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## **The EU Migration Dilemma**

*The crisis consists precisely in the fact that  
the old is dying and the new cannot be born.  
Antonio Gramsci (from the Prison  
Notebooks, 1929-1935)*

### **Introduction**

The topic of migration is probably one of the most contentious issues in contemporary politics. Europe, in particular is facing an unprecedented crisis over an alarming rise of migrant arrivals. The issue is causing strong tensions among and within European Member States on how to deal with the continuous flow of refugees, asylum seekers and economic migrants who see the European Union as the Promised Land for them and their children. Their fierce persistence, determination and conviction that the future will be better once they reach the European borders reflect the degree of despair and precariousness of life in their own countries.

The latest Frontex figures which show a 149% increase of migrant arrivals this year compared with the same period in 2014 are telling. According to the International Organisation for Migration the number of deaths in the Mediterranean stood at 1865 by 10 June 2015, a massive surge with no signs of relenting. In addition to the strong pressure point in the Mediterranean, new points of arrival are emerging at the Greek border in the Aegean Sea, the Hungarian border with Serbia and the port of Calais between France and the UK. Migrants are coming by overloaded boats, packed on tiny dinghies, by train through the Balkans, on foot across the Sahara or hidden inside vehicles crossing the English Channel, but they keep coming.

There are no physical borders which can deter someone who is ready to risk his or her life. Only utter despair and a lack of alternative can push someone to embark on an uncertain, highly risky adventure with unforeseeable outcome. Neither is it likely that the partial, piecemeal solutions, hastily concocted by policymakers in the aftermath of the highly mediatised humanitarian catastrophes, accompanied by unacceptable scenes involving migrants trying to reach Europe, can produce a long lasting effect. With its potential to unsettle political stability and create deep divisions between EU Member States, along with a widening social polarisation between those who are moved by the human tragedy and others who are pointing to their stretched capacities and the impossibility to integrate migrants already living in the EU, the crisis is increasingly akin to the French Dreyfus affair which has polarised society and has left a long lasting mark on the whole history of Europe. To quote Angela Merkel, the refugee problem is one of the greatest challenges facing the EU, laying bare the limits of European integration and open border principles.

What are the origins of the current crisis? Why are the current policy instruments and actions insufficient to deal with it? What can be done to address the real causes of the present crisis and break the vicious circle of dealing with its symptoms? How can we enhance the EU's common action and set out an EU migration policy geared to the challenges of the present

time? This paper will try to address these and other questions in an attempt to disentangle political, legal and institutional aspects of this highly complex phenomenon. In conclusion, a few proposals will be put forward for possible solutions.

## **1. The origins of the current crisis**

When an overloaded migrant boat capsized just outside Libya's territorial waters in April 2015 leaving 700 dead and missing, the question of migration reached a new urgency level. That Europe is struggling over the issue how to deal with migration is nothing new, but the number of refugees hoping to reach Europe has risen to a degree that has rendered the policies and actions in place obsolete.

Several reasons are to blame for the current refugee crisis. The first and the most important reason is the change caused by conflicts and civil wars in the Middle East and the political turmoil in Africa resulting in torn, barely functioning or failed states, unable to provide security and prosperity for their citizens. The 2003 invasion of Iraq has sparked the first wave of refugees, most of which settled in the neighbouring countries. Back then, barring Sweden, very few European countries admitted a significant number of Iraqis.

Today many countries in this region, such as Lebanon and Jordan, are home to a large number of refugees from previous Israeli-Palestinian conflicts. The capacities of these countries are already stretched thin and the new wave of refugees fleeing Iraq and Syria seriously threatens their social capacities, internal peace and security.

The paradigm shift triggered by the so called Arab Spring in 2011 and the staggering disposal of long standing dictators in a number of Arab countries gave a fresh impetus to the migration movement. The spill over of the ensuing Syrian war which has escalated into a highly complex, protracted internal conflict triggered a massive displacement of people within and outside the country. Libya's case proved to be even more difficult. This does not mean that people in the Arab world do not deserve or are not ready for democracy, but the way how these changes came along, the pace of events and the management of the aftermath left a lot to be desired. Many countries in the region had neither the capacity nor the mechanisms to cope adequately with the huge challenges of this new political environment. And the international community failed to comprehend the underlying depth of ethnic and religious divisions suppressed by the dictatorial regimes.

