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Reducing Irregular Migration Flows through EU External Action

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Policy Brief

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Irregular immigration is emerging as a threat to the political stability of the EU.² The EU's asylum and immigration system has been overly tolerant towards irregular migration and not attuned enough to legal migration, particularly with regard to skilled migration. Furthermore, countries in the vicinity of the EU, particularly in North Africa, have yet to develop functioning asylum and migration systems. And despite a dramatic decrease in the number of migrants and refugees coming to Europe, the need remains to instil in the European public a sense that the EU border is properly guarded and that the number of illegal border crossings—as one aspect of irregular migration—is being reduced. In the short to medium term, the EU should help to ensure the protection of the refugees who are hosted in other countries. It should provide the requisite financial and political support to the hosting governments in order to ensure the basic welfare of migrants. The EU should resettle the most vulnerable refugees through legal channels at the expense of irregular migration movements. Where individuals are granted asylum following interception at sea, they should not be allowed to settle in the EU.

¹ Thanks are due to a number of people: Martens Centre President Mikuláš Dzurinda for initiating this project and providing invaluable guidance, and Joanna Apap, Tomi Huhtanen and Federico Reho for their comments. Special thanks go to an anonymous reviewer, Vladimír Šimoňák, Christina Bache, Niklas Nováky, Roland Freudenstein, Christian Kremer and Claudia Cajvan for their insights, advice and vigorous discussions. The views expressed in this document are those of the author.

² In this paper, 'EU' is used to refer to both (1) the EU-level institutions and (2) these institutions together with the member states. The two uses will be distinguished wherever necessary.



Instead, the Union should negotiate with non-EU ('third') countries about accepting these individuals. Finally, the EU's external border needs to be vigilantly policed in order to increase public confidence in the EU's migration policy. As part of this recommendation, the EU should continue assisting third-country coastguards to undertake search and rescue operations, and to bring the rescued individuals back to their own countries. Over the long term, the EU should set itself the goal of enlarging the area of migration and asylum governance by incentivising non-EU countries to adopt asylum legislation in order to fulfil their obligations under the Refugee Convention of 1951 or equivalent international instruments.

Keywords Irregular immigration – Asylum – Border control – Search and rescue – Security – Refugee Convention – EU – Australia – US

Introduction

Politics across Europe have become polarised around immigration issues. According to Eurobarometer data from spring 2018, 'over half of Europeans feel negative about the immigration of people from outside the European Union'. In several member states, political parties across the spectrum are refusing to accept migrants from outside Europe. Migration is becoming an increasingly salient issue in European and national politics. The bloc has a limited absorption capacity.³

The EU is facing a number challenges, each of which is related to a specific migration issue. The challenge that this paper focuses on is **illegal border crossings from non-EU countries into the EU**. Another challenge, one that is not covered in this study, is that linked to situations where **legal immigration becomes asylum seeking**. Since 2017 the migration situation in the EU has been radically different from what it was in 2015–16, when a massive wave of irregular migrants swept across its borders. In 2017 (the latest year for which we have complete data), the number of asylum applications submitted (650,000) far exceeded the number of illegal border crossings (205,000).⁴ Thus in 2017 the majority of asylum applications were submitted by people already present on EU

³ However contentious the term 'absorption capacity' may seem, the fact remains that the European Commission calculated its national distribution quotas for 2015 based on criteria that, when considered together, amount to the kind of capacity that the phrase refers to. These criteria are the size of the population, total GDP, unemployment rate, the average number of spontaneous asylum applications per year and the number of resettled refugees per one million inhabitants. See G. Choi and R. Veugelers, *Europe's True Immigration Capacity: What We Can Learn from the US Green Card System*, Bruegel (10 September 2015).

⁴ According to Frontex and Eurostat data.



territory. This contrasts with the situation in 2015–16, when it was newly arrived migrants who made the majority of asylum applications. We can assume that most of the asylum applications in 2017 were made by people who had entered the EU legally, for example on a Schengen visa.⁵ Apart from the policy implications of this phenomenon, this shows the terminological flaw in conflating the category ‘irregular (or illegal) migrant’ with that of ‘asylum seeker’.

