in 2015 alone, the European Court of Human Rights issued four judgments finding that the conditions of detention in Greece violated the prohibition of inhuman or degrading treatment contained in the European Convention on Human Rights.²²

Other institutions have also played a role in raising the profile of migrant rights. Since its creation, the EU Agency for Fundamental Rights (FRA) has made this one of its priorities. The FRA focused its 2014 annual conference on the human rights of migrants, and since January 2016, it has published monthly updates covering a variety of human rights issues pertaining to migrants, including child protection, registration and asylum applications, reception conditions and public responses (including racist demonstrations and hate speech).²³ At Frontex, the Fundamental Rights Officer, Ms Inmaculada Arnaez Fernandez, and her staff have made important contributions, including the establishment of a code of conduct for joint return operations, the VEGA Children Handbook and the establishment of a mechanism for monitoring respect for fundamental rights.

One of the most critical initiatives related to the protection of migrant rights has been the ongoing search and rescue operations provided by both the government of Italy and Frontex through the Mare Nostrum and Triton Operations. During approximately one year, from October 2013 to October 2014, Italy’s Operation Mare Nostrum reportedly saved more than 160,000 lives.²⁴ When Italy discontinued the Mare Nostrum initiative in late 2014 due to its cost and the failure of other states to provide support (in part owing to the morally twisted argument that the search and rescue operation constituted a ‘pull’ factor for migrants), substantial concerns were raised about the fate of migrants crossing the Mediterranean.²⁵ These concerns persisted when Frontex established the Italian initiative’s replacement, Operation Triton, with a budget that was a mere fraction of Mare Nostrum’s and a vastly reduced mandate that prioritised border control rather than search and rescue, causing substantial concern among humanitarian actors. However, following a tragic incident in spring 2015 in which an estimated 850 migrants died in a single shipwreck, EU leaders agreed to expand Triton’s search and rescue efforts significantly, resulting in a dramatic reduction in deaths at sea.²⁶ Finally, in December 2015, Frontex launched the Poseidon Rapid Intervention, which will provide additional officers, interpreters and technical equipment to support Greece in registering and screening migrants arriving on the Greek Islands.

²² See *A.Y. v. Greece* (Application no. 58399/11), ECHR 5 November 2015; *E.A. v. Greece* (Application no. 74308/10), ECHR 30 July 2015; *Lutanyuk v. Greece* (Application no. 60362/13), ECHR 25 June 2015; *Mahammad and others v. Greece* (Application no. 48352/12), ECHR 15 January 2015.

²³ See EU Agency for Fundamental Rights (FRA), “Regular overviews of migration-related fundamental rights concerns”, FRA, Vienna, 2015 (fra.europa.eu/en/theme/asylum-migration-borders/overviews).

²⁴ See Amnesty International, “Italy: Ending Mare Nostrum search and rescue operation would ‘put lives at risk’”, Amnesty International, London, 2014 (ecre.org/component/content/article/70-weekly-bulletin-articles/855-operation-mare-nostrum-to-end-frontex-triton-operation-will-not-ensure-rescue-at-sea-of-migrants-in-international-waters.html).

²⁵ *Ibid.*

²⁶ See, e.g. Leila Østerbø, “Who is who in the Mediterranean rescue scene”, Migrant Report, Sliema, 20 June 2015 (migrantreport.org/infographic-mediterranean-assets/) and Alice Philipson, “Revealed: ‘Dramatic’ fall in Mediterranean migrant deaths”, *The Telegraph*, 10 July 2015.

Other positive developments include regular migration initiatives, such as the Blue Card system, the third-country Seasonal Workers Directive²⁷ and the draft directive on students and researchers. Both the Blue Card system and the draft directive on students and researchers are aimed at facilitating the mobility of skilled non-EU/EEA nationals coming to the EU to study or work, while the Seasonal Workers Directive addresses the situation of low-skilled migrants and covers stays not exceeding three months. It is hoped that the number of migrants using such avenues would rise to a level that would allow them to effectively fulfil their purpose.

Lastly, and perhaps most importantly given the current situation, are the initiatives undertaken by the European Commission. In May 2015, the European Commission adopted the European Agenda on Migration, which sets out the Commission's ideas for a comprehensive, coherent and holistic approach to migration, covering both legal and irregular migration.²⁸ The Agenda on Migration was subsequently followed by a communication setting out priority actions to be taken by the EU in terms of operational measures, budgetary support and the implementation of EU law.²⁹ Additionally, the Council proposed measures in May 2015 to relocate 40,000 people, in July to resettle approximately 22,000 and then in September 2015 to relocate another 120,000 in clear need of international protection. Unfortunately, as of 4 February 2016, only 4,522 relocation places had been made available by member states.³⁰

Despite these positive elements, a clear focus on security and repression continues to structure the way in which the EU handles border management. A wholesale, coherent integration of the human rights of migrants into European policies is still missing. As discussed below, the system continues to be characterised by its complexity, a lack of harmonisation between relevant policies and regional and international human rights standards, limited responsibility sharing and the absence of the political will needed to initiate the required changes.

2. The EU's migration and border management: Still characterised by securitisation and repression of irregular migration

Looking at the situation in Europe at the beginning of 2016, the only possible conclusion is that the status quo is not sustainable. The current EU border management system is buckling under the pressure of increased irregular migration. As migrants continue to die at sea, and large-scale suffering is experienced at each stage of migration, it is clear that the EU does not govern migration properly. This lack of control manifests itself in a number of different ways,

²⁷ See Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375, 28.3.2014.

²⁸ See European Commission, Communication on a European Agenda on Migration, COM(2015) 240, Brussels, 13 May 2015 (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf).

²⁹ See European Commission, Communication on Managing the refugee crisis: Immediate operational, budgetary and legal measures under the European Agenda on Migration, COM(2015) 490, Brussels, 29 September 2015 (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/communication_on_managing_the_refugee_crisis_en.pdf).

³⁰ See European Commission, "Member States' Support to Emergency Relocation Mechanism (Communicated as of 4 February 2016)", Brussels, 2016; see also European Commission, "Balancing responsibility and solidarity on migration and asylum", Brussels, 14 August 2015 (ec.europa.eu/dgs/home-affairs/e-library/multimedia/publications/index_en.htm#08012624904fdcd4/c) and also European Commission, "European Solidarity: A refugee relocation system", Factsheet, Brussels, 9 September 2015 (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_eu_solidarity_a_refugee_relocation_system_en.pdf).

raising a wide range of human rights concerns, many of which have persisted since 2013 and have gained increasing urgency over the past two years.

2.1 Precarious routes into the EU and human rights

As noted above, the use of precarious routes into the EU, first through the central Mediterranean Sea and now through the Eastern Mediterranean and Western Balkan routes, has increased dramatically in recent years and resulted in large-scale violations of the right to life, as well as significant human rights abuses at all stages of the migratory process. This form of migration is driven largely by conflict and poverty (push factors), as well as by unacknowledged needs within European labour markets (pull factors). Most of these migrants use precarious routes because regular migration opportunities are not available.³¹

Organised smuggling rings are profiting from this lack of regular migration channels, staying ahead of border control initiatives and facilitating crossings through precarious routes in exchange for large payments. Smugglers have consistently displayed a remarkable disregard for the dignity, life and rights of migrants, and have systematically exploited those desperate to reach safer soil. Commonly, boats carrying migrants to the EU leave from Egypt and Libya when using central and Eastern Mediterranean channels; from Morocco and Tunisia when using the western Mediterranean; and from Turkey when using the Aegean Sea route.³² Many migrants have come an extremely long way, including from the sub-Saharan region, the Middle East, Central Asia or the Indian sub-continent. Moreover, these migrants, particularly those travelling through the Sahara, are often subjected to horrific forms of violence.³³

When migrants reach their intended country of destination, they often suffer further violations of their rights. The FRA has published reports of makeshift camps with extremely poor conditions that are run by migrants in Morocco, as well as of migrants locked in small huts by smugglers in Turkey, not to speak of the 'Jungle' in Calais.³⁴ Smugglers typically charge several thousand US dollars per person for boat journeys to the EU, such that families with multiple members can pay well in excess of \$10,000 to make the trip.³⁵

³¹ For four years, Syrian refugees were forced to live illegally in the Middle East - unable to access the local labour market or education and health services. Many placed their faith in the formal processes of resettlement, wrongly trusting that countries such as the UK would eventually provide them with a long-term future. 'If there is a possibility of not putting their families' lives at risk, they will choose that,' the UN refugee agency's top official in Jordan told me when I visited in January. 'If it doesn't work out, then they may make a move.' And in 2015, once people realised that countries such as Britain never would help voluntarily, that's what they did. They came to Europe anyway.

Derived from Patrick Kingsley, "The shame of the migrant shed masks a deeper scandal", *The Guardian*, 8 March 2016. See also Human Rights Watch (HRW), *Europe's Refugee Crisis: An Agenda for Action*, HRW, Brussels, 2015 (www.hrw.org/report/2015/11/16/europes-refugee-crisis/agenda-action).

³² See, e.g. European Commission, "Questions and Answers: Smuggling of Migrants in Europe and the EU Response", Factsheet, Brussels, 13 January 2015 (europa.eu/rapid/press-release_MEMO-15-3261_en.htm) and UN Office on Drugs and Crime (UNODC), *The Role of Organized Crime in the Smuggling of Migrants from West Africa to the European Union*, UNODC, Vienna, 2011.

³³ See Amnesty International, *Libya is Full of Cruelty: Stories of Abduction, Sexual Violence and Abuse from Migrants and Refugees*, Amnesty International, London, 2015 (www.amnesty.org.uk/sites/default/files/libya_is_full_of_cruelty.pdf).

³⁴ See the EU Agency for Fundamental Rights (FRA), *Fundamental rights at Europe's southern sea borders*, Luxembourg: Publications Office of the European Union, 2013 (fra.europa.eu/sites/default/files/fundamental-rights-europes-southern-sea-borders-jul-13_en.pdf).

³⁵ See, e.g. "The Billion-dollar Business of Refugee Smuggling", *Al Jazeera*, 15 September 2015 (www.aljazeera.com/programmes/countingthecost/2015/09/billion-dollar-business-refugee-smuggling-

The boat trips themselves are perilous, involving very basic vessels that have limited navigation systems, are not seaworthy and often have insufficient amounts of food, water, fuel, first-aid kits and life jackets. Boats are usually overcrowded, occasionally containing more than double the recommended capacity. Once migrants have paid for the journeys, they are often forced to go ahead with their plans despite sometimes having second thoughts when seeing the vessels. Migrants have reported incidents of boats not having captains, with inexperienced migrants being required to navigate, as smugglers do not want to risk being caught by the authorities.³⁶ When smugglers are on the boats, incidents of sexual violence and slavery against women have been reported. The crossing from North Africa takes, on average, between one and three days, but can take significantly longer depending on the boat and the maritime conditions. Many boats capsize or go into distress.³⁷

The search and rescue services provided by Italy unilaterally and by Frontex are a response to these alarming trends. In addition, some private and military vessels have saved migrants' lives. Still, as underlined by the International Maritime Organisation, the support provided to search and rescue operations by merchant vessels should remain exceptional, and states should shoulder the main responsibility for such operations.³⁸

Although positive efforts to protect migrants' rights to life have been made, they remain insufficient. Major challenges include incoherence in search and rescue zone management, tensions between unilateral and regional interventions, disincentives for private and military vessels to provide assistance to migrants, limited resource commitments from member states and difficulties in establishing disembarkation protocols.