What is more, the fall of the old, albeit undemocratic regimes, did not address the key issues that triggered the revolution: the lack of economic opportunities and the future of the Arab youth. Instead, some of the countries slid into chaos, lawlessness and new forms of oppression thus generating a big number of refugees and asylum seekers that fled not only their countries but also the rising influence of the Islamic State which has filled every void left by the crumbling old regimes.

Another aspect of the present crisis can be attributed to the lingering crises in a number of African countries. Migrants from Sub-Saharan countries originating from Somalia, Eritrea, Senegal and Nigeria flee their countries which are characterised by struggling economies, repression, lack of freedom, dysfunctional institutions and (like Eritrea) dictatorships. With the rise of Islamist extremism and the emergence of the Islamic State the plight of migrants has been given a new dimension of unbearable horror. All these dramatic changes have caused ripple effects in the region and beyond, triggering mass migration.

Before the Arab Spring, especially prior to 2013, migrants were predominantly from West and Sub-Saharan Africa, fleeing dictatorship, poverty and lack of employment opportunities. This migration flow mostly stopped at the North African border, either because migrants were able to find work in transit countries and in Libya or thanks to the deal Western governments had

made with the Libyan leader Gaddafi who had made a commitment to stem the flow of illegal migrants towards Italy and Europe. The fall of Libya's old regime not only put an end to those deals but made room for smugglers and traffickers who promptly seized the new opportunities for their business.

The European governments and the EU have failed to grasp the magnitude and anticipate the consequences of these fundamental shifts. The test proved to be too difficult for the European external policy, which back then was still struggling with the setting up of the new European External Action Service and the internal political divisions, caused by the implementation of the Lisbon Treaty. Hence, the EU approach to the migration challenge has mostly been reactive, instead of being proactive and aimed at shaping events.

## 2. The evolution of the EU legal framework and competences in the field of migration

Asylum and migration have not always been an EU competence. The conclusions of the Tampere European Council in 1999 marked the beginning of EU policies in the field of migration. Against the background of a single economic market, the Union has set off to expand its competences and build an area of freedom, security and justice. Beneficiaries of this project were to be EU citizens and migrants legally residing in the EU.

Even though the scope of EU action encompassed various aspects, including the cooperation with third countries of origin and transit of migrants, the principal goal was to ensure the internal EU security. Following the integration of the Schengen agreement into the EU *acquis* EU Member States relinquished control over their territory, not a small feat given the importance of border control as one of the main features of state sovereignty. The EU migration policy was thus conflated into the security imperative, with the protection of external borders being central to this paradigm. To compensate for the new possibility of border free movement within the EU, the external borders were perceived as a rampart against a threat coming from outside its territory. The setting up of a number of EU justice and home affairs agencies, including Frontex, Eurojust, Europol, Ceuol was then complemented with a number of information systems (Schengen Information system, Visa Information System, Eurodac, the Europol Information System) to underpin the functionality of the internal, security and area of justice. Conscious of the need to provide shelter and protection for third country nationals fleeing persecution, the EU developed a growing body of legislation pertaining to refugees and asylum seekers.

Based on the 1951 Geneva Convention on the status of refugees, a Common European Asylum System (CEAS) has been set up. It is composed of the key directives on the conditions for receiving asylum seekers (the Reception Conditions Directive) the processing of their claim (the Asylum Procedure Directive) and setting the standards for subsidiary protection (Qualification Directive) for genuine asylum seekers and those who do not qualify as refugees but face a risk of suffering or harm if returned to their countries. The EU system is a novel instrument, in sync with modern times, which applies higher standards than the Geneva Convention ratified in the aftermath of the Second World War and bearing the imprint of the Cold War. Together with the Dublin regulation, which determines the Member States' responsibility for examining asylum claims the EU has sought to harmonise Member States' legislation and practices. However, the final decision on the merit of an asylum claim has been left to the individual Member States. This is why the chances to be granted asylum vary considerably from one state to another.