A third challenge concerns the **type of migrant that the EU predominantly receives**. Apart from exceptional years such as 2015–16, most mass immigration is legal. The number of regular entries into the EU—including through family reunification and temporary visa permits—far exceeds the number of irregular entries.⁶ Temporary work permits (for example, those issued by Poland to Ukrainian citizens) result in much-needed additions to the labour force. The numerically more significant family unification policy is completely legal, but does not bring in the required skills and talent. More than this, by fostering the use of the language of the country of origin within families, it perpetually thwarts efforts to integrate the migrant population in Europe.⁷

Finally, the broad question of the **integration of first-, second- and even third-generation migrants** has yet to be decisively tackled by Europe’s governments.

This paper focuses on illegal border crossings, though without downplaying the importance of the other challenges. The reasons for this choice are (1) that it has become politically impossible for the EU to accept another massive wave of irregular migrants and refugees, and (2) that we need to preserve our passport-free zone, the Schengen Area, whose existence is threatened by the continuing flow of irregular migrants over the EU’s external border.

Supported by the finding that almost 70% of Europeans want a common European policy on migration,⁸ the paper argues that managing irregular migration better, including working with non-EU countries, would help to restore public trust in our constitutional democracies and to cement the conditions for the survival of

⁵ This phenomenon is the same across the Global North. See, for example, C. Horwood, ‘It’s Time for a More Honest, Less Partisan Debate on Mixed Migration’, *Refugees Deeply*, 22 January 2019, accessed at <https://www.newsdeeply.com/refugees/community/2019/01/22/its-time-for-a-more-honest-less-partisan-debate-on-mixed-migration> on 7 February 2019.

⁶ See, e.g., European Commission, Joint Research Centre, *Many More to Come? Migration from and within Africa* (2018), accessed at <https://ec.europa.eu/jrc/en/publication/eur-scientific-and-technical-research-reports/many-more-come-migration-and-within-africa> on 19 December 2018.

⁷ I am grateful to an anonymous interviewee for inspiring these two paragraphs.

⁸ European Commission, Standard Eurobarometer 86. Autumn 2016. Public opinion in the European Union (December 2016), 24, accessed at <http://ec.europa.eu/COMMFrontOffice/publicopinion/index.cfm/Survey/getSurveyDetail/instruments/STANDARD/surveyKy/2137> on 13 February 2019.



our shared values, including respect for human rights, the rule of law, democracy and equality.⁹

Those aspects of the EU's irregular migration control system that have been externalised are working remarkably well. (In this paper, 'externalisation' means working with non-EU countries on border control, migration management, asylum policies and search and rescue operations.) Since 2016 the bloc has managed to dramatically decrease the number of migrants and refugees¹⁰ coming to Europe. This is thanks to a set of measures that includes the EU–Turkey agreement, the near closure of the West Balkans route, and collaboration with the Libyan, Moroccan and Nigerien governments. In the second half of 2018, irregular arrivals dropped by 95% relative to the second half of 2015.

However, we should keep in mind that many elements of the irregular migration control system may not be stable. Due to Turkish domestic politics, the EU–Turkey agreement may not last for long. In any case, the existing EU funding under this agreement will run out at the end of the current decade. (In contrast, arrangements with the Libyan coastguard are informal, but appear stable.)

These factors necessitate further EU planning. Now is the time to lay strong foundations for implementing one of the conclusions set forth in the 2016 *Bratislava Declaration and Roadmap*: 'Never to allow [a] return to uncontrolled flows . . . and further bring down [the] number of irregular migrants'.

Finally, the black and grey labour markets—estimated to constitute 1% of the EU labour force¹¹—provide a pull factor for irregular unskilled migrant workers. This is despite the adoption of the Employer Sanctions Directive in 2009. The problem concerns, in particular, the construction industry, agriculture, social care and housework.

Before listing policy recommendations, this policy brief provides a detailed analysis of EU policies on irregular migration. This analysis begins by overviewing EU legislation on refugee governance. Then it compares EU policies on illegal border crossings with those in the US and Australia. It goes on to explain how the EU is assisting other countries in developing migration, asylum and border control policies. Then it outlines how the EU has been protecting its migration-related security interests abroad. Finally, it discusses border control, and search

⁹ Treaty of Lisbon, art. 2.