Search and rescue services are a vital part of addressing the human rights challenges faced by migrants trying to reach the EU by precarious routes; however, the root causes of the use of these channels must also be examined. A main driver is the lack of regular migration channels that reflect the EU's genuine labour needs and the humanitarian and protection needs of those fleeing humanitarian situations. The EU's collective response to the Syrian crisis exposes a remarkably intransigent refusal to offer Syrians any significant migration opportunities in practice. Most EU member states have preferred to look the other way, unsurprisingly pushing migrants to turn to smugglers.

Nevertheless, the increased use of the Mediterranean migration routes and the influx of migrants seen during the last third of 2015 demonstrate beyond any reasonable doubt that, whatever measures the EU implements, migrants will continue to come to the region, and 'sealing' European borders will be very difficult without resorting to measures violating human rights, such as pushbacks or refoulement. The risks that migrants are prepared to take to reach safer soil show that border control measures are not an effective disincentive when desperate people face situations of war, insecurity, violence and extreme poverty.

150913113527788.html) and Global Initiative against Transnational Organised Crime, "Smuggled Futures: The dangerous path of the migrant from Africa to Europe", Global Initiative, Geneva, 2014, and also UNODC (2011), op. cit.

³⁶ See Global Initiative against Transnational Organised Crime (2014), op. cit.

³⁷ Ibid.; see also UNODC (2011), op. cit.

³⁸ See, e.g. International Maritime Organisation (IMO), UN High Commissioner for Refugees (UNHCR) and International Chamber of Shipping (ICS), "Rescue at Sea: A guide to principles and practice as applied to refugees and migrants", IMO, London, January 2015 (www.imo.org/en/MediaCentre/HotTopics/seamigration/Documents/RescueatSeaGuideENGLISH.pdf) and IMO, "Unsafe mixed migration at sea", IMO, March 2016 (<http://www.imo.org/en/MediaCentre/HotTopics/seamigration/Pages/default.aspx>)

2.2 Externalisation

Worrying trends in the use of externalisation techniques have also continued in recent years. The EU has adopted the Global Approach to Migration and Mobility (GAMM) as a policy framework with significant scope for future migration governance and border control. The GAMM comprises a complex array of loosely associated policy and legal mechanisms, as well as a number of projects in countries of transit and origin. Mobility partnerships are an important tool of the GAMM and have been prominent in the recent dialogue held by the EU on its migration and border management. The partnerships address a broad range of issues, ranging from development aid to visa facilitation, circular migration programmes and the fight against unauthorised migration, including cooperation on readmission. Since 2013, the EU has signed mobility partnerships with Azerbaijan, Jordan, Morocco and Tunisia, as well as two Common Agendas on Migration and Mobility with Nigeria and Ethiopia.³⁹

Overall, the GAMM lacks transparency and clarity on the substantive contexts of its multiple and complex elements. Additionally, many agreements reached in the framework of the GAMM have weak standing under international law and generally lack monitoring and accountability mechanisms; this allows for power imbalances between countries and for the politics of the day to determine implementation. Nonetheless, the EU has continued to use the GAMM to promote greater ‘security’. There are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overriding emphasis on security and the lack of policy coherence within the GAMM as a whole generate a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies.⁴⁰

Readmission agreements are an area of particular concern. Despite protections against such practices in EU legislation, pushbacks and refoulement to countries of origin and third countries with weak rule of law and poor asylum systems have been conducted under the broad auspices of bilateral agreements. The European Court of Human Rights has challenged such practices. In 2012, the Court ruled on *Hirsi Jamaa and Others v. Italy*, and held that Italy had violated Arts. 3, 4 and 14 of the European Convention on Human Rights by returning Somali and Eritrean migrants travelling by sea back to Libya.⁴¹ The argumentation of the government of Italy cited the bilateral readmission agreement in place between Italy and Libya. The ruling, however, which awarded compensation to the migrants, reflects that bilateral agreements cannot be used to justify practices that are incompatible with human rights. In 2014, in *Sharifi and Others v. Italy and Greece*, the European Court of Human Rights ruled on the treatment of irregular migrants who had entered Italy from Greece and then had been deported back to Greece, with the fear of subsequent deportation to their respective

³⁹ See the website of the European Commission, DG Migration and Home Affairs, “Global Approach to Migration and Mobility” (ec.europa.eu/dgs/home-affairs/what-we-do/policies/international-affairs/global-approach-to-migration/index_en.htm).

⁴⁰ See European Commission, *Report on the implementation of the Global Approach to Migration and Mobility, 2012-2013*, COM(2014) 96 final, Brussels, 21 February 2014; see also Concord, “Migration and Development: Coherence for migration and security. And what about development?”, Spotlight Report 2015 Policy Paper, Concord, Brussels, 2015 (www.concordeurope.org/images/publications/SpotlightReport_Migration_2015.pdf); and also Katharina Eisele, *The External Dimension of the EU’s Migration Policy, Different Legal Positions of Third-Country Nationals in the EU: A Comparative Perspective*, Leiden: Brill Nijhoff, 2014.

⁴¹ See *Hirsi Jamaa and Others v. Italy* (Application no. 27765/09), ECHR 23 February 2012.

countries of origin.⁴² It held that both countries had violated Arts. 3 and 13 of the European Convention on Human Rights and that Italy had violated Art. 4 of Protocol No. 4 to the Convention.

In 2014, the EU launched a pilot project to monitor whether the human rights of returnees are respected in Pakistan and Ukraine.⁴³ The project is being implemented by the International Organization for Migration with the UNHCR and local partners. Unfortunately, little to no information has been released concerning the results of this project. Given the rights in play, no one should be returned to any country under the GAMM without effective oversight by a post-return mechanism for monitoring human rights.

2.3 Continuing use of detention as a tool for border control

Another concerning trend in migration governance is the extensive use of detention. According to EU law and Art. 5 of the European Convention on Human Rights, deprivation of liberty for immigration reasons must only be used as a measure of last resort.⁴⁴ Nevertheless, after making often long, dangerous and arduous journeys to the EU, many irregular migrants and asylum seekers find themselves subjected to immigration detention. Detention is also commonly used by states when migrants are waiting to be returned, either because of an unsuccessful protection claim or because they have been identified through the EURODAC fingerprint database as having entered the EU in another country.

As noted by the European Court of Human Rights, some instances of immigration detention in EU member states are in contravention of European and international human rights law because such domestic law does not require detention to be reasonable, necessary, proportionate and of last resort, or because it is not decided on a case-by-case basis.⁴⁵ Additionally, there are a number of human rights concerns relating to the impact of detention. Many migrants perceive their treatment as harsh and punitive, despite irregular migration not being in any way a criminal act. Prolonged detention without a clear basis has been shown to have a devastating effect on migrants' and asylum seekers' mental health, for example by contributing to post-traumatic stress disorder, anxiety and depression.⁴⁶ This is frequently compounded by unacceptable detention conditions, such as unsanitary toilet and shower

⁴² See *Sharifi and Others v. Italy and Greece* (Application no. 16643/09), ECHR, 21 October 2014.

⁴³ See International Organization for Migration (IOM), "IOM and Partners to Monitor the Situation of Readmitted Migrants", IOM, Geneva, 4 July 2014 (iom.org/ua/en/home-page/news/iom-and-partners-to-monitor-the-situation-of-readmitted-migrants.html); see also European Commission, "Annex 1 to the AAP 2012 part 3 of the Thematic Programme for Cooperation with Third Countries in the Areas of Migration and Asylum", Brussels (ec.europa.eu/europeaid/sites/devco/files/aap-migration-pakistan-ukraine-p3-af-2012_en.pdf).

⁴⁴ Under Art. 8 of the Reception Conditions Directive (2013/33/EU) and Art. 15 of the Return Directive (2008/115/EC), detention should only be used when no other less intrusive measures are available to achieve the legitimate objective pursued.

⁴⁵ See, e.g. *Mathloom v. Greece* (Application no. 48883/07), ECHR, 24 April 2012 and European Court of Human Rights, "Factsheet - Migrants in Detention", Strasbourg, 2014 (www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf).

⁴⁶ See, e.g. Jesuit Refugee Service - European Regional Office, *Becoming Vulnerable in Detention*, JRS-Europe, Brussels, June 2010 (www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29338/20111014ATT29338EN.pdf) and Katy Robjant, Rita Hassan and Cornelius Katona, "Mental health implications of detaining asylum seekers: A systematic review", *British Journal of Psychiatry*, Vol. 194, No. 4, 2009, pp. 306-12.

facilities and unhygienic kitchens. Plus, there is often a lack of effective access to healthcare, as well as to physical and recreational activities.⁴⁷

Long periods of immigration detention can also lead to sustained barriers to migrants claiming their economic and social rights, even after having been released. UNHCR research suggests that detention disempowers migrants who are often keen to work. A sustained absence from the labour market and the emotional and mental toll of detention can lead to migrants becoming unnecessarily dependent on state-provided support later on.⁴⁸

Of particular concern of course is the presence of children in detention facilities. Children are usually afforded additional protections by member states, and according to many national policies, are not supposed to be detained.⁴⁹ Yet, if the age of the child is unknown, which is common among those without documents or coming from countries that do not have robust birth registration systems, they can be detained or kept in reception centres until their age can be verified. This can take weeks or months. In some instances, while in detention, children live and sleep with adults, without any special accommodation made for their young age and without access to education. In others, families are separated in different sections of the detention facility according to age and gender. The detention of children, even for short periods, can have severe, negative psychological effects. Moreover, the Committee on the Rights of the Child has clearly stated that immigration detention can *never ever* be in the best interest of a child and that families of migrants should not be separated.⁵⁰ Hence, unaccompanied minors and families with children should always benefit from alternatives to detention.⁵¹

These alternatives to detention are currently being explored, as evidenced by the FRA's October 2015 report entitled *Alternatives to Detention for Asylum Seekers and People in Return Procedures*, which provides a compilation of crucial resources to promote the use of detention alternatives.⁵² A number of countries have moved towards more open reception facilities, particularly for vulnerable migrants such as children and families.⁵³ Two of the countries that

⁴⁷ See, e.g. Human Rights Watch (HRW), *Boat Ride to Detention*, HRW, Brussels, 2012 (www.hrw.org/report/2012/07/18/boat-ride-detention/adult-and-child-migrants-malta) and the "Global Detention Project" (www.globaldetentionproject.org).

