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**“New approach to migration:**

**Instead of resisting migration, let's organise it”**

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Open the door

We’re all migrants

My follow up work on EU border management was prompted by the unprecedented number of deaths of migrants trying to cross the Mediterranean in 2014. The continued ineffectiveness and paradoxes of European Union border management policies and the lack of a coherent, human rights-based approach to migration were vividly and visibly demonstrated by these deaths. These tragic events have propelled the issue of the human rights of migrants who use sea-based migratory routes into the spotlight.

The suffering of so many and the tendency of migration to take place clandestinely is a symptom of systemic failings within the European Union border management system and a clear sign that the region is losing control of this migration despite sustained investment in securing borders. These failings also speak deeper to how the European Union responds to difference and diversity.

In my report, I propose recommendations to address immediate and urgent concerns, such as the search and rescue of migrants at sea. Given the political change across Europe and change of leadership in Brussels, I have also taken the opportunity to make proposals for the long term in the hope that these recommendations may be used by EU Institutions and EU member states.

My long term proposals for migration in the EU are a result of my belief that maintaining the status quo is unsustainable as the human and resource costs associated with it are huge. Migrants lose their lives or if they survive they experience inexplicable suffering, exploitation and the violation of a series of rights. Furthermore, significant resources are lost through member states investing into an ineffective system that overwhelmingly focuses on securitisation and not maximising the opportunities offered by migration at a time of significant demographic, economic and social challenges in the EU.

Over reliance on securing borders is based on a fantasy, that which says that borders can be “sealed”. It is something that governments tell themselves and their electorate, in order to project an image of being in control. In reality, borders can only be regulated and the only way that countries can effectively gain control over border crossings is if they invest in regulated mobility.

**Banking on mobility**

Banking on mobility means that the overall goal is to have most migrants using official channels to enter and stay in Europe. For that, European Union member states must accept that migrants will come, no matter what, because there are either push factors or pull factors for them to do so. Any attempt at “sealing” borders, as the nationalist populist discourse stridently calls for, without offering many more legal avenues for migration, will continue to fail on a massive scale.

This estimated number of 200 or 300.000 persons crossing irregularly into Europe every year is only a very tiny portion of the 750 millions annual border crossings into the EU. Yet, for this small portion, it is paradoxical that, in the name of securing borders, European States have actually lost control over their borders, as flexible and opportunistic smuggling rings will almost always be ahead of the game. Prohibitions and repressive policies, without regular migration channels for asylum seekers and much needed low-wage migrants, only entrench smuggling operations and underground labour markets, where unscrupulous recruiters and employers exploit undocumented migrants, and increase the precariousness of the migrants’ situation, resulting in more deaths at sea and more human rights violations.

This is why the EU’s request to the UN Security Council for a Chapter 7 Resolution to bomb smuggler boats cannot be an effective strategy to stop smuggling: it can only be a temporary and mostly ineffective tactic. Security and defence policy options, such as destroying boats, constitute only a very short-sighted response. Strengthening the capacity of transit countries to stop irregular migration on their territory and resorting to military means, without offering migrants and refugees long-term mobility solutions and without adequate human rights guarantees, does not change the root causes of the smuggling market and can only entrench it, thus compounding human rights violations.

Instead of prohibition policies, the EU must develop more harm-reduction policies, taking as a central concern the human rights of migrants, and create innovative regulated mobility options that will incentivise most migrants and asylum seekers to avoid having recourse to smugglers and will reduce the size of the underground labour markets.

If Europe is to witness a significant reduction of human suffering at borders, it must bank, not on strict closure and repression, but on regulated openness and mobility. In the end, it is better to recognise this mobility as an inevitable consequence of globalisation, to offer the asylum seekers and migrants what they need, and therefore create incentives to register officially, and ultimately regain the control of entries and exits from the smuggling rings and the control of labour markets from unscrupulous underground employers.

The European Agenda on Migration is a welcome step in the right direction. I think that it alludes to a fundamental shift that recognises that, despite whatever nationalist populist political discourse may be at play, those on the boats are human beings and just like the rest of us they have rights. I am under no illusion about how difficult it must have been for the EU to come up with such an Agenda and how even more difficult will be its implementation, as some member states will fully embrace their international human rights obligations whilst others will try to turn a blind eye.