An important step toward balancing the internal security aspect with the external dimension of migration was framed by the Global Approach to Migration and Mobility instrument (GAMM). Emphasis was placed not only on the conclusion of the readmission agreement and the fight against irregular migration but on partnership, development and facilitation of circular migration to enable exchange and reinforce tools for regional protection.

Even though the EU prides itself on being a champion of highest human rights standards, there is one issue which deserves particular attention. It is the question of access to asylum and international protection. At present there are barely any lawful channels for refugees to reach Europe. In order to be able to lodge the asylum claim refugees have to come to Europe. That means that they need to cross the border to reach the European territory. Border crossing is illegal unless the potential asylum seeker is in a possession of a visa – the requirement imposed to almost all the countries of origin of migrants. In the absence of a visa the only way to reach the European shores is to resort to the services of smugglers and traffickers. This is the fundamental flaw of asylum and migration policies casting doubt on the recognised rhetoric of the existence of the legal right to seek asylum.

This incongruity plays directly into the hands of smugglers and traffickers who exploit this gap and charge huge sums of money for their services. Smugglers and traffickers are criminals, but they are only a symptom not the cause, as they provide refugees with a possibility to accede Europe in the first place. By making the crossing of borders ever harder the EU is indirectly engaging in the smugglers' business. Fighting smugglers and traffickers is unlikely to succeed unless accompanied by a forceful set of measures aimed at addressing the root causes of migrant movements.

Closely linked to the latter is another shortcoming pertaining to the responsibility to examine the merit of an asylum demand.

The Dublin regulation has been designed to determine which country is responsible to deal with an asylum claim of a person seeking international protection. In theory the responsible state is the one in which the candidate has family ties or, more often the country of entry to Europe. This exposes the frontline countries, where the majority of potential asylum seekers enter Europe to a disproportionate pressure of refugee flows. As a result, the geography becomes a country's predicament. Italy and Greece have been swamped with migrants putting a heavy strain on their capacities to provide necessary services and adequate care. To cope with the loop holes in the asylum system some countries have tried to build physical barriers as a means of deterrence. Greece has built a barbed wire fence on the Greek-Turkish border to stop the flow of refugees coming from as far as Afghanistan, Syria and Iraq. But the smugglers have quickly switched to other options using the island of Kos as an alternative. Bulgaria and recently Hungary have resorted to similar actions. The physical barriers can perhaps provide temporary relief and alleviate pressure but can neither stop migrants from coming nor provide a sustainable solution. No sooner is a border closed than another crossing point emerges elsewhere.

Europe needs a comprehensive and fair system underpinned by a uniform application of asylum law in all EU Member States. This needs to be boosted by a permanent resettlement mechanism that would share the immigration burden equitably among all Member States, taking into account different parameters such as the size of the country, the size of the population, the GDP as well as unemployment and the overall political stability. The European Commission should focus on ensuring the viability of this mechanism by making available funds to support Member States in their efforts to provide international protection. In addition an alternative option should be to offer a considerable number of humanitarian visas for refugees coming from countries ravaged by war-an idea strongly backed up by

UNHCR and the UN in the past. This would reinforce legal ways to access to Europe, create alternatives for risky, treacherous journeys and prevent smugglers to thrive on human misery. Finally, there have been suggestions for the set up of reception centres in third countries, closer to the area of conflict. If this idea is to be developed further, close attention should be paid to the country of choice, its political and economic situation and human rights record.

### **3. Conflicting agendas: security versus human rights: how to strike the right balance**

EU policy is torn between two conflicting agendas: on the one hand the core narrative of the EU integration project revolves around the concept of building a society based on democracy, the rule of law and respect for human rights. On the other hand security and the protection of borders are equally important, enabling free movement and guaranteeing safety to the European citizens. To strike the right balance between these two opposing agendas proves to be a daunting task. Europe has been built from the ashes of World War II and was determined to put an end to the centuries of conflict and human misery. A Europe at peace and prosperity is no small feat. It has become a model to its neighbours and the ideal to strive towards. Building its core narrative around peace and fundamental values Europe has placed human rights at the heart of its agenda. The commitment to human rights is not only the ideal to be pursued inside the EU but a key element of EU policy towards third countries. All agreements concluded with third countries reiterate the importance of and a need to observe human rights.