⁴⁸ See UN High Commissioner for Refugees (UNHCR), "UNHCR Comments on the European Commission's amended recast proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of asylum-seekers (COM(2011) 320 final, 1 June 2011)", UNHCR Bureau for Europe, Brussels (www.unhcr.org/513da1cc9.pdf).

⁴⁹ See, e.g. Parliamentary Assembly of the Council of Europe, Resolution 2020 (2014) – The alternatives to immigration detention of children, 3 October 2014, Strasbourg; see also Directive 2008/115/EC of the European Parliament and of the Council Directive on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive), OJ L 348/98, 24.12.2008.

⁵⁰ See UN Committee on the Rights of the Child, General Comment No. 6 (2005): Treatment of unaccompanied and separated children outside their country of origin, CRC/GC/2005/6, 39th Session, 1 September 2005.

⁵¹ See, e.g. *Rahimi v. Greece* (Application no. 8687/08), ECHR 5 April 2011; see also *Popov v. France* (Application nos. 39472/07 and 39474/07), ECHR 19 January 2012.

⁵² See EU Agency for Fundamental Rights (FRA), *Alternatives to detention for asylum seekers and people in return procedures*, FRA, Vienna, October 2015(a) (fra.europa.eu/en/publication/2015/alternatives-detention-asylum-seekers-and-people-return-procedures).

⁵³ See, e.g. Francesca Cancellaro, "The New Face of Italian Immigration Detention: A Retreat from the Criminalisation of Migrants", University of Oxford, Faculty of Law, 2015 (www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2015/03/new-face-italian) and the "Global Detention Project" (www.globaldetentionproject.org).

have been most criticised for their use of detention, Italy and Greece, have both made reforms to their detention policies and practices, and reduced the use of administrative detention during the course of 2015. Italy has reduced immigration detention from 18 to 3 months.⁵⁴ Following a change in government, Greece pledged in early 2015 to close down immigration detention centres and release persons whose detention exceeded six months, to implement measures to improve detention conditions and to ensure that detention is used only as a last resort.⁵⁵

Unfortunately, this progress may be short-lived as recent reports suggest that Greece is under pressure from the EU to re-open some of the detention centres previously shut down.⁵⁶ Thus, despite some welcome changes, prolonged immigration detention and the associated negative consequences on the human rights of migrants continues in many member states.

2.4 Access to justice

The ability to access justice through legal or administrative recourse is a key component of ensuring the protection of and the accountability for fundamental rights. In a positive trend, many national and regional bodies appear willing to support migrants in fighting for their rights; however, systemic barriers to the right to access justice remain in place in many EU member states. These barriers act either to impede the provision of justice by institutions or to prevent individuals from accessing justice resources. Significant resource constraints make member states unwilling to invest in services that facilitate access to justice for migrants, such as access to competent lawyers, to legal aid and to translation and interpretation services. The migrants' fear of detection, detention and deportation if they assert their rights to access justice presents another crucial barrier. Additionally, substantial inconsistencies in access to justice persist depending upon the rights at stake, the type and nationality of the migrants and the jurisdiction in question. Finally, a lack of specific rules on courts' duties to apply sanctions or compensation for violations of migrants' human rights (or both) constitutes another important barrier.⁵⁷

Concerns about access to justice have been expressed in a number of rulings of the European courts. Decisions of the European Court of Human Rights in *Louled Massoud v. Malta* (2010) and *Suso Musa v. Malta* (2013) held that the way in which both applicants were treated violated Arts. 5(1) and (4) of the European Convention on Human Rights on the basis that not all the detention had been legal and proceedings to determine its legality had not been adequately implemented.⁵⁸ Similarly, in June 2014, the Court of Justice of the European Union

⁵⁴ See the website of Human Rights Watch, "Italy" (www.hrw.org/europe/central-asia/italy).

⁵⁵ See UN High Commissioner for Refugees (UNHCR), "UNHCR welcomes the envisaged changes in the administrative detention of third-country nationals", 19 February 2015(c) (www.unhcr.gr/nea/artikel/24dcef5d13ebd29a1559fc4d7339ad10/unhcr-welcomes-the-envisaged-changes.html).

⁵⁶ See Philip Chrysopoulos, "Greek Gov't to Change Immigration Policy under EU Pressure", *Greek Reporter*, 30 December 2015 (greece.greekreporter.com/2015/12/30/greek-govt-to-change-immigration-policy-under-eu-pressure/).

⁵⁷ See, e.g. Jeremy McBride, *Access to Justice for Migrants and Asylum-seekers in Europe*, Report for the European Committee on Legal Co-operation (CDCJ), Strasbourg, 24 February 2009 (www.coe.int/t/dghl/standardsetting/equality/03themes/access_to_justice/CPEJ_McBride.pdf) and International Commission of Jurists (ICJ), "Undocumented" Justice for Migrants in Italy, ICJ, Geneva, October 2014 (www.refworld.org/pdf.id/5452554a4.pdf).

⁵⁸ See *Louled Massoud v. Malta* (Application no. 24340/08), ECHR 27 July 2010 and *Suso Musa v. Malta* (Application no. 42337/12), ECHR 23 July 2013. See also *E.A. v. Greece* (Application no. 74308/10), ECHR 30 July 2015 and *Khlaifia and Others v. Italy* (Application no. 16483/12), ECHR, 1 September 2015.

made a significant ruling in the case of *Bashir Mohamed Ali Mahdi*, emphasising that, under EU law, a lack of identity papers should not be used to justify extending immigration detention and that migrants should have access to justice to challenge such detention.⁵⁹ Despite state resistance and significant barriers, the decisions of the European Court of Human Rights support the assertion that ensuring access to justice for migrants and asylum seekers is a critical component of ensuring that their fundamental rights are respected.

2.5 Fingerprinting and freedom of movement under the Dublin system

Another major challenge to the EU's governance of migration is the Dublin system itself. The severe restrictions on the movement of asylum seekers under the Dublin system are in sharp contrast to the mobility provided to EU citizens through the freedom of movement framework. Updated in 2013, the overall purpose of the regime is to ensure that one member state is responsible for the examination of an asylum application, to deter multiple asylum claims and to determine as quickly as possible the responsible member state to ensure effective access to an asylum procedure as well as to ensure procedural safeguards, such as the right to information, personal interview and access to remedies. This regime also provides a mechanism for early warning, preparedness and crisis management.⁶⁰ Under the Dublin regime, asylum seekers are required to have their claims assessed in the country deemed responsible for their entry into EU common territory; most often, it will be the first country of entry. Once the fingerprints of asylum seekers are collected, they are then entered into the EURODAC database, which is shared among member states. If migrants whose details are stored in this database apply for protection in other member states, they are supposed to be returned to the country deemed responsible. In fact, the whole system is geared towards making frontline countries, such as Italy and Greece, responsible for keeping on their territory most asylum seekers and irregular migrants, when it is common knowledge that their mechanisms for asylum and refugee status determination are subpar and the economic and social integration opportunities meagre.

Both Italy and Greece, seen by most migrants as merely countries of transit, have faced a huge influx of asylum seekers as well as a sustained economic downturn. This has resulted in many migrants becoming stuck where there are no jobs available for them, with disastrous results for migrants and for the host societies, and has acted as an incentive for many more migrants to avoid registration in the first country of entry in order to quickly move on towards another EU country. Migrants and asylum seekers are unwilling to provide their identification and fingerprints because they do not trust that it serves their best interest in the long term. These migrants are right: being stuck in a frontline EU country does not offer them the best prospect for positive status determination and economic integration.⁶¹

Troubling reports have emerged about border management officials using force to collect fingerprints.⁶² This practice in turn increases the market for smugglers and encourages the use

⁵⁹ See Case C-146/14, *PPU Bashir Mohamed Ali Mahdi*, Court of Justice of the European Union, 5 June 2014.

⁶⁰ See Immigration Law Practitioners' Association (ILPA), "Information sheet, Dublin III", ILPA, London, 2014.

⁶¹ See Susan Fratzke, *Not Adding Up: The fading promise of Europe's Dublin system*, Migration Policy Institute, Washington, D.C., 2015.

⁶² See, e.g. Yermi Brenner, "Far away, so close: For migrants, reaching Italy is only the start", *Aljazeera America*, 20 August 2015 (america.aljazeera.com/articles/2015/8/20/far-away-so-close-for-migrants-reaching-italy-is-only-the-start.html); see also "Ministers back use of force to get migrant fingerprints: Home Office agrees 'coercion' can be used by border officials", *Daily Mail Online*, 23 August, 2015

of precarious routes across Europe, as migrants seeking protection are forced to do so in an irregular way, to avoid detection and forced fingerprinting. It is disconcerting to see that EU rules and practices have caused the reappearance of smuggling routes within the EU, when such routes had disappeared a quarter-century ago with the establishment of freedom of movement.

The European Commission took note of the issue of forced fingerprinting in 2014. It requested information from EU member states on the legal frameworks in place and common practices. Some states, such as Greece, Malta and Italy, have legally allowed the use of force if migrants resist fingerprinting, while other states, such as Austria and Ireland, have prohibited this practice.⁶³ Responses from all governments tend to suggest that migrants and asylum seekers are only rarely unwilling to give their fingerprints, while others have said that it is very difficult to force a person who fundamentally will not cooperate. Even countries that reported migrants being uncooperative at the point of disembarkation, such as Malta, claimed the individuals could typically be recalled later for fingerprinting. While these reports by member states are encouraging, troubling anecdotal evidence by migrants and frontline workers suggests that force has been used in countries of first entry to the EU. Even more troubling are reports that, in the face of the huge increase in the number of migrants and asylum seekers arriving in Europe and the difficulties associated with registering them in a timely manner, in December 2015 the European Commission ordered Italy to use force if necessary to compel migrants and asylum seekers to have their fingerprints taken.⁶⁴

In contrast, the European Court of Human Rights has recently ruled on two significant cases in relation to the Dublin logic. As discussed above, in 2014 in *Sharifi and Others v. Italy and Greece*, the Court ruled that both countries had violated Arts. 3 (prohibition of torture) and 13 (right to a remedy) of the European Convention on Human Rights. Italy's violation occurred as a result of returning a group of Afghan asylum applicants to Greece, while Greece's violation was due to its failure to grant access to the asylum procedure and the existing risk of deportation to Afghanistan.⁶⁵ Similarly, in *Tarakhel v. Switzerland*, in November 2014, the Court ruled on the refusal of Switzerland to examine the asylum application of members of an Afghan family and the decision to send them back to Italy without assurances that their rights would be protected. The Court held that there had been a violation of Art. 3 of the Convention and discussed "systemic deficiencies" in the Italian system.⁶⁶ In 2011, in *M.S.S. v. Belgium and Greece*, the Court held that Belgium had violated Art. 3 of the Convention by deporting an

(www.dailymail.co.uk/news/article-3207490/Ministers-use-force-migrant-fingerprints-Home-Office-agrees-coercion-used-border-officials.html).