An example of this is the search and rescue operations (SAR). Last year saw good SAR initiatives like the Italian *Mare Nostrum* operation, which I commended for recognising a humanitarian need and providing a humanitarian response. This was no small feat for Italy considering its financial constraints, strong national anti-migrant populist discourse and pressure from others who criticised Italy’s SAR on the twisted reasoning that it encourages other irregular migrants to come to Europe.

For the past few months, I have urged the EU to strengthen its search and rescue capacity, while respecting the principle of *non-refoulement,* guaranteeing immediate disembarkation of asylum seekers and migrants at the nearest post, providing information, care and support to migrants, equitably processing asylum claims, and encouraging commercial vessels to carry out rescue operations without risk of retaliation or harassment due to them being considered as accessory to smuggling operations. In order to cope with the peak months in which migration by sea occur, I called upon the EU to strengthen Frontex’s *Triton* Operation which would include providing *Triton* or a similar operation with a longer term mandate, more resources and an increased area for its search and rescue operations – similar to those of *Mare Nostrum* – in order for it to effectively continue to save lives.

The EU’s response to continued pressure for SAR has resulted in the tripling of Triton Operation’s budget and member states that were once sceptical about SAR are willing to support SAR operations and are no longer calling such operations a “pull factor”. This is a significant step in the right direction. However, once rescued, the responsibility of receiving migrants who arrive by boat continues to be left mainly to frontline states such as Greece, Italy and Malta. More concerted effort is required from European member states to assist the frontline states. With the current surge in migration, the EU should ensure that there are sufficient reception centres with adequate facilities to accommodate the new arrivals.

**Taking the leadership in refugee resettlement programmes**

It is estimated that in 2014 over 200,000 migrants and asylum seekers arrived in Europe by sea, compared with 80,000 in 2013. In 2015, Europe has already received over 100,000 migrants who have arrived by boat with frontline states like Greece reporting daily arrivals. This is already half the number of total migrants that arrived by boat last year and we are just approaching the “peak season” when boat arrivals increase.

At present, many people crossing the Mediterranean are manifestly refugees, such as Syrians and Eritreans. With the continued crises in Syria, Eritrea and now Yemen, the numbers of people arriving and seeking safety in Europe are unlikely to decrease in the foreseeable future.

Although the European Agenda on Migration is a step in the right direction, measured against such odds, it is woefully inadequate. I welcome the plan on resettlement and in fact was delighted to see it, as I have been calling for one since October 2014. However, when I look at the number of arrivals and compare it to the number of resettlement places being offered, I am disheartened.

The EU cannot expect Syrians to live in camps or cities in Lebanon or Turkey indefinitely, with no prospects for a better life for themselves or their families, while the EU (and the Global North generally) stalls in making a commitment to a meaningful refugee resettlement programme. UNHCR estimates that 350.000 Syrians are in need of emergency resettlement. If nothing else is available to them, refugees will take their chances with smugglers in order to provide a future for their loved ones, as many of us would do in similar circumstances.

Europe is missing here a great opportunity of taking the leadership of a meaningful resettlement programme, in partnership with other Global North Countries, such as the USA, Canada, Australia and New Zealand, as well as host countries in the South. Most of these refugees would wait in line and contribute some money for a meaningful opportunity of resettlement in Europe. Altogether, taking as a model the Comprehensive Plan of Action for the Indochinese refugees of the 80s, and expanding on worthy initiatives such as the Austrian “Save Lives” proposal, one could imagine one million refugees being resettled from transit States (such as Turkey, Lebanon and Jordan for the Syrians), over five years, with the help of UNHCR and civil society organisations, according to priority criteria. These refugees would be resettled according to a distribution key inside Europe and benefit from integration programmes. Such a policy would send an appropriate message of solidarity to the overcrowded host countries of the Middle-East, support international organisations and civil society organisations now bearing the brunt of the crisis and show political and moral leadership.

To my mind, instead of the EU calling for a Chapter 7 resolution, it would be much more effective for the EU to call upon the international community to share responsibility in establishing a more effective resettlement programme.

**Taking stock the collapse of the Dublin logic and banking on the mobility of asylum seekers**

The information I have gathered based on my research and visits has demonstrated to me that the Dublin mechanisms prevent European Union member states from taking shared responsibility for refugees, discourage frontline states from fully implementing Dublin Regulations, and encourage asylum seekers and migrants to use smugglers.