¹⁰ The distinction between migrants and refugees will be maintained in this paper although, in reality, the difference between the two categories is blurred until an asylum decision has been rendered.

¹¹ P. Martin 'Irregular Migrant Workers in the EU and the US', *Migration Data Portal*, 17 November 2017, accessed at <https://migrationdataportal.org/blog/irregular-migrant-workers-eu-and-us> on 5 February 2019.



and rescue operations; asylum and resettlement; and returns and readmissions. Because policy comparison can provide important insights, the last three sections list the essential elements of relevant US and Australian policies.

Analysis

Legal overview

Before venturing into the analysis of European policies on irregular migration, there are four legal matters that need to be addressed: the 1951 Refugee Convention and its interpretations, the legal instrument of subsidiary protection, the territorial basis of the EU's asylum system and the law of the sea.

National and EU legislation set a high standard for the protection of asylum seekers' legal and welfare rights.¹² And with certain notable exceptions, these standards are being upheld. The EU's asylum system is derived from the Refugee Convention (Convention Relating to the Status of Refugees). Each of the EU member states has separately ratified this convention. Although the convention has not been signed by the EU, it is referred to in the Lisbon Treaty (Article 78) as well as in the EU's Charter on Fundamental Rights. The Refugee Convention outlines the rights and obligations of refugees and the responsibilities of the signatory states. It defines a refugee as a person who, 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality.' The core principle is non-refoulement, which asserts that refugees cannot be returned to a country where they face serious threats to their life or freedom. The Convention outlines the obligations of refugees, including adherence to the laws of the receiving country. The Convention does not specify which state is responsible for accepting a refugee into its territory.

The Refugee Convention contributes to the definition of the European way of life and has become part of our identity. However, it has sometimes proved difficult to implement. It was established to define the status and rights of individuals who had been forcibly displaced after the Second World War. The Convention does not explicitly refer to those who have left their country to search for inter-

¹² M. Kegels, *Getting the Balance Right: Strengthening Asylum Reception Capacity at National and EU Levels*, Migration Policy Institute (February 2016), accessed at <https://www.migrationpolicy.org/research/getting-balance-right-strengthening-asylum-reception-capacity-national-and-eu-levels> on 10 October 2018.



national protection.¹³ Furthermore, the existing interpretations of the Convention encourage European governments to register all irregular migrants as asylum seekers. This poses a challenge in situations where it is necessary to deal with mixed (economic and forced) migration on a mass scale. In particular, it leads to the asylum administration being overburdened.

In addition, the convention offers a privileged legal status for those who have obtained 'convention' asylum. This status is not available to those who have not reached a country with functioning asylum legislation,¹⁴ and they make up the majority of the world's refugees. The neediest are not those who are trying to cross to Europe but those left behind in or near their own countries.

Another point concerning the interpretation of the Refugee Convention is the following. The European Court of Human Rights has ruled against the push-backs¹⁵ carried out by Italy and Spain—the rulings were made in 2012 and 2017 respectively. The 2012 ruling stated that Italy's interdiction of Somali and Eritrean migrants on the high seas violated the Refugee Convention. This same ruling resulted in a de facto reinterpretation by Italy of its international obligations at sea. Italy delegated border control and search and rescue in Libyan waters to the Libyan coastguard (formerly local militias). The implications of the ruling against Spain are not yet clear.

As a separate point, the EU's Qualification Directive of 2011 has been instrumental in codifying 'subsidiary protection' for those who may not qualify for refugee status under the Refugee Convention. According to Eurostat data for 2017, some 35% of the positive first-instance decisions on international protection in the EU were issued under subsidiary protection. Centre-right observers argue that international law does not require subsidiary protection to be codified in EU and national legislation. Instead of examining the threat faced by an individual person, subsidiary protection considers the threat to a group of which a person is a member. The application of this legal instrument burdens our asylum administration, at the expense of those who qualify as refugees under the Refugee Convention.