⁶³ See European Commission, Ad-Hoc Query on EURODAC Fingerprinting, Requested by COM on 10 July 2012, Compilation produced on 22 September 2014 (ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/border/588_emn_ahq_eurodac_fingerprinting_en.pdf); see also EU Agency for Fundamental Rights (FRA, "Fundamental rights implications of the obligation to provide fingerprints for Eurodac", FRA Focus, FRA, Vienna, May 2015(b) (fra.europa.eu/sites/default/files/fra_uploads/fra-2015-fingerprinting-focus-paper_en.pdf).

⁶⁴ See Mark Micallef, "German Police Admit They 'Can't Fingerprint All Newcomers Immediately'" Migrant Report, Sliema, 16 July 2015 (migrantreport.org/bavaria-police-admits-it-cant-fingerprint-all-newcomers/); see also Lisa De Bode, "EU demands Italy use force to fingerprint all refugees", *Aljazeera America*, 16 December 2015 (america.aljazeera.com/articles/2015/12/16/eu-demands-italy-use-force-to-fingerprint-all-migrants.html).

⁶⁵ See *Sharifi and Others v. Italy and Greece* (Application no. 16643/09), ECHR 21 October 2014.

⁶⁶ See *Tarakhel v. Switzerland* [2014] ECHR 1185, 4 November 2014.

Afghan migrant to Greece despite systemic failures in asylum and social protection provisions.⁶⁷

Alongside this jurisprudence, there are other signs that the Dublin logic is failing and that the restrictions to freedom of movement are not sustainable. For example, Frontex has reported that EU border states are making significant reforms to detention policies, possibly enabling greater freedom of movement and a decrease in successful returns. But perhaps the most striking evidence of the failure of the Dublin system is found in the images of thousands of migrants walking across Europe to Germany, and in Chancellor Merkel's assertion to the European Parliament that "the Dublin process, in its current form, is obsolete".⁶⁸

2.6 Migrant workers

The precarious routes to Europe discussed above are mixed migration channels, with migrants also risking their lives to seek opportunities because regular channels for low-wage migrant workers do not exist or are insufficient. Some progress in opening up economic migration channels has been made through the development of the above-mentioned Blue Card system and Seasonal Workers Directive. Still, use of the Blue Card among EU member states is low and sustained official opportunities for low-skilled migrants are scant.

Europe has jobs for migrants. Many of these jobs are in the official labour market. One of the factors that pushed Chancellor Merkel to open the borders of Germany in the autumn of 2015 was the advice of the business community that Germany needed migrant workers.⁶⁹ A very interesting report on behalf of several German foundations, including the Volkswagen and Siemens foundations, explained very accurately the demographic and labour challenges they faced and the need for migrants to come.⁷⁰ The positive impact of the migration over the past two years in Germany, in terms of an uptick in its GDP, has already been documented.⁷¹

But many low-wage migrants are employed in the underground labour markets that we have allowed to flourish in certain sectors of our economies that have low profit margins and cannot be delocalised; depending on the country, these may include agriculture, construction, hospitality, care, fisheries and extraction.

Agricultural workers in southern Italy work ten-hour days in fields in the summer for €20. Domestic workers work 17-hour days six days a week in France for a pittance.⁷² This pliable

⁶⁷ See *M.S.S. v. Belgium and Greece* (Application no. 30696/09), ECHR 21 January 2011.

⁶⁸ See "Migrant crisis: Hungary migrants start walk to border", BBC, 4 September 2015 (www.bbc.com/news/world-europe-34155701); see also "François Hollande and Angela Merkel face MEPs", Press Release, European Parliament News, 7 October 2015 (www.europarl.europa.eu/news/en/news-room/20150929IPR94921/Fran%C3%A7ois-Hollande-and-Angela-Merkel-face-MEPs).

⁶⁹ See, e.g. Markus Dettmer, Carolin Katschak and Georg Ruppert, "Rx for Prosperity: German Companies See Refugees as Opportunity", *Spiegel Online International*, 27 August 2015 (www.spiegel.de/international/germany/refugees-are-an-opportunity-for-the-german-economy-a-1050102.html).

⁷⁰ See Expert Council of German Foundations on Integration and Migration (SVR), *Immigration Countries: Germany in an International Comparison, 2015 Annual Report*, SVR, Berlin, February 2015 (www.svr-migration.de/wp-content/uploads/2015/06/SVR_Annual-Report-2015_WEB.pdf).

⁷¹ See, e.g. Karin Strohecker, "Deutsche Bank raises German GDP forecast, expecting migrants to boost demand", *Reuters*, 2 October 2015 (www.reuters.com/article/us-germany-economy-deutschebank-idUSKCN0RW1B720151002).

⁷² See Amnesty International, *Exploited Labour: Migrant Workers in Italy's Agricultural Sector*, Amnesty International, London, 2012; see also *Siliadin v. France* (Application no. 73316/01), ECHR 26 October 2005.

workforce occupies the socioeconomic slot once occupied by the slaves of yesteryear and by industrial workers at the end of the 19th century.

One must understand the dynamics at work. A considerable number of employers are actually calling for more exploitable migrants to come and migrants are responding to the opportunities of such underground labour markets. Migrants would not come if it were not for such possibilities.

Unfortunately, the domestic framework on labour law is incapable of regulating such underground labour markets and the implementation mechanisms are inadequate: unionisation is rare and labour inspections inefficient. Exploitation is rife and migrants are too often subjected to intimidation, abuse and violence. Yet migrants often consider that the risk of exploitation is worth taking if it gives them the opportunity to set foot in a country where they hope to move upwards on the social scale.⁷³

While the relationship between irregular migration status and labour market abuses is complex, the former will tend to increase the vulnerability to the latter. Undocumented workers, constrained by circumstances, will perform tasks at great financial, physical and psychological cost. Little attention has been given to the impact of EU labour market dynamics on pull factors for irregular migration and the suffering of undocumented migrant workers. While the human rights implications of using precarious sea routes have been highly visible, the suffering experienced by undocumented migrant workers once they arrive in the European Union is largely unseen.⁷⁴ Indeed, migrant workers trying to survive in Europe often find themselves subject to racism and discrimination. Labour market-related abuses and xenophobia within the overall population are mutually reinforcing. It has been reported that employers do not employ even highly skilled foreign workers and that there is a failure to maximise the potential of migrant workers within the European Union, with many migrants underperforming in the labour market relative to their education, in part because of xenophobic attitudes.⁷⁵

The unwillingness of EU member states to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families clearly reflects their refusal to be held accountable for human rights abuses against undocumented migrant workers.

2.7 The EU's policy response to the migrant crisis

Even as early as the spring of 2015, it was clear that the current policies within the EU would not be sufficient to cope with the increase in irregular migration. In an effort to respond effectively to what appeared to be a developing emergency situation, the EU adopted a new European Agenda on Migration on 13 May 2015.⁷⁶ This Agenda identifies short-term as well as

⁷³ See, e.g. Human Rights Watch (HRW), *Rights on the Line: Human Rights Watch Work on Abuses against Migrants in 2010*, HRW, Brussels, 11 December 2010 (www.hrw.org/report/2010/12/11/rights-line/human-rights-watch-work-abuses-against-migrants-2010).

⁷⁴ See, e.g. EU Agency for Fundamental Rights (FRA), *Severe labour exploitation: Workers moving within or into the European Union, States' obligations and victims' rights*, FRA, Vienna, 2015(c).

⁷⁵ See, e.g. European Network Against Racism (ENAR), *Racism and Discrimination in Employment in Europe: ENAR Shadow Report 2012-2013*, ENAR, Brussels, March 2014 (cms.horus.be/files/99935/MediaArchive/publications/shadow%20report%202012-13/shadowReport_final.pdf).

⁷⁶ See European Commission, Communication on a European Agenda on Migration, Brussels, 13 May 2015, COM(2015) 240 final; see also the European Commission website, "European Agenda on Migration" (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/index_en.htm).

medium- and long-term priorities in addressing migration and sets out a range of actions necessary to better govern all aspects of migration. The Agenda is built upon four pillars. The first pillar is the reduction of incentives for irregular migration and involves addressing root causes of irregular and forced displacement in third countries, improving the enforcement rate of return of irregular migrants and combating smuggling and trafficking operations in cooperation with third countries. The second pillar focuses on border management and includes both securing external borders and saving the lives of people trying to cross them. The third pillar seeks to support the EU's duty to protect asylum seekers by adopting and implementing a Common European Asylum System and reforming the Dublin system so that responsibility for asylum applications is better shared across member states. Finally yet importantly, the fourth pillar seeks the development of a new policy on legal migration and involves such activities as those outlined in the Labour Mobility Package and the Initiative on Skills, as well as revising the Blue Card Directive⁷⁷ for highly qualified third-country nationals.⁷⁸

Following the adoption of the European Agenda on Migration, certain actions were taken immediately in the context of a first implementation package. In response to the deaths of approximately 850 migrants in a single shipwreck in April 2015, one of the most important actions taken was to expand the capability and geographical scope, as well as tripling the budget, of the Frontex joint Operations Triton and Poseidon. These operations have subsequently played an invaluable role in saving the lives of migrants crossing the Mediterranean. Member states that were once sceptical about search and rescue operations are now willing to support them. The Agenda has definitely invalidated the twisted reasoning according to which such operations constituted a 'pull factor'.

In addition to this initiative, the EU quickly set up a temporary relocation scheme for 40,000 migrants and a resettlement plan for 20,000 individuals in clear need of international protection in order to respond to the high volume of arrivals and to ensure that the responsibility for these arrivals was balanced fairly among EU member states according to Art. 78(3) of the Treaty on the Functioning of the European Union.⁷⁹ A second implementation package in September 2015 adopted a system for the relocation of some 120,000 asylum seekers from Italy, Greece and Hungary (however, Hungary refused to participate).⁸⁰ Unfortunately, as of 4 February 2016, only 4,522 relocation places had been made available by member states.⁸¹ The second implementation package also included strengthened provisions for combating criminal smuggling networks (with information-sharing strategies), established a European list of safe countries of origin and sought to address some of the root causes of migration by providing financial assistance to countries through a Trust Fund for Africa, among other actions. The second implementation package also included an EU action plan on

⁷⁷ See Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment, OJ L 155/17, 18.6.2009.

⁷⁸ See European Commission, Communication on a European Agenda on Migration (2015), op. cit.

⁷⁹ See the Treaty on the Functioning of the European Union, OJ C 326/01, 26.10.2012; see also European Commission, "A European Agenda on Migration - State of Play: January 2016", Brussels (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/eam_state_of_play_20160113_en.pdf).

⁸⁰ See European Commission, "European Solidarity" (2015), op. cit.