A number of documents, not least the Charter of Fundamental Rights bear witness to this commitment. While observing the principles of international human rights conventions the EU went even further, setting more progressive, higher standards, leading by example and encouraging the others to follow suit. A case in point is the Directive on minimum standards for the qualification of third country nationals as refugees. Whereas the Geneva 1951 Convention stipulates the right to asylum for those fleeing prosecution based on race, religious belief, nationality, political affiliation or membership of a particular social group, the EU Directive extends and complements protection to persons facing a real risk of suffering serious harm, a threat to civilian life or indiscriminate violence in situations of international internal armed conflict (Art.15.c). These provisions grant protection to all those fleeing wars, civil strife or internal conflict in their countries. Refusing asylum to a person coming from such a country would amount to “*refoulement*” violating the cornerstone principle of international protection. What the authors of this EU legislation could not expect is a growing number of conflicts, a number of failed or utterly dysfunctional states plagued by civil strife and the number of displaced persons as a consequence.

To minimise the number of potential asylum seekers the EU Member States have adopted the concept of ‘safe countries’, where citizens supposedly do not face the risk of political prosecution or inhuman, degrading treatment and to which, therefore, migrants can be sent back automatically, respectively their applications should be examined in an accelerated procedure. With the recent surge of refugees, EU Member States are trying to extend the list of the safe countries, by including not only the Balkan countries, but countries in Africa experiencing economic hardship. The concept has been criticised by human rights organisations because of a blurred definition of what is considered to be a safe country and doubts that the necessary safeguards may be compromised.

Not all migrants are refugees and genuine asylum applicants. Prior to 2013 and before the current refugee wave from war torn countries, migrants were often fleeing economic hardship and poverty. Seeking asylum for economic reasons is in principle not recognised as a valid ground for protection so the applicants are either obliged to leave (or are deported by force) or they chose illegality from the outset. The trouble is that many people flee for a combination of political, economic and social reasons. In addition a flourishing underground economy and labour market gaps in some countries makes it relatively easy to find work. All these reasons make it very difficult to decide upon the eligibility for admission or refusal.

In protecting the EU borders through the concept of integrated border management and helping the third countries to increase their capacities to control the outflow of migrants the EU has reinforced the image of a 'fortress Europe' where borders and security matters most. The growing tension between border control, labour market requirements and its human rights commitments have the potential to seriously undermine the very basis of the EU project.

If the EU is to live up to its fundamental values and will commend its model as the one to be followed by other regions it must be consequent in respecting human rights and principles of solidarity. It also needs to address the present and future labour market shortages not only for the highly qualified but also medium qualified migrants to offset shortages and make up for its dwindling population.

#### **4. Connecting the dots: migration as a constitutive component of EU external relations**

The entry into force of the Lisbon Treaty ushered in a new era for EU migration policy. Previously belonging to the so called 'third pillar' governed by intergovernmental cooperation, the issue of migration, that is to say border control, status of refugees, asylum seekers and irregular and legal migrants have reached a new level of development. The Treaty endowed the Union with the new competences and expanded its realm of action. With the new role of the European Parliament, the extended jurisdiction of the European Court of Justice (EUCJ) in the area previously outside its field of competence, the legislative process in the area of asylum, migration, free movement of persons now follow the ordinary legislative procedure (including co-decision and qualified majority voting). The legally binding Charter of Fundamental Rights further reinforced the status of the European Union as a bastion of human rights. Capitalising on this development the EUCJ has built its own jurisprudence, underpinning the human rights aspect of the EU migration and refugee policy. By stressing that the principle of human rights is central to the European project the ECJ has strengthened EU authority against challenges of various national interpretation of EU legislation.

One of the prominent novelties of the new Treaty was the strengthening of the EU foreign policy with the establishment of the European External Action Service (EEAS) and the appointment of the High Representative as a face representing the EU in the world. The EU was conferred with a legal personality and the possibility to conclude international agreements. But the EEAS somehow failed to grasp the importance of migration, not only as one of the policy priorities in negotiations with third countries, but even more so as an important strategic issue and a repercussion of its (or its Member States') policy choices. It also failed to capitalise on the new legal prerogatives which endowed the EU with the possibility to become a global actor. Apart from a few laudable examples, the EU has failed

to position itself as a strong international player with a power to anticipate and shape events on a global level.