The EU's current asylum system is territorial in character: the vast majority of asylum claims are processed within the EU. This territorial basis of the EU's asylum laws puts the EU's asylum system under extreme pressure during migration crises. This weakness could be overcome by externalising the asylum

¹³ K. Koser, *Australia and the 1951 Refugee Convention*, Lowy Institute (30 April 2015), accessed at <https://www.lowyinstitute.org/publications/australia-and-1951-refugee-convention> on 16 November 2018.

¹⁴ A. Betts and P. Collier, *Refuge: Transforming a Broken Refugee System* (London: Allen Lane, 2017), 43.

¹⁵ Forcing migrants back to their country of departure.



process in such a manner that the right of asylum is preserved, and is guaranteed by the EU's partner governments in other countries. Another weakness of the current system is that, even when asylum seekers' applications have been turned down, the probability of their being returned from EU territory is low. This holds even in those cases where the asylum seeker has committed a crime.

Signed in 1979 and revised in 2004, the International Convention on Maritime Search and Rescue divided the Mediterranean Sea into search and rescue zones.¹⁶ Countries on all sides of the Mediterranean, including the North African countries, are parties to this convention. This and other maritime conventions oblige ships to rescue people. However, the agreements leave room for interpretation as to which port should take responsibility for admitting those who have been rescued. Once passengers disembark, the state that admitted them has legal obligations towards them.

Learning from Australia and the US

The EU can learn from US and Australian experience. Nevertheless, there are numerous factors that speak against adopting these countries' policies *en bloc*.

First, the short distances by sea between third countries and Europe make it much easier to enter the EU illegally than is the case with Australia. The EU does not have the 'luxury of natural buffers . . . that until recently limited opportunities for illegal entry [into Australia] and allowed policymakers to focus on carefully crafted selection mechanisms.'¹⁷

Second, Australia—more so than the US—has adopted selective immigration policies that focus on skills. Each year both countries accept large numbers of labour migrants from across the world. Australia currently accepts 190,000 economic migrants annually. In contrast, the EU has a tradition of rights-based immigration policies with a humanitarian focus and extensive family reunification schemes.

Third, Australia has never had to deal with a migrant crisis on the scale of that faced by the EU in 2015–16. In these two years, 2.58 million asylum applications were filed in the EU,¹⁸ the vast majority following irregular entry. The Austral-

¹⁶ See, for example, Italian Coalition for Civil Liberties and Rights, *Guidance on Rescue Operations in the Mediterranean* (25 September 2018), accessed at <https://cild.eu/en/2018/09/25/kyr-guidance-rescue-operations-mediterranean/> on 4 October 2018.

¹⁷ D. G. Papademetriou et al., *In Search of a New Equilibrium: Immigration Policymaking in the Newest Era of Nativist Populism*, Transatlantic Council on Migration and the Migration Policy Institute (November 2018), 21.

¹⁸ Eurostat, 'Asylum and First Time Asylum Applicants by Citizenship, Age and Sex: Annual Aggregated Data (Rounded)' (24 September 2018).



ian peak was in 2011–13, when approximately 33,000 asylum seekers sought protection in the country.¹⁹ Since 2013 the Australian coastguard and navy have transferred only some 3,000 people to the islands.²⁰ The Australian model has been applied to very small numbers of migrants. In contrast, there have been times when the US was faced with numbers similar to those that confronted the EU in 2015–16. In each of the years 1998, 1999 and 2000, more than 1.5 million migrants were apprehended at the US–Mexico border.²¹ Nevertheless, it has been much easier for the US government to predict the land-based economic immigration from and through Mexico, which continues to date, than it was for the EU to foresee the 2015–16 migration crisis.

Fourth, Australia has set up offshore asylum processing on islands belonging to small neighbouring countries. Nauru and Papua New Guinea (PNG) are weak nations, highly dependent on Australia. The US has been processing asylum applications on its military base in Cuba. The EU does not currently have access to such isolated and protected territories where it could conduct offshore asylum processing in a safe manner. The Greek islands cannot be used under the current circumstances.

Fifth, the countries in the EU's neighbourhood are themselves parts of large migrant-producing continents: Asia and Africa. To some extent the EU shares this feature with the US, whose south-western border is much more exposed to irregular migration than, for example, the EU's eastern border. Nevertheless, the EU's southern land border in the Balkans is unique in that it is exposed to irregular migration by people who have left violent conflicts or underdeveloped countries, crossed the sea and then landed in Europe en route to one of the member states.