⁸¹ See European Commission, "Member States' Support to Emergency Relocation Mechanism" (2016), op. cit.

return, which has as its objective substantially increasing the rate of return of irregular migrants, in safety and dignity.⁸²

Another key component of the EU's reformed strategy is the use of the hotspot approach to governing migration. Hotspots are frontline locations that face disproportionate pressures due to migration and are thus in need of additional resources. Once a hotspot is identified, the European Asylum Support Office, Frontex, the EU Police Cooperation Agency (Europol) and the EU Judicial Cooperation Agency (Eurojust) will work with state authorities to identify, register, fingerprint and process incoming migrants, to facilitate the relocation of some migrants, and to channel individuals in need of protection into an asylum procedure as quickly as possible.⁸³ At this time, hotspots have been identified solely in Greece and Italy, but the implementation of this approach could be extended to other countries as needed. While nominally intended to assist frontline states, the hotspot approach has also been critiqued as having as its purpose the shift of responsibility back onto frontline states after the breakdown of the Dublin system over the past year.⁸⁴ We heard, in February 2016, of four centres being opened on Greek Islands, with a fifth one to come.⁸⁵ The evolution of hotspots will have to be closely monitored. If used to identify individuals in order to detect protection needs and offer appropriate services, they might succeed at attracting most asylum seekers. If used essentially to deter, detain and deport irregular migrants, they will fail, as smuggling routes will bypass them.

The solicitation and allocation of additional funding has also been an important component in the EU's response to the migrant situation throughout 2015. The European Commission has proposed amendments to both its 2015 and 2016 budgets, increasing the resources devoted to governing migration by €1.7 billion. Member states in turn have committed to match EU funding for the UNHCR, the World Food Programme, the EU Regional Trust Fund for Syria, the Emergency Trust Fund for Africa and other organisations.⁸⁶

A third implementation package, the 'Borders Package', was presented by the European Commission in December 2015. The objective of this package is to implement a common approach to border management across the EU territory. To this end, the Borders Package calls for the creation of a European border and coast guard, which would share responsibility with member states for implementing an integrated approach to border management and reinforce the mandate of Frontex.⁸⁷ This enhanced border service would have monitoring and supervisory responsibilities as well as the capacity for rapid border interventions and joint

⁸² See European Commission, "Towards an Effective Return Policy", Factsheet, Brussels, September 2015 (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/effective_return_policy_en.pdf).

⁸³ See European Commission, "The hotspot approach to managing exceptional migratory flows", Brussels (n.d.) (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf).

⁸⁴ See Francesco Maiani, "Hotspots and Relocation Schemes: The right therapy for the Common European Asylum System?", *EU Immigration and Asylum Law and Policy*, 3 February 2016 (eumigrationlawblog.eu/hotspots-and-relocation-schemes-the-right-therapy-for-the-common-european-asylum-system/).

⁸⁵ See "Migrant crisis: Greece ready to house more on islands", BBC, 17 February 2016 (www.bbc.com/news/world-europe-35594705).

⁸⁶ See European Commission, "Refugee crisis: Commission reviews 2015 actions and sets 2016 priorities", Press Release, Brussels, 13 January 2016 (europa.eu/rapid/press-release_IP-16-65_en.htm).

⁸⁷ See European Commission, "A common approach to managing Europe's external borders", Brussels, 15 December 2015 (ec.europa.eu/news/2015/12/20151215_en.htm).

operations with member states. An additional component of the Borders Package is the revision of the Schengen Borders Code, which introduces the obligation to carry out systematic checks on all persons, including those enjoying the right of free movement, at the external borders of member states for the purpose of guarding against threats to public order and internal security.⁸⁸

Although not part of the Borders Package, as a forerunner of the European coast guard and in keeping with the emphasis on securing international borders and deterring human smuggling, it was announced in early February 2016 that NATO ships will be deployed to the Aegean Sea to provide surveillance and interception. Incidentally, any migrants apprehended by NATO ships will be returned to Turkey rather than be taken to any other NATO country.⁸⁹ Although clearly designed to include Turkey – a key NATO member – in the management of the external borders of the EU, the operationalisation of such a military operation remains to be outlined. What will NATO do that Frontex does not do? When intercepting a migrant boat, what will the procedure be? Will they embark migrants on their navy ships as the Italians did in Mare Nostrum? If not, what happens? If they do, where will they disembark them? Turkey? Greece? To what authority will they transfer them? How will simple pushbacks be prevented? How will they treat the migrants on board? How will they identify protection needs?

And how much will all this cost? One cannot imagine that it will be cheaper than Frontex or Italian operations. Such amounts could be applied to much more productive policies, such as integration projects in countries of destination and transit, which would benefit all concerned, including local populations.

And how will we know what NATO forces are doing? What civilian oversight mechanisms will be in place to ensure the protection of the rights of the migrants during the operation? Or is asking NATO to conduct such operations precisely a way to avoid the human rights oversight that EU and national legal frameworks have come to impose on national navies and on Frontex?

In 2016, it will be critical that the EU acts decisively to implement its proposed reforms and to meet its stated objectives. In particular, despite the already small numbers agreed upon, only a tiny number of migrants have been relocated or resettled, leaving much work to be done in the coming year, including the development of a long-term EU-wide resettlement and relocation system.⁹⁰ The identification of and continued assistance to hotspot areas will also play a crucial role, as will the increased efforts to ensure the effective return of migrants who have been denied the right to stay in Europe. Looking forward, the European Commission has identified three new initiatives for 2016. The first is to ensure that there is sufficient financial support to meet the requirements of the new policies and initiatives. More importantly, however, the European Commission has proposed undertaking a reform of the Dublin System and the development of a legal migration package that will include a revision of the Blue Card

⁸⁸ See European Commission, “European Agenda on Migration: Securing Europe’s External Borders”, Factsheet, Strasbourg, 15 December 2015 (europa.eu/rapid/press-release_MEMO-15-6332_en.htm).

⁸⁹ See “Migrant crisis: Nato deploys Aegean people-smuggling patrols”, BBC, 11 February 2016 (www.bbc.com/news/world-europe-35549478).

⁹⁰ See European Commission, “Managing the Refugee Crisis: State of play and future actions”, Brussels, 13 January 2016 (ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/eam_state_of_play_and_future_actions_20160113_en.pdf). Only 272 people out of 160,000 agreed upon in September had been relocated as of January 2016. Similarly, only 779 individuals out of 22,504 agreed upon had been resettled by the end of 2015.

system.⁹¹ More than any other strategy or initiative thus far, these proposed revisions will set the course for the coming years and determine whether the European Union can withstand the pressures of a new migration paradigm.

Strategies implemented over the last few years have been important in saving lives and offering solutions to a limited number of migrants, but have taken place in a context of crisis, an atmosphere of moral panic and a situation of emergency. This is unsustainable and not conducive to taking the best decisions in view of establishing a principled migration policy based on a long-term vision.

Recent decisions have largely been reactive ‘Band-Aid’ solutions as opposed to truly transformative of the migration system in Europe. The past year has seen the disintegration of the Dublin logic while, in the EU’s supposedly border-free Schengen area, ever more member states are unilaterally imposing border controls.⁹² Relocation and resettlement schemes agreed to in theory have been met by a lack of cooperation and responsibility sharing by EU member states. Although there is talk of saving lives, protecting migrants from unscrupulous smugglers and offering asylum, the strategies adopted, not to mention the common discourse, belie this and suggest that the priority of member states is not human rights, but remains the strict control of borders, deflection of responsibility and the prevention of irregular migration at almost any cost. Something needs to change.

The EU–Turkey agreement

As we were finishing this paper, the EU summit of 17–18 March 2016 adopted the general outline of an EU–Turkey agreement on migration controls. The agreement⁹³ calls on Turkey to take back, on a fast-track basis, people who travelled irregularly from Turkey to Greece. In exchange, Europe would take in Syrian refugees from Turkey who have been properly recognised as refugees. The EU would also adopt visa facilitation for Turkish citizens travelling to the EU, accelerate the process towards Turkey’s membership in the EU and pay Turkey up to €6 billion to help it ‘manage’ migration movements.

The deal follows the European Commission document issued on 16 March 2016, which offered reassurances on the human rights framework:

[T]he case of each person requesting international protection needs to be assessed individually, in line with requirements from the Charter of Fundamental Rights, and according to the parameters laid down in the Asylum Procedures Directive. This can be done while also making full use of the possibilities offered by the Directive for faster procedures. But let me be crystal clear about this, there can be no ‘blanket returns’ and there can be no ‘refoulement’.⁹⁴

However, according to the agreement, the individual assessment is limited to evaluating the category into which each migrant will be slotted for return to Turkey. If one does not apply for asylum in Greece, one will be deemed an irregular migrant and returned to Turkey under a new fast-track procedure. If one does apply for asylum in Greece, and one had previously

⁹¹ Ibid.

⁹² See “Forming an orderly queue”, *The Economist*, 6 February 2016 (www.economist.com/news/briefing/21690066-europe-desperately-needs-control-wave-migrants-breaking-over-its-borders-how).

⁹³ See the results of the European Council of 17–18 March 2016 (www.consilium.europa.eu/en/meetings/european-council/2016/03/17-18/).

⁹⁴ See European Commission, “Readout by First Vice-President Frans Timmermans following the College Meeting on 16 March”, Brussels, 16 March 2016 (europa.eu/rapid/press-release_SPEECH-16-845_en.htm).

received temporary protection in Turkey, the application will be considered inadmissible, and one will be returned to Turkey as the 'first country of asylum'. If one had not yet received temporary protection in Turkey, the asylum application will also be considered inadmissible and one will be returned to Turkey as a 'safe third country' that can provide sufficient protection. We are very far from an individual assessment of protection needs: this is effectively a 'pushback agreement'.

Turkey certainly deserves help to deal with the nearly three million refugees it has already taken in. But Europe is not providing Turkey with billions of euros out of humanitarian feelings of solidarity. It is buying a deal whereby Turkey promises to *do what it takes* to stem the migration movement towards Europe.

Europe cannot shrug off its responsibility for migrants and simply pass the buck to Turkey. European member states, once responsible for drafting key international legislation on human rights and humanitarian protection, seem to be about to abandon their obligations. For political expediency, the agreement involves mass expulsions of migrants and pushbacks at sea, without proper individual assessments and asylum procedures, in direct contravention of international and European human rights laws. Making Turkey the gatekeeper should not absolve Europe from its responsibility of welcoming migrants and refugees and protecting their rights. The UNHCR,⁹⁵ the UN Special Rapporteur on the Human Rights of Migrants,⁹⁶ Human Rights Watch⁹⁷ and Amnesty International⁹⁸ have questioned the legality of the deal under the 1951 Geneva Convention on refugees with its principle of non-refoulement, under the European Convention on Human Rights with its prohibition of mass expulsions, as well as under general, international human rights law, with its provisions protecting children or persons with disabilities for example, or with its principle of access to justice.