Migration experts have long argued that linking migration with other external policy instruments, such as development, trade, commerce, energy etc. can considerably increase the EU leverage in relations with third countries. The Global Approach to Migration and Mobility was conceived with the aim to create a mixed policy instrument capable of encompassing security, development, social and labour aspects. This cross cutting, holistic approach was favoured by experts and acknowledged by the European Commission as the best for negotiations with third countries. Nevertheless, these attempts fell short of the expected result. The issue of migration has been largely confined to the negotiation of readmission agreements, visa policy, the fight against illegal migration, trafficking and smuggling.

Instead of empowering the EU with strong foreign policy prerogatives the EU Member States have preferred to follow their own foreign policy agenda in accordance with their particular strategic interests and without giving consideration to the wider political consequences, including migratory movements. For too long migration has been dealt with by the EC home affairs directorate and the ministers of the interior.

The EU has failed to fathom the importance of migration as a strategic issue risking serious tensions among and within EU Member States. A more comprehensive foreign and security policy is absolutely essential to prevent, anticipate and manage massive migration arrivals.

Accordingly, the DG Migration and Home Affairs should not be given a monopole over migration but should work at equal footing with the European External Action Service. If the EU is serious about migration it should strengthen its foreign policy clout and develop a top diplomacy with global outreach.

## **5. The looming crisis in the EU neighbourhood**

It is already difficult to cope with the current migration crisis. Unfortunately, a number of countries still hold potential for generating additional migrant flows. The inability of the international community to grasp the significance and consequences of the Arab revolutions has left many unresolved questions. One of the pressing issues is the (lack of a) long term prospect for young people in the Middle East and North Africa (MENA) countries, all of them part of the EU neighbourhood. Close to one third of the population is aged 15-29, a total of over 100 million people. Every autumn thousands of young people enter the economic market, which is unable to absorb the rapidly growing population. According to statistics between 25% and 60% of young people are underemployed with some countries reaching the level of 70%. Even an (unlikely) economic growth of more than 3% would not be enough to keep pace with the rapid demographic change. Cross border mobility among Arab countries is hampered by their fragmented internal markets and poor infrastructure. A serious mismatch between the skills demanded by employers and foreign investors and the skills offered by the young labour force portend a looming crisis. Unless drastic structural changes are implemented, the Arab youth will soon become disillusioned with their countries, which can only play into the hand of the Islamic State or smugglers. Algeria and Egypt both face an uncertain future. Other countries in the region struggle to maintain fragile political equilibrium punctuated by sporadic violence of Islamist militants.

## 6. European Agenda on Migration: hope for a new beginning?

In the aftermath of the big loss of lives in the Mediterranean in April 2015 the EU has decided to review its migration policy and propose further measures to manage the rising migration influx. It was clear that the new patterns of migration require forceful action and that the old muddling through practices can no longer work. True, the European Agenda on Migration has offered hope for a more comprehensive approach towards migration.

Boosting Frontex capacities and tripling the resources allocated to search and rescue at sea is certainly a positive development, as it is the increased presence at sea of the naval operations Triton and Poseidon. But the CSDP mission EUNAVFOR MED (European Union Naval Force Mediterranean) is much more problematic. With the aim to identify, capture and destroy the suspected boats used by smugglers and traffickers the mission is seeking to disrupt the smugglers' business model and save lives. In fact, this will again fight symptoms, not the causes. In addition, using military force can prove to be a very risky enterprise. The purported intent will soon become entangled with the provisions of international law, notably the Law of the Sea which delineates territorial waters of sovereign states and was ratified by the EU in 1998. In case of Libya, not explicitly mentioned, but tacitly assumed, the one thing on which the two Libyan governments (otherwise divided by almost everything) agree is that there is no question of violating their maritime territory. Meeting other international human rights law obligations, such as the obligation to assist persons in distress at sea, as stipulated by the military mission mandate will further complicate the EU military operations.

Moreover, the necessary cooperation with the UN Security Council and coastal states could be hampered by unforeseeable legal and political barriers. Using the latest technological possibilities and operating without any moral or legal constraints smugglers and traffickers will be hard to fight as long as there are people in despair who need their services.