Sixth, Australia does not have a bill of rights and is not bound by any regional human rights convention. US courts have adopted immigration rulings that interpret the country's international obligations in a rather loose manner. In contrast, European courts, and the (Council of Europe's) European Court of Human Rights in particular, interpret the states' international obligations very strictly.

¹⁹ Save the Children and UNICEF, *At What Cost? The Human, Economic and Strategic Cost of Australia's Asylum Seeker Policies and the Alternatives* (2018), 9.

²⁰ UNHCR, 'UNHCR Urges Australia to Evacuate Off-Shore Facilities as Health Situation Deteriorates' (12 October 2018), accessed at http://www.unhcr.org/news/briefing/2018/10/5bc059d24/unhcr-urges-australia-evacuate-off-shore-facilities-health-situation-deteriorates.html?utm_source=NEWS&utm_medium=email&utm_content=1st+section+1st+story+unhcr&utm_campaign=HQ_EN_therefugeebrief_external_20181012 on 18 October 2018.

²¹ This US Border Patrol data is available here: C. Bialik, 'Border Apprehensions Increased in 2018—Especially for Migrant Families', Pew Research Center, accessed at <http://www.pewresearch.org/fact-tank/2019/01/16/border-apprehensions-of-migrant-families-have-risen-substantially-so-far-in-2018/> on 14 February 2019.



All these factors call for unique EU solutions. Effective border management needs to be matched by intensive cooperation with neighbouring countries. This effort needs to be even greater than that made by, for example, the US vis-à-vis governments in Central America.

The EU as an example on migration governance

Although this may seem an exaggerated claim in view of the EU's current problems with migration, it is argued here that the EU's asylum legislation is among the most developed in the world. The level of legal rights afforded to asylum seekers is not matched by other developed nations. What is lacking in Europe is the implementation of legislation and a political consensus on migration, border control, and search and rescue policies.

It is also argued that good governance and the rule of law are criteria that the countries of origin must meet if they are to be able to profit from population growth and offer prospects to their young people. And despite growing internal problems, the EU continues to set an example to others when it comes to good governance, democracy and transparency.

As the EU's *Global Strategy for the European Union's Foreign and Security Policy* (2016) suggests, '... fragility beyond our borders threatens all our vital interests. By contrast, resilience—the ability of states and societies to reform, thus withstanding and recovering from internal and external crises—benefits us and countries in our surrounding regions.' The *Global Strategy's* focus on widening 'the reach of international norms, regimes and institutions' could readily be applied to the area of migration governance.

Some of the legal preconditions for third countries to work with the EU on migration issues are already in place: most countries in the immediate EU neighbourhood are signatories of the Refugee Convention.²² In addition, all of the EU's maritime neighbours have signed the conventions that govern search and rescue.

However, although many countries in North Africa have fairly effective border controls, they have not developed effective asylum policies. In December 2018, Niger took a pioneering step by adopting the first African law for internally dis-

²² There are two exceptions: Libya and Turkey. Libya has not signed the 1951 Refugee Convention and does not have asylum legislation. However, it has ratified the 1969 Organisation for African Unity convention on refugees (The Organisation for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969). Although Turkey applies significant limitations to the Refugee Convention, it has its own asylum rules and hosts record numbers of refugees.



placed persons (IDPs). The law is based on the Kampala Convention, a 2009 African Union treaty that sets forth the principles for the protection of IDPs.²³

EU bodies have recognised the potential for the neighbouring countries to cooperate on the issues of irregular migration. As early as 2005 the European Commission proposed the establishment of Regional Protection Programmes. These EU-assisted programmes were supposed to lead to ‘durable solutions’: ‘repatriation, local integration or resettlement in a third country if the first two durable solutions are not possible’.²⁴ Between 2004 and about 2014, several such programmes were implemented in Africa and Eastern Europe. They focused on capacity building for the asylum and refugee protection systems. The success of these programmes has been limited due to a lack of coordination between the various actors, a lack of project visibility, and insufficient understanding and engagement on the part of the partner countries.²⁵ More recently, the EU’s *Global Strategy* clearly highlighted the intention to ‘support transit countries by improving reception and asylum capacities, and by working on migrants’ education, vocational training and livelihood opportunities.’