Moreover, the effectiveness of such an agreement remains to be tested. Increasing security and closing borders incurs the risk of only increasing the suffering of migrants and encouraging them to take even more dangerous journeys with smugglers. Additionally, no one yet knows how Turkey will implement the deal. Will it put in place a mass detention mechanism for all migrants caught trying to move to Europe? What about the separation of families or the determination of the best interest of the child in the case of unaccompanied migrant children? Such unresolved questions are vital to the legality and legitimacy of the whole scheme. The effective implementation of a border sealing strategy seems to involve a considerable amount of violence against innocuous and innocent migrants and refugees; in essence, it seems that Europe is paying Turkey to use a violence that would be considered illegal on EU territory.

⁹⁵ See UN High Commissioner for Refugees (UNHCR), "UNHCR's reaction to the Statement of the EU Heads of State and Government of Turkey, 7 March", Briefing Notes, UNHCR, Geneva, 8 March 2016 (www.unhcr.org/56de9e176.html).

⁹⁶ See UN Special Rapporteur on the Human Rights of Migrants, "EU Migration Summit: 'Some European States showing a complete disregard for human rights' - UN expert", News Release, United Nations, Human Rights, Office of the High Commissioner, Geneva, 16 March 2016 (www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=17232&LangID=E).

⁹⁷ See Human Rights Watch (HRW), "EU: Turkey Mass-Return Deal Threatens Rights, Would Harm Refugees, Undermine EU's Principles", Press Release, HRW, Brussels, 15 March 2016 (www.hrw.org/news/2016/03/15/eu-turkey-mass-return-deal-threatens-rights).

⁹⁸ See Amnesty International, "EU-Turkey Summit: EU and Turkish leaders deal death blow to the right to seek asylum", Press Release, Amnesty International, London, 8 March 2016 (www.amnesty.org/en/latest/news/2016/03/eu-turkey-summit-reaction/).

One expects that, very quickly, national and European tribunals will be called upon to analyse the legality of the individual decisions taken under such an agreement. It is difficult to see how they could approve most of the expulsions towards Turkey. If, as determined in the *MSS* decision by the European Court of Human Rights,⁹⁹ Greece was not considered a safe country for Dublin returns, it is hard to see how Turkey would be considered a safe country for many of the refugees who might be returned from Greece.

3. Developing a human rights-based framework that banks on mobility over a generation

All the human rights concerns discussed above are signs of stress in the EU border management and migration systems. They are clear indications that the status quo is simply not sustainable. Ignoring these warning signs and pouring more resources into an ineffective and paradoxical system of border closure will lead to further, avoidable human suffering, as well as wasted resources and lost opportunity costs from not reaping the rewards of organised mobility. In contrast, developing a human rights-based framework that tackles the most pressing concerns and sustains the political will needed to stay the course of reform over a generation will enable the EU to bank on the economic and social benefits of mobility.

3.1 Developing a human rights-based framework

Policies and practices governing international migration and border management generally involve actions and initiatives based on a combination of four rationales, all relating to states' self-interest: security imperatives, humanitarianism, economic benefits and human rights. The nature of a particular system of migration regulation and its objectives will depend on the specific balance achieved between these four motivations. In recent years, security rationales have dominated internationally. States emphasise the importance of maintaining control over their own borders and envisage this control as the capacity to restrict entry and exit under the guise of protecting national security. The security rationale is similarly apparent in the focus on strategies that seek to combat migrant smuggling (all too often conflated with human trafficking), the widespread use of preventative detention and the criminalisation of irregular migration. While security concerns are clearly relevant in the regulation of migration, the current system has become unbalanced with security considerations often directing the development of policy to the exclusion of most other factors, and in spite of fact-based evidence disputing both the risks to national security and the effectiveness of security-based migration initiatives.

The second rationale on which migration policies may be based is that of humanitarianism. While the dominant focus of a security rationale is on the integrity of the state, humanitarian approaches place greater focus on the individual, the subject of migration policy. In this way a humanitarian-based approach is consistent with the idea of offering asylum to those in need of protection. The problem with a humanitarian-based approach is that, at both a practical and a conceptual level, the offer of protection is made at the behest of the state and is understood as a privilege, not a right. Traditional humanitarianism is based on charity, not rights, and it is centred on a relatively narrow discussion of essential needs.¹⁰⁰

⁹⁹ See *M.S.S. v. Belgium and Greece* (Application no. 30696/09), ECHR 21 January 2011.

¹⁰⁰ See James Darcy, "Human Rights and Humanitarian Action: A review of the issues", Background paper prepared for the workshop on Human Rights and Humanitarian Action convened by the IASC Sub-Working Group and co-hosted by Unicef, the UN High Commission for Human Rights and ICVA, Geneva, April 2004.

The third rationale is economic and has mostly been developed by traditional immigration countries, such as the US, Canada, Australia and New Zealand. These countries decide which migrants can be beneficial to the economy of the country, which professional skills are needed by the labour market and what business experience or investment opportunities would enhance prosperity. The selection is based essentially on the idea that these persons will immediately start contributing to the collective wealth through work, taxes and their own wealth. Many migrants are accepted as permanent residents, on their way to becoming citizens within a few years. In the last decade, these countries have added important programmes of temporary migrant workers who come at the request of specific employers, can only stay for a certain number of years and often do not have the possibility of asking for permanent residence and citizenship. Again, there is no free mobility in this case.¹⁰¹

In contrast, a human rights-based approach recognises each individual as a free, self-determining agent endowed with inherent dignity and rights. This approach adopts a much broader focus and is fundamentally concerned with the realisation of the full range of human rights that are necessary to a dignified life. Consequently, a human rights-based framework requires that efforts be made to identify and address the root causes of inequality and the underlying and structural obstacles that constitute impediments to the realisation of rights. Moreover, unlike a humanitarian approach, a human rights-based framework is fundamentally concerned with issues of justice and injustice, and as a result, includes an element of accountability: realising rights also means identifying and holding responsible those who hold corresponding duties.¹⁰²

The EU has developed such a human rights-based migration system for itself, through the implementation of the freedom of movement for European citizens within the common territory. The obligation to respect, protect and fulfil human rights is in the international as well as the European human rights system, which applies to all regardless of nationality and administrative status.¹⁰³ The constitutive Treaty on the European Union itself notes that the Union “is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”.¹⁰⁴ A human rights-based framework for migration would embody these values and ensure the application of these obligations and duties to people in vulnerable situations of migration, based on equality and non-discrimination, the duty to protect and access to justice.

3.2 Implementing a human rights-based approach to mobility

The adoption of a human rights-based framework founded on the core principles and provisions of international and regional law requires that immediate action be taken to stop the widespread suffering at the borders of the EU. More than that, policies and practices must be implemented not only to address the current situation but also to prevent, as much as possible, its recurrence. Thus, in addition to short-term, immediate actions, medium- and

¹⁰¹ See Bridget Anderson, “Migration, immigration controls and the fashioning of precarious workers”, *Work, Employment & Society*, Vol. 24, No. 2, 2010, p. 300; see also Fay Faraday, *Profiting from the Precarious – How recruitment practices exploit migrant workers*, Metcalf Foundation, Toronto (metcalffoundation.com/wp-content/uploads/2014/04/Profiting-from-thePrecarious.pdf).

¹⁰² See Darcy (2004), op. cit.

¹⁰³ See, e.g. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS No. 5.

¹⁰⁴ See the Treaty on European Union (Consolidated version 2012), OJ C 326/01, 26.10.2012, Art. 2.

long-term strategies that articulate a shared vision for how the EU can govern mobility over a generation are also imperative.

Streamlining search and rescue

A key element in a human rights-based approach is the protection of life and the security of the person without which most other rights are meaningless. A vital first step is for the EU to expand and maintain its search and rescue operations at sea. While these efforts were scaled back significantly with the end of the Mare Nostrum Operation, spring 2015 saw renewed and additional funding and resources being allocated to Operations Triton and Poseidon. Yet, the announcement in February 2016 that NATO ships will join in patrolling the European coastline highlights another important factor: it is not only crucial that sufficient resources be committed to providing assistance to those in distress at sea, but also that this mandate be given priority over merely securing international borders. To this end, to ensure the protection of the human rights of migrants, it is critical that the EU respect the principle of non-refoulement; allow irregular migrants to disembark immediately at the nearest port; provide information, care and support to migrants; process asylum claims equitably; and support commercial vessels in exceptional circumstances to carry out rescue operations without risk of retaliation or harassment for being considered accessories to smuggling operations. The priorities within a human rights-based framework should be clear: fighting smuggling operations is less important than saving lives. The argument often advanced, according to which one should not increase search and rescue capacity in order to avoid encouraging smuggling operations, is morally, politically and legally unacceptable when human lives are at stake.¹⁰⁵ Moreover, if the plan is that migrants rescued at sea are returned immediately to Turkey, this will encourage smuggling operations to change their tactics again and try new, more costly and dangerous routes, and it will most probably push migrants further underground and towards exploitation.

Opening legal migration channels

The development of a human rights-based framework goes beyond basic life-saving initiatives and protection at sea, however. To address the shortcomings mentioned above, the EU needs to take stock of the failure of the Dublin mechanism and develop options for solidarity among its member states that recognise the important role that freedom of movement plays in the realisation of the human rights and the promotion of human dignity of migrants in Europe. Reversing the present logic, asylum seekers should be able to register their asylum claim in the country of their choice and the EU should build upon current initiatives and support the countries receiving asylum claims with proportionate and adequate financial and technical support. Standardising reception conditions and harmonising procedures for determining refugee status, while stepping up the creation of alternatives to detention (particularly for children) throughout the EU should be a top priority, in order to avoid 'asylum dumping' and stress on the countries that offer better conditions.

Developing and implementing a human rights-based framework will also require continued commitment and the creation and expansion of many more regular migration channels, including resettlement opportunities for refugees. The most effective way to do this is to begin a process of opening up regular migration channels to the EU, exploring a range of options.

¹⁰⁵ See, e.g. Alan Travis, "UK axes support for Mediterranean migrant rescue operation", *The Guardian*, 27 October 2014 (www.theguardian.com/politics/2014/oct/27/uk-mediterranean-migrant-rescue-plan).

First, many people presently crossing the Mediterranean Sea, thanks to smugglers, are manifestly in need of international protection, such as most Syrians and Eritreans. One cannot expect Syrians to live in camps or cities in Jordan, Lebanon or Turkey indefinitely with no prospects for a better life. As we have seen, if no other option is available, refugees will take their chances with smugglers in order to provide a better future for themselves and their children, as many Europeans have done in similar circumstances in the past. Through resettlement programmes for refugees and other options for legal migration, including humanitarian visas, humanitarian admission, temporary protection and family reunification, it is well within the EU's means to resettle, from Turkey, Jordan and Lebanon, up to three million refugees over six years, with the help of UNHCR and civil society organisations, according to priority criteria. The distribution of 500,000 refugees per year among 28 countries representing almost 500 million inhabitants makes for acceptable annual numbers for each country. If we use only the population of each country as a distribution key – and a more sophisticated instrument would be necessary – the numbers are indeed reduced: 80,000 for Germany (not 800,000 as in 2015), 60,000 for the UK and France, 10,000 for Belgium, 8,000 for Austria (not 90,000 as in 2015) and 7,000 for Switzerland. With the help of other countries from the Global North and the Global South, the numbers could be reduced or the time lines accelerated.