Regarding the cooperation with third countries of origin and transit the new deals should be discussed, taking into account the concerns and priorities of these countries, notably in connection with the growing presence and influence of the Islamic State.

The forthcoming EU conference in Valetta in November this year will need to address all these issues thoroughly.

The new European Agenda on Migration has certainly opened new avenues, especially with regard to solidarity, a long standing promise and one of the EU constitutional principles, but hitherto in short supply. At present a few countries continue to receive the vast majority of asylum seekers, notably Germany, which has recently issued a forecast for 800 000 applicants for this year only. The Agenda makes a proposal for migrants' relocation (for those already in the EU) and resettlement (those outside the EU), according to the established criteria. Sharing out the responsibility for hosting the refugees and taking on a fair share is indispensable and should be made compulsory for all EU Member States. This would avoid the situations where only a few frontline countries, along with those which take the majority of asylum seekers bear the brunt of migration influx.

Another strand of the Agenda is the return of irregular migrants and rejected asylum seekers. The return is conditional upon the third countries which have signed the readmission agreement to take back their own nationals along with those who have crossed their territory. The Agenda on Migration sets as a priority a more swift return system, pointing out that only 39% of all return decisions issued in 2013 were effectively enforced. Countries which are asked to respect readmission obligations need to be offered more incentives and better conditions to fulfil their obligations. With no prospect for a better future the returnees will use all means to return back to Europe. Debate should be launched to decide what to do with those who do not qualify for asylum but are not returnable to their countries.

## 7. Conclusion: the need for a global response to the EU migration crisis

The European migration problem has been long overdue and is now reaching its apotheosis with the scale of the current migration wave. Nobody doubts that a single state cannot cope with the migration issue alone. It is also unanimously acknowledged that sustainable solutions must address the root causes. Yet it seems that the situation is only getting worse, which is proven by the unprecedented number of refugees and migrants trying to reach the European shores in the summer of 2015.

In the absence of a global initiative and a sustainable political solution the grand political crises affecting the Middle East will continue generating flows of refugees and migrants. Whereas other countries, notably the US should play a role, the EU is particularly concerned, given its geographic proximity. Building fences and reinforcing security prerogatives against the flow of migrants can only displace the pressure from one entry point to another. Making the access to Europe ever more difficult can only increase the amount of money the traffickers charge for their services.

The current migrant crisis has put a spotlight on how domestic politics of individual European countries could undermine the importance for a fair and thorough debate. Because of the rise of anti-immigrant, extreme right parties in Europe migration has become a subject of political bickering in almost every EU country. There is clearly no silver bullet solution, neither is the one size fits all approach likely to work.

Support for proposals to welcome more migrants carry high political risks and are often considered as no-no. The established patterns portraying migrants as a burden for a welfare system or prone to criminal activities are hard to break.

But with the massive unrest in a number of countries, with a rise of conflicts and dysfunctional states the number of migrants is set to rise. Whereas governments in Europe are grappling with the successive wave of migrants and refugees, the number of forcibly displaced persons worldwide reached an all time high already in 2014, according to the UNCHR. The world seems to enter into the age of global migration. If so, than the problem would require a global response. First and foremost the deteriorating situation in the Arab world and the Middle East need to be addressed by the whole international community. Europe should take a leading role in setting the stage for a major international conference (involving all parties with a stake in the conflict) on resolutions for the crisis in Syria and elsewhere in the Middle East. Moreover, all major powers should share responsibility for the plight of refugees, whose numbers are almost equal to those after the Second World War. Countries in the region which shelter the majority of refugees due to their geographical proximity need to be supported by the developed countries with financial, technical humanitarian and other necessary support.

Resettlement policies and schemes need to be discussed by the EU and its partners, notably the US and Canada, which both have longer tradition and experience in this regard. The UN and the Security Council should be mobilised in finding a way to set up a global regime for protection.

Migration movements are a phenomenon of the new era and the panoply of reasons for future movements have only begun to emerge. If forecasts of climate experts turn out to be right, the number of refugees in future will rise due to climate change and the loss of habitat. The world needs a framework for global migration governance.

Inaction means no more and no less than moral and political failure to address one of the most pressing issues of our time.

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