Positive examples already exist. The Spanish experience of working with Morocco shows that multilateral ties based on trade, intelligence and fighting terrorism are necessary to establish trust with the government in question. This trust is necessary for building functioning ties on migration and border control. However, EU member states currently do not have a sufficient presence in Africa through embassies and trade representations.

Assisting refugees abroad

The EU is not the main refugee-hosting bloc. The number of refugees in other countries is many times greater than the number being hosted within the Union. For example, according to World Bank data, Turkey, Lebanon and Jordan hosted almost eight million refugees in 2017, while the EU hosted over two million.²⁶ Nevertheless, European states have money that the countries near sources of

²³ Reuters, ‘Niger Adopts Law to Protect Displaced People in First for Africa’, 6 December 2018.

²⁴ European Commission, *Regional Protection Programmes*, COM (2005) 0388 final (1 September 2005), accessed at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52005DC0388> on 17 October 2018.

²⁵ European Council on Refugees and Exiles, *New Research Takes Stock of EU Regional Protection Programmes and Assesses Their Potential* (Brussels, 2015), accessed at <https://www.ecre.org/new-research-takes-stock-of-eu-regional-protection-programmes-and-assesses-their-potential/> on 17 October 2018.

²⁶ World Bank, ‘Refugee Population by Country or Territory of Asylum’, accessed at <https://data.worldbank.org/indicator/SM.POP.REFG> on 28 January 2019.



conflict do not have. Europeans, and the entire West, have an interest in providing funding to countries in the developing world to assist refugees.²⁷

When it comes to economic migration, however, the EU needs to realise that reducing poverty in developing countries is not necessarily going to reduce the desire to emigrate to Europe (and the West). A recent study by the European Commission's Joint Research Centre reveals that the existence of diasporas, family reunification, aspiration for a better life and development of skills, rather than sheer desperation, are the main drivers of migration in general. The study identified conflicts, state fragility and poverty in the countries of origin, and diasporas in the countries of destination, as important drivers for people seeking asylum.²⁸ Where internal conflict is the source of forced migration, the lack of legislation and protection in the countries of transit can have an effect on migrants heading for Europe.

The total funds regularly donated by the EU and its members make the bloc the largest global donor to the United Nations High Commissioner for Refugees (UNHCR). These donations came to some \$1.5 billion in 2017 alone.²⁹ Turkey, Syria, Jordan and Lebanon are prominent recipients. The EU also acts as a direct donor to third countries. For example, the Jordan Compact, which the EU and Western donors concluded with the Jordanian government in 2016, has established special economic zones for Syrians in Jordan. The Compact seeks to mobilise the Western private sector to create jobs locally and—with very limited success so far—to open European trade with Jordan. In Lebanon and Turkey, the EU finances improvements to the health, education and water infrastructures, which benefit the local population as well as refugees from Syria. With the EU–Turkey deal, the bloc has pledged €6 billion in the Facility for Refugees in Turkey.³⁰

In Libya the joint African Union–EU–United Nations Taskforce allows migrants to be protected through Assisted Voluntary Return and Resettlement. The EU's support to Libya for migration has so far amounted to €286 million. The focus has been on providing basic services and local employment opportunities, and assisting and protecting vulnerable migrants. The funding is also used to improve conditions for migrants and refugees at disembarkation points and even

²⁷ Betts and Collier, *Refuge: Transforming a Broken Refugee System*.

²⁸ S. Migali et al., *International Migration Drivers: A Quantitative Assessment of the Structural Factors Facing Migration*, European Commission, JRC Science for Policy Report (2018).

²⁹ UNHCR, '2017 Contributions to UNHCR Programmes' (2018), accessed at <http://www.unhcr.org/donors.html> on 26 October 2018.

³⁰ European Council, 'EU–Turkey Statement' (18 March 2016).



in detention centres.³¹ However, there seems to be little in the way of holding the recipients of EU funding accountable. The abuse of migrants is rampant.