A properly announced and effectively implemented resettlement programme in the EU for 500,000 Syrian refugees per year from Turkey, Lebanon and Jordan would have obvious advantages, as it would

- reduce significantly the market for smugglers. Many migrants will not spend €10–20,000 and risk the lives of their children, if there is a meaningful possibility of regular, safe and cheap resettlement available within a reasonable time;
- allow for all the security checks by intelligence agencies to be made in the transit countries with enough time to process such checks;
- reduce considerably the workload on the mechanisms for refugee status determination within the destination countries, since refugee status would be attributed before leaving the transit country;
- send a powerful message of solidarity to transit countries, thus allowing for more effective strategic coordination and development cooperation over the long term;
- provide the opportunity to show the public of destination countries that borders are respected, that the authorities are governing this migration properly, that there is no 'chaos on the beach', that reception mechanisms are in place and are not overwhelmed, that investments have been made in integration policies, and that the fear-mongering discourse of nationalist, populist politicians is based on stereotypes, myths and fantasies; and
- provide opportunities for mainstream politicians to develop a pro-mobility, pro-migration and pro-diversity discourse, which has been singularly lacking in the past two decades.

In all, reducing arrivals by sea will considerably help the EU regain control of its external borders.

The EU is not overwhelmed by a migrant population that represents less than 0.5% of its overall population. With well-organised and coordinated resettlement and integration policies in place, the EU can easily absorb half a million refugees per year. Vice Chancellor Sigmar Gabriel said that Germany alone could absorb that number every year for a number of

years.¹⁰⁶ Unfortunately, many EU member states continue to debate whether they can take a hundred or so asylum seekers.

Second, smugglers and exploitative employers are presently facilitating the labour mobility that many European labour markets need in order to thrive. By developing and incentivising other regular and safe migration channels for workers at all skill levels, including for low-wage migrants, the EU could streamline the number of migrants coming through irregular means. Coupled with entry and exit controls as well as other supporting initiatives, multi-year and multi-entry visas could incentivise migrants to come to the EU for work and return to the country of origin while respecting visa conditions. For such a plan to be successful, the EU and its member states will need to employ tougher labour inspection mechanisms, facilitate the representation of migrant workers (whatever their status) by labour unions and fully implement the Employers Sanctions Directive (2009/52/EC). Since they act as a magnet for irregular migration at the request of exploitative employers, the objective is to considerably reduce underground labour markets and exploitation in the workplace over the coming decade.¹⁰⁷ Long-term investment in enforcement of the labour and human rights of all workers, including all migrant workers, whatever their status, will allow the EU to better fill, in an efficient and organised way, the inevitable widening of gaps in its labour markets.

Fully sustaining the implementation of a human rights-based framework for regular migration across the EU therefore involves increasing search and rescue capacity; facilitating access to justice for migrants; developing alternatives to detention; reinforcing the labour inspection mechanisms needed to ensure respect for the rights of all workers in the EU, including migrant workers; facilitating the unionisation of migrant workers; setting up massive resettlement programmes for refugees; and creating multiple labour-visa opportunities to incentivise migrants to use regular migration channels.

Changing the perceptions about migrants

The successful implementation of this rights-based policy requires challenging the many intersecting and negative perceptions of migrants and migration that have pervaded EU debates, discourses, policies and politics. Through fact-based analysis and long-term thinking, stakeholders need to reflect on the conceptualisations of migrants and migration that underpin counterproductive and ineffective security policies, which result in the criminalisation and stigmatisation of migrants, and which have fostered the rise of right-wing nationalist populism and xenophobia within the European Union. To achieve this end, it is critical that certain data gaps be filled – such as those concerning underground labour markets, labour exploitation and deaths at sea – so that evidence-based policies can be enacted.

As a starting point, the strict conceptual delineation between internal and external migrants, demonstrated by the freedom of movement within the Schengen region and the securing of external borders, needs to be challenged, as it conflicts with a human rights-based framework

¹⁰⁶ See Helena Smith and Mark Tran, “Germany says it could take 500,000 refugees a year”, *The Guardian*, 8 September 2015 (www.theguardian.com/world/2015/sep/08/germany-500000-refugees-a-year-clashes-lesbos).

¹⁰⁷ See Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30.6.2009. See generally European Parliament, Directorate-General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Exploring new avenues for legislation for labour migration to the European Union, Study for the LIBE Committee, PE 536.452, 2015 ([www.europarl.europa.eu/RegData/etudes/STUD/2015/536452/IPOL_STU\(2015\)536452_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/536452/IPOL_STU(2015)536452_EN.pdf)).

for migration that is based on equality, human dignity and non-discrimination. This distinction also ignores the potential benefits of mobility and rests on the assumption that sealing international borders is possible, which the unsustainable status quo vividly shows is not the case.

The view of migrants among many stakeholders as being ‘illegal’ is counterproductive and is not based on facts or the provisions of international law. While migrants who come to the EU without documents are in an irregular situation (or ‘undocumented’ or ‘unauthorised’), they have not committed a criminal act. The conceptualisation of irregular migrants as illegal has undoubtedly played into the use of immigration detention. It has also had an impact on the general public’s perception of migrants, legitimising policies that are not in line with human rights guarantees and contributing to xenophobia and discrimination.

Indeed, the criminalisation of irregular migration also has an impact on the realisation of other human rights by limiting access to justice and social protection. By characterising irregular migrants as ‘illegal’ or ‘criminal’, it becomes both easier and more socially acceptable to limit or deny them access to other rights. Facilitating access to justice – without fear of detection, detention or deportation – in order to help migrants fight for their rights would go a long way towards, on the one hand, legitimising new migration policies by showing that territorial sovereignty and human rights are not incompatible, and on the other hand, changing mentalities regarding migration by fighting myths, fantasies and stereotypes.

The common conception that migrants are ‘job stealers’ is one of these harmful fantasies. Much economic literature has highlighted how migrants complement rather than compete with citizens, thus generating overall productivity gains within the economy.¹⁰⁸ A 14-year study into the effects of non-EU migration on 15 western European countries showed that by taking manual jobs, migrants pushed natives towards more highly skilled and better-paid jobs.¹⁰⁹ In that study, a significant increase in more complex skills among natives following migration was noted. The labour market adjusted with no significant effect on natives’ employment rates. The impact of the global recession was shown to diminish but not eradicate this positive phenomenon, debunking the argument that an economic downturn justifies repressive policies.

Similarly, conceptions of migrants as ‘burdens’ are not based on reality, nor are they productive. Much EU debate focuses on the need to share the ‘burden’ of irregular migration across different member states. Against a backdrop of fiscal and demographic challenges in many countries and political discourses of austerity, discussing external migration as a burden again legitimises the further securing of borders and engenders negative public attitudes. While society undoubtedly has a responsibility towards migrants and more solidarity in sharing this responsibility is to be encouraged, migration in itself is not and should not be presented as a burden. A significant amount of economic literature suggests that, as workers, consumers and taxpayers, migrants contribute to the economic growth of societies with very

¹⁰⁸ See David Card, “The impact of the Mariel Boatlift on the Miami labor market”, *Industrial and Labor Relations Review*, Vol. 43, No. 2, 1990, pp. 245-57; see also Mette Foged and Giovanni Peri, “Immigrants’ effect on native workers: New analysis on longitudinal data”, IZA Discussion Paper No. 8961, IZA, Bonn, 2015; and also Andri Chassamboulli and Giovanni Peri, “The labor market effects of reducing the number of illegal immigrants”, *Review of Economic Dynamics*, Vol. 18, No. 4, 2015, pp. 792-821.

¹⁰⁹ See Francesco D’Amuri and Giovanni Peri, “Immigration, jobs and employment protection: Evidence from Europe before and during the Great Recession”, *Journal of the European Economic Association*, Vol. 12, No. 2, 2012, pp. 432-64.

limited downsides.¹¹⁰ In fact, the perceived burden of migration comes predominantly from the financial, technological and human resources necessary to implement EU member states' counterproductive security-focused policies and deal with their unintended (although foreseeable) secondary effects. Acknowledging that migrants are human beings with rights, the EU and its member states should be talking about sharing a responsibility, not a burden.

The normative basis for more positive, realistic views of migrants lies within an abundance of fact-based analysis, as well as the EU's founding values of respect for human dignity, freedom, democracy, equality, the rule of law and human rights for all, as evidenced in the robust human rights regime and the international human rights instruments that member states have ratified.¹¹¹ Integrating these analyses at a political level, as well as within public communication and education curricula is a key element both for garnering support for more open migration policies and for combating the xenophobia and racism that appears to be strengthening its foothold in certain member states.

Finally, the implementation of a human rights-based approach will require the full recognition of the push and pull factors of irregular migration and the EU's responsibility in governing and mitigating them. While certain pull factors, such as the failure to implement returns and the existence of underground labour markets, can be addressed in a relatively straightforward manner, many push factors are considerably more complex. In particular, the EU should be encouraged to use its considerable global influence, including two permanent seats and a non-permanent one on the Security Council, to press for more effective solutions to the humanitarian crises that are prompting this unprecedented human migration, including those in Syria, Iraq, Eritrea, Afghanistan and Ukraine.

Not all migrants arriving on Europe's shores are in need of refugee protection, even if a considerable number are. Even those migrants who do not meet the standard definition of refugee and who are often referred to as 'economic migrants', without distinguishing between Global North expats and undocumented or temporary migrant workers, may in fact be part of a larger group of individuals who can be referred to as "survival migrants".¹¹² Although failing to meet the narrow criteria necessary to qualify for refugee protection under international law, these individuals may have found themselves in untenable situations where their very survival and that of their families were at stake owing to factors such as disasters, environmental change, food insecurity, endemic poverty and state fragility.

The expression 'survival migrants' includes all those who saw no other choice but to leave their countries, because they cannot feed their family or see no opportunity to offer a different future for their children and feel compelled to seek this future abroad. In a sense, refugees and survival migrants are in the same boat, quite often literally.

Survival migrants are not looking for handouts and do not siphon off the social budgets, contrary to what many politicians are saying. Migrants come to Europe because there are jobs. To say otherwise is simply to bury one's head in the sand. The EU should help its member

¹¹⁰ See, e.g. OECD, "Is migration good for the economy?", *Migration Policy Debates*, OECD, Paris, May 2014(a) (www.oecd.org/migration/OECD%20Migration%20Policy%20Debates%20Numero%202.pdf); see also International Labour Organization (ILO), OECD and World Bank, "The Contribution of Labour Mobility to Economic Growth", Joint paper for the G20 Labour and Employment Ministers' Meeting in Ankara, Turkey 3-4 September 2015, ILO, Geneva, 2015 (www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_398078.pdf).