Migrants and asylum seekers are unwilling to be registered and provide their fingerprints because they do not trust that it serves their best interest in the long term, and rightly so as there is little chances of local integration in frontline states.

The European Court of Human Rights, the European Court of justice and national tribunals – most recently a court in Belgium – have also prevented European Union member states from the North of Europe applying the Dublin mechanisms and have urged them to apply the Dublin Regulation in manner compatible with the European and national human rights guarantees.[[1]](#footnote-1)

There is also an urgent need to allow migrants to circulate within the EU to where they can be reunited with their families, or find a job and start contributing to their new communities and paying taxes. Reversing the present logic, asylum seekers should be able to register their asylum claim in the country of their choice and the EU should support the countries receiving asylum claims with proportionate and adequate financial and technical support. Trying to forcibly allocate individuals and families to countries in which they don’t want to live and which don’t offer them the chance at a better life for themselves and their families, is a recipe for entrenching opportunities for smuggling operations and underground employers.

Standardising reception conditions and Refugee Status Determination (RSD) procedures throughout the EU should be a top priority, in order to avoid “asylum dumping” and stress on the countries that offer better conditions. In addition, EASO needs considerable expansion and harmonisation should be accelerated through several mechanisms including: mutual recognition of RSD decisions; exchange of refugee judges between States; a common EU Refugee Determination Appeal Board; and a common or shared reception mechanisms.

Registration at the earliest contact is an important element of migration governance, and it can be best implemented when incentives are offered to do so because benefits are attached to it. An EU wide facilitated relocation programme, implemented in consultation with the asylum seekers, and a well-managed distribution key for allocating appropriate funding to countries actually receiving asylum seekers – thus reversing the logic of Dublin – would constitute a clear incentive for asylum seekers to get registered in the first European country of entry. It would encourage asylum seekers to not use the evasion tactics that are now systematically employed to avoid their identification and thus the application of the Dublin logic.

A question I have often heard from frontline State officials is “how much physical violence does Brussels want us to use so as to implement Dublin?” Europe cannot expect that frontline countries will use violence against thousands of migrants who haven’t committed any crime, in order to implement identification mechanisms, such as fingerprinting, when such migrants are reluctant to do so because of the consequences attached to such identification, in particular the inability to move beyond the European country deemed responsible for the entry and the prohibition of claiming asylum in the country of their choice. This is especially true as some northern European Union member states have made little use of the family reunification clause, the humanitarian clause and the sovereignty clause that could enhance the mobility of migrants throughout Europe. Trying to confine migrants to the territory of the frontline countries obliges migrants to continue traveling underground, further empowering smuggling rings and unscrupulous employers, and places undue responsibilities on such frontline countries.

In effect, the Dublin logic has already collapsed, with the realisation that the return of migrants to the frontline countries of Europe constitutes a punishment for both the migrant and the frontline countries to which they return: it is unsustainable in the long term and will need to be replaced by effective mobility solutions.

**Banking on the mobility of migrant workers**

We need to recognise that many migrant workers are as much “survival migrants” (Alexander Betts) as refugees. They may not fear persecution and may not need international protection according to the 1951 refugee convention, but they feel they heva no option but migration in order to lift their family out of utter poverty and they are in need of protection for their human rights. As for the refugees, they have little to lose and will come no matter what, hopefully with visas, but with smugglers if not.

The biggest failing of the EU Agenda on migration is the absence of any proposal regarding open regular migration channels for such low skilled workers. Migrants continue to come to Europe because there are jobs. To say that there are no jobs is simply burying one’s head in the sand. This means that irregular migration will certainly continue, migrants will continue to be exploited while Europeans thrive from their “cheap labour” and smugglers will continue to have a thriving business.

The EU should help weaning its member states from their addiction to “cheap labour” in sectors of their economies where huge numbers of irregular migrants are being employed, such as agriculture, construction, hospitality or caregiving. Beyond the worthy initiatives on seasonal workers and the “blue card” – which have yet to be implemented in significant numbers –, European countries should recognise their real labour needs, particularly in the low-wage and medium-wage sectors. The EU should help those States combine facilitated regular migration for such sectors through numerous visa options.

This should be accompanied with a sharp increase in the effectiveness of labour inspections for ensuring the respect of labour conditions, as well as a real effort in the repression of unscrupulous exploitative employers, *inter alia* through the effective implementation of the Employer Sanction Directive.