Protecting the EU's security interests abroad

The EU's security interests reach far beyond its own borders. Addressing the root causes of fragility and insecurity is very much in the EU's interest. It has to be admitted that over the past two decades irregular migration to the EU has increased partly as a result of Western military operations aimed at regime change. This has happened despite successes in toppling the rulers in Afghanistan, Iraq and Libya. Also, experience gained from the EU's involvement in Afghanistan shows the risks of underestimating the importance of infrastructure and education.

Common Security and Defence Policy and missions outside the EU have a role to play in protecting the EU's security interests, as do NATO, measures to target migrant smuggling and joint investigation teams in cooperation with other countries.

Articles 42 and 43 of the Lisbon Treaty provide for 'missions outside the Union for peace-keeping, conflict prevention and strengthening international security in accordance with the principles of the United Nations Charter.' These goals can be attained by 'civilian and military means' including 'joint disarmament operations, humanitarian and rescue tasks, military advice and assistance tasks, conflict prevention and peace-keeping tasks, tasks of combat forces in crisis management, including peace-making and post-conflict stabilisation. All these tasks may contribute to the fight against terrorism, including by supporting third countries in combating terrorism in their territories.'

Where the EU has been acting in cooperation with the existing regime, it has established partnerships that are helping to stem irregular migration. Military and civilian–military missions established under the Common Security and Defence Policy have aimed at facilitating the delivery of humanitarian aid, establishing safe and secure environments for local communities, improving regional and international cooperation against terrorism and organised crime, and reinforcing the rule of law. Examples include the following:

- EU Military Operation in the Democratic Republic of the Congo (2006),
- EU Military Operation in Chad and the Central African Republic (2008–9),
- EU Capacity Building Mission Sahel Niger (since 2012),
- EU Border Assistance Mission in Libya (since 2013),

³¹ European External Action Service, 'EU–Libya Relations' (24 September 2018), accessed at https://eeas.europa.eu/headquarters/headquarters-homepage_en/19163/EU-Libya%20relations,%20factsheet on 28 September 2018.



- EU Capacity Building Mission Sahel Mali (since 2014).

The first two missions listed serve as examples of providing ‘hard’ military security, including the protection of civilians. The other three missions have generally been successful in meeting their stated objectives. They are assisting, however slowly and gradually, in establishing the rule of law in the countries involved. In addition, the joint African Union–EU–UN Task Force has succeeded in freeing people from Libyan detention centres and in the emergency removal of migrants from Libya to Niger. The EU’s Partnership Framework on Migration from 2016 covers the existing civilian–military missions and operations, and envisages further ones as required.

As for the role of NATO, countering irregular migration and migrant smuggling in the Mediterranean is not a priority for the alliance. Thus, in areas such as migration controls, it is important that the EU should act as a whole. But as was highlighted during the 2018 NATO summit, the Alliance has a role to play in conflict prevention and in the protection of civilians in armed conflicts.³²

Migrant smuggling generates billions in revenue. The figure estimated for 2015 was some €4.5 billion.³³ These smuggling operations support criminal networks and even terrorist organisations in war zones. With proper migration and refugee governance, the number of people turning to smuggling networks would decrease.

Anti-smuggling cooperation with Niger has been successful, having cut the number of migrants passing north from 334,000 in 2016 to some 50,000 in 2018.³⁴ However, the security measures aimed at smuggling networks have not been accompanied by sufficient support for alternative economic activities.

Finally, Spain has been working with Mauritania inside the latter’s territory, deploying specialised agents in joint investigation teams to work with local authorities and disrupt the route to Spain’s Canary Islands. The EU has adopted this model and currently runs a similar project in Niger.³⁵ Spanish agreements with Mauritania,

³² NATO, ‘Brussels Summit Declaration: Issued by the Heads of State and Government Participating in the Meeting of the North Atlantic Council in Brussels 11–12 July 2018’, accessed at https://www.nato.int/cps/ic/natohq/official_texts_156624.htm on 26 October 2018.

³³ R. Gladstone, ‘Smugglers Made at Least \$5 Billion Last Year in Europe Migrant Crisis’, *New York Times*, 17 May 2016.