¹¹¹ Ibid.

¹¹² See Alexander Betts, *Survival Migration: Failed Governance and the Crisis of Displacement*, Ithaca, NY: Cornell University Press, 2013.

states wean themselves from their addiction to ‘cheap labour’ in sectors of their economies where huge numbers of migrants with no status or a precarious status are employed, such as agriculture, construction, hospitality or caregiving.

Beyond the worthy initiatives for seasonal workers and the Blue Card, which have yet to be implemented in sufficient numbers, EU countries should recognise their real labour needs, and establish facilitated, regular migration channels for low-wage work through numerous smart visa options.

3.3 Banking on mobility over a generation

Applying the EU’s core values to policies that are based on fact rather than on fiction leads to migration policies that facilitate mobility and celebrate diversity. The long-term development of the human rights-based framework discussed above will become increasingly vital to the EU’s internal and external interests. Over the next 25 years, the EU will undergo large-scale demographic, societal and labour market changes.

By 2025, more than 20% of EU citizens will be over age 65, with a particular increase in those over 85. The population of elderly people will almost double from 87.5 million in 2010 to 152.6 million in 2060. It is also expected that the share of those aged 80 and over will rise from 5% to 12%.¹¹³ At the same time, many member states have fertility rates below the rate of replacement. An average fertility rate of 2.1 children per woman is estimated to be necessary to keep the population at a stable size between generations in developed countries. UN population data suggests that between 2010 and 2015, all EU countries will have had average fertility rates below the 2.1 mark, with the regional average being 1.6.¹¹⁴

In line with these demographic changes, the EU workforce is declining. In 2010, for the first time, more workers were retiring from the EU labour market than were joining it. The EU and OECD are predicting that, with a zero net increase in migration, the working-age population will drop by 3.5% by 2020. Over the next 50 years, the working-age population is expected to decline by nearly 42 million.¹¹⁵

These changes have the potential to exacerbate and widen existing skill gaps within the EU. Of the companies that responded to the 2013 European Company Survey, 40% stated that despite high unemployment levels, they found it difficult to find applicants with the correct skills set.¹¹⁶ The demographic shifts discussed above are going to add pressure to the need to ensure balance between labour supply and demand. According to both the European Commission and OECD, for the EU to meet its 2020 employment targets, it will need to employ a mix of policies and reconsider how it utilises the skills of non-EU migrants.¹¹⁷

¹¹³ See European Commission, “Population Ageing in Europe, Fact, Implications and Policies”, Brussels, 2014 (ec.europa.eu/research/social-sciences/pdf/policy_reviews/kina26426enc.pdf).

¹¹⁴ See UN Department of Economic and Social Affairs (DESA), *World Fertility Patterns 2015*, UN DESA, New York, NY, 2015 (www.un.org/en/development/desa/population/publications/pdf/fertility/world-fertility-patterns-2015.pdf).

¹¹⁵ See European Commission, “Population Ageing in Europe, Fact, Implications and Policies” (2014), op. cit.; see also OECD and European Commission, *Matching Economic Migration with Labour Market Needs*, OECD, Paris, 2014.

¹¹⁶ See European Centre for the Development of Vocational Training (CEDEFOP), *Skill shortages and gaps in European enterprises*, Luxembourg: Publications Office of the European Union, 2015(a).

¹¹⁷ See OECD and European Commission (2014), op. cit.

In the context of such shifts, the European Centre for the Development of Vocational Training has projected that there will mainly be an increase in demand for workers with medium and high skill levels and that demand for workers with low skills will decrease. Yet, demand for low-skilled workers in 2025 is still projected to be significant, at around 43 million. This figure has to be viewed against the EU's 2020 target of increasing the proportion of citizens gaining a tertiary education, as well as the already rapid increases in those doing so. According to the Centre, between 2002 and 2013, a 13% increase in the proportion of 30-34 year-olds who have attended tertiary education and a 57% increase in the absolute number of tertiary education graduates were recorded.¹¹⁸

Another reason for adopting a human rights-based approach to migration is the EU's need to remain globally competitive. The World Economic Forum has noted diverging trends among EU countries. Some, such as Germany, the Netherlands, Sweden and the UK, are among the top-ten most competitive economies in the world, while others lag behind. The highest-ranking EU country was Germany, in fifth place, and the lowest ranked was Greece, in eighty-first place.¹¹⁹ There is currently a low level of highly skilled labour migration from non-EU countries to most member states owing to barriers to legal access and an informal reluctance by employers to hire from outside the region.¹²⁰ This demonstrates how an approach defined by an emphasis on security can permeate all dimensions of migration.

Well-organised migration and a considerable reduction of the underground labour markets would allow member states to properly understand the skill levels of non-EU migrants and support realistic strategies for filling labour shortages in order to maintain and build global competitiveness. Migrants in irregular situations cannot be assumed to have low skill levels. Those who do can still contribute in important ways, given the aim of building the capacity of Europeans and the continued projected demand for low-skilled workers.

A well-organised migration policy based on mobility and human rights could also help the EU to enhance its humanitarian and development impacts. In 2013, migrants sent approximately \$404 billion in remittances, as highlighted in the 2013 report of the Special Rapporteur.¹²¹ Furthermore,

[r]emittances to developing countries are expected to reach \$435 billion in 2015, registering a modest growth rate of 2 percent from last year. This represents a significant slowing in the growth of remittances from the rise of 3.3 percent in 2014 and of 7.1 percent per year from 2010-13. Global remittances, sent home from some 250 million migrants, are projected to grow by 1.3 percent to \$588 billion.¹²²

¹¹⁸ See the website of the European Centre for the Development of Vocational Training (CEDEFOP), "Forecasting skill demand and supply" (www.cedefop.europa.eu/en/events-and-projects/projects/forecasting-skill-demand-and-supply/data-visualisations); see also CEDEFOP, "Briefing Note: Europe's uneven return to job growth", CEDEFOP, Thessaloniki, June 2015(b) (www.cedefop.europa.eu/en/publications-and-resources/publications/9098).

¹¹⁹ See World Economic Forum (WEF), *The Global Competitiveness Report 2014-2015*, WEF, Geneva, 2014.

¹²⁰ See European Commission, "Employment: Report shows worker mobility key to tackle EU demographic and skills challenges", Press Release, Brussels, 18 September 2014 (europa.eu/rapid/press-release_IP-14-1016_en.htm).

¹²¹ See UN Human Rights Council (HRC) (2013), op. cit.

¹²² See World Bank, "World Bank Forecasts a Slowdown in Migrant Remittances in 2015", Press Release, World Bank, Washington, D.C., 22 October 2015 (www.worldbank.org/en/news/press-release/2015/10/22/world-bank-forecasts-a-slowdown-in-migrant-remittances-in-2015).

Migrants who moved from countries with a low human development index to countries with a higher index experienced, on average, a 15-fold increase in income, a doubling in education enrolment rates and a 16-fold reduction in child mortality.¹²³ If the human rights of migrants are effectively promoted, respected and protected within well-governed migration processes, such development outcomes can be greatly enhanced.

Committing to a generational shift in migration policy that recognises that external mobility can mirror the benefits of internal mobility will better equip the EU and its member states to deal with these economic, social and demographic changes in a way that sustains recovery, encourages growth and further develops global competitiveness. It will also allow the European Union to truly promote its founding values in its relations with the rest of the world, as envisaged in the Treaty on the European Union.

It is encouraging to see that the European youth is much more diverse and mobile than the previous generations. They have friends from all over the world and are much more sensitive to and respectful of differences. Diversity and mobility policies will come to them naturally when they take charge 30 years from now. It is going to be a long and painful quarter-century if we have to wait for them before the present political deadlock over migration is replaced by more sensible policies.

Conclusions

The events in the Mediterranean Sea and the mirroring of this suffering across each stage of the migratory process over the past four years have clearly shown that the status quo in relation to the EU's approach to border control, asylum and migration is not sustainable in the long term. One may fear, however, that the current state of political 'short-termism' regarding migration may include allowing the mortality rate of migrants at sea to remain high, as it allows politicians to present it as a deterrence mechanism, even if this deterrence effect has never been proven. The ability of migrants to reach European soil despite a huge investment in securing borders demonstrates beyond a doubt that sealing international borders is impossible. Migration is a long-standing part of the human condition, and in the globalised and conflict-ridden world in which we live it is inevitable.

The costs of denying this reality are huge. Most significantly, the human costs continue to grow. There are no signs that the push and pull factors influencing migratory patterns will change or that the many associated human rights abuses will decrease. In addition to the human costs, the huge investment of resources by the EU and its member states in ineffective and paradoxical border-control mechanisms could be spent in many other ways.

As immense as these costs are, they are in no way unavoidable. It is not beyond the moral agency of the EU to considerably reduce the suffering of large numbers of migrants. The EU's regional system of human rights and other normative standards, its founding values and its strong tradition of promoting peace, security and human rights, show that the EU has the potential to play a global leadership role on the issue of migration. Claiming this leadership role involves the development of coherent and holistic human rights-based approaches that require short-, medium- and long-term interventions. It is vital that in the short term, the EU step up search and rescue operations, further explore alternatives to detention (particularly for children and families), start providing more resettlement opportunities for people from Syria,

¹²³ See World Bank, "Migration and Development Brief", No. 20, World Bank, Washington, D.C., 19 April 2013 (siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1110315015165/MigrationandDevelopmentBrief20.pdf).

Iraq, Eritrea and Afghanistan in line with its share of global resources, and take stock of the failing Dublin logic and the systemic pressures it is generating.

While taking these short-term actions would have a significant impact on the human rights of migrants, it is important that the EU also take a strategic, long-term view. In the medium term, the EU should set up a permanent programme for refugee resettlement, adopt a common migration programme that would provide regular migration channels at all skill levels, invest in labour inspection and tackle xenophobia, racism and discrimination against migrants. These changes need to be sustained over the long term and accompanied by a fundamental rethinking of the conceptualisation of migrants, along with the development of integration programmes in the context of general diversity policies.

To achieve lasting success, the EU must consider how its founding principles and normative standards apply to those who are not citizens of its member states. It must use fact-based analysis and rational, long-term thinking to challenge the many negative conceptualisations that underpin current social and policy debates relating to migration within the EU. These include the strict delineation between internal and external migrants, the idea of irregular migrants being 'illegal', the preoccupation with irregular non-EU migration as a 'burden' in the context of continuing fiscal challenges, and the perception of migrants as being 'job stealers' who deprive native citizens of economic opportunities.

The benefits of this rethinking and of the EU taking a leadership role go far beyond the fulfilment of normative commitments. Fact-based economic analyses have tended to conclude that migrants contribute to economic growth and productivity. As Europe changes over the next generation, extending mobility to those outside its borders will enable EU member states to reap opportunities for peace, security and sustainable development both within and outside the EU.

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