Such a policy, based on the idea that we should repress exploitative employers and protect all workers, including irregular migrant workers, from abusive labour conditions, would create an entirely new framework for legal and better regulated labour markets, thus reducing considerably underground labour markets which constitute an important pull factor for irregular migration.

Migrants aren’t stupid: they go where they can find jobs. If there’s no job to be had, they move on: mobility helps them move on.

**Allowing migrants to express their “voice”**

The EU needs to coordinate better the EU National Human Rights institutions (NHRIs) in order to achieve a better standard of protection for the human rights of migrants. This can be done through enhanced complaint mechanisms, increased investigative powers, multiplication of site visits to detention facilities and closer monitoring of return procedures.

**Access to justice**

Access to justice for all migrants is also key, if Europe really wants the human rights of migrants to be respected, protected and promoted. In the recent past, the European Court of Human Rights, the European Court of Justice, national courts and tribunals, as well as national human rights institutions and ombudspersons, have shown their willingness to defend the rights of migrants. Facilitating access to justice by migrants, without fear of detection, detention or deportation, in order to help them fight for their rights, would go a long way towards, on the one hand, legitimising such migration policies through showing that territorial sovereignty and human rights are not incompatible, and, on the other hand, changing mentalities regarding migration through fighting fantasies and stereotypes.

 **Firewalls**

In order to protect the rights of all migrants, including irregular migrants, efforts must also be undertaken to establish a “firewall” between immigration enforcement and all other public authorities, who should not be used as auxiliaries of immigration enforcement. Irregular migrants should be able to access health care, education, local police, social services, health and safety inspectors, and labour inspectors, without risking being reported to immigration enforcement authorities.

In terms of labour standards for example, migrant workers must be considered as workers first, in favour of whom all labour standards must be respected, and proper wages and adequate compensation must be paid despite the migrant worker being in an irregular situation and susceptible to deportation. Like is the case for any other labour standard violation, we should consider the employer responsible for the situation, not the worker.

This doesn’t prevent immigration enforcement from accomplishing its mission of detecting and deporting migrants in an irregular situation. To the contrary, this mission would be considerably facilitated, if the underground labour markets were reduced, if migrants were offered mobility solutions and if they had easy access to public services, as this would avoid entrenching underground practices and considerably reduce the hold of smugglers and exploitative employers over such migrants.

**Achieving coherence between EU internal and external actions on migration issues**

I commend the new High Representative of the European Union for Foreign Affairs and Security Policy and Vice-President of the European Commission, Ms. Federica Mogherini, for the inclusion of migration issues as a priority in the external action of the EU and am eager to see how the new Strategic Framework and Work Plan will develop her ideas on migration.

The involvement of the EEAS in the design and implementation of Mobility Partnerships should also focus on reinforcing the human rights guarantees and mechanisms available to migrants. The support that the EU could provide to national human rights institutions in partner countries would be of extreme importance for migrants, as such NHRIs should be able to receive complaints from migrants and investigate situations where migrant rights may be violated, such as detention and return procedures for which the EU is providing capacity-building programmes. Supporting human rights civil society organisations would also be of crucial importance.

**Tackling discrimination against migrants**

While it may constitute an administrative offence, irregular migration is not a crime, neither against persons, nor against property, nor against State security (in their vast majority, migrants are harmless, hardworking and courageous). Although they may have violated an administrative requirement, irregular migrants are not criminals per se, and should not be treated as such.

There is an urgent need for a political counter-discourse which would emphasize the benefits that migration brings to both countries of origin and destination. It can be done, as has been demonstrated by countries like Germany where Chancellor Merkel has provided a strong counter-discourse to far-right anti-immigration movements. Facts-based analyses which highlight the contribution of migrants to societies at all levels (economic, social, cultural, demographic and fiscal) are important in countering the nationalist populist discourse and informing the electorate.

The EU and EU Member States should progressively establish a human-rights-based, coherent and comprehensive migration policy, which addresses these issues and makes mobility its central asset. A common narrative celebrating mobility and diversity, recognising real labour market needs as well as the needs of migrants, based on human rights guaranties and access to justice, must be developed. I trust that the recent European Migration Agenda is a step in this direction.

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1. **Sharifi and Others v. Italy and Greece; Tarakhel v. Switzerland** [↑](#footnote-ref-1)