³⁴ P. Ford, ‘In High Stakes Experiment, EU Migration Policy Moves Front Lines to Niger’, *The Christian Science Monitor*, 19 November 2018, accessed at <https://www.csmonitor.com/World/Africa/2018/1119/In-high-stakes-experiment-EU-migration-policy-moves-front-lines-to-Niger> on 25 November 2018.

³⁵ European Commission, ‘Managing Migration: Commission Calls Time on Asylum Reform Stalling’ (Brussels, 4 December 2018), accessed at http://europa.eu/rapid/press-release_IP-18-6627_en.htm on 4 December 2018.



Morocco and Senegal that date back to the 2000s provided for joint patrols and became models for Frontex operations across the Mediterranean.

Border control and search and rescue

For several years now European politicians have been preoccupied with a set of issues around border control, search and rescue, anti-smuggling operations on the sea and disembarkation. The 2015–16 migration and humanitarian crisis amply demonstrated that the member states, when acting in isolation, have difficulties adequately guarding the EU's external borders. In particular, this holds for the EU's south-eastern members, including those in the Western Balkans. In total the EU member states have more than 100,000 border guards,³⁶ their primary mandate being to protect the national borders. Even where capacity or skills are lacking at a particular moment or in a specific geographical area, governments tend to be reluctant to request assistance from Frontex. The existing system is fragmented. According to a Frontex survey from 2017, 50 separate authorities, under 30 ministries, are active in marine surveillance along the EU's southern borders.

Border control arrangements with other countries

Hope is increasingly being put in border control arrangements with non-EU countries. Established in 2015, the Emergency Trust Fund for Africa aims to improve stability and address the root causes of irregular migration. In North Africa and the Sahel, the Fund's goals include better border management. Thus far €4 billion has been mobilised under this Fund.³⁷ The EU and certain member states have been providing additional financial and technical assistance to non-EU countries, the objectives being to take measures against smugglers, intercept migrant boats, save lives and bring migrants back to the territories of those third countries.

Separately, the EU–Turkey deal represents a new EU approach to third countries in that it focuses solely on irregular migration. As a result of the deal, the number of irregular arrivals from Turkey has fallen by 97% relative to early 2016.³⁸ The Turkish government prevents migrants and refugees from leaving the Turkish coast, intercepts in Turkish waters those boats that do manage to depart (thus saving lives) and offers protection to refugees in Turkey. (It often deports Iraqis and Afghans, who are not covered by the deal.) Some parts of the deal are not being implemented. These include fast-track border-asylum procedures on Greek islands and the resettlement of Syrian asylum seekers in the EU. The Turkey deal enables refugee protection in the hosting country, penalises irregular arrivals and, instead, favours regular resettlements of selected individuals in

³⁶ European Commission, Factsheet, 'Securing Europe's External Borders: A European Border and Coast Guard Agency' (November 2017), accessed at http://europa.eu/rapid/press-release_IP-17-123_en.htm on 4 October 2018.

³⁷ Ibid.

³⁸ European Commission, 'Managing Migration: Commission Calls Time on Asylum Reform Stalling'.



the EU. The latter two factors are very much in line with the approaches that have been adopted by Australia and the US.

The arrangements between Italy and Libya (re-established in 2017) provide another example of working with another country. In the second half of 2018, irregular arrivals from Libya were down by 80% compared to early 2017. In June 2018, Libya, with assistance from the EU, claimed control over the search and rescue region that it had formally agreed to as early as 2004.³⁹ The Libyan coastguard intercepts smugglers' boats in the Libyan search and rescue zone and brings them back to the Libyan shore, using ad hoc disembarkation arrangements. Several factors are making the EU's collaboration with Libya more problematic than its arrangements with Turkey:

- There is little in the way of a functioning administration in Libya.
- Standards for protection and safety are incomparably lower in Libya. People returned to Libya from unseaworthy boats in the Mediterranean are kept in inhumane conditions. Human rights abuses are disturbingly common.
- Libya is not an EU candidate country, and thus the EU has less leverage over the authorities there.
- There is no resettlement component in the Italy–Libya deal.
- Due to worsening conditions in the country, the UNHCR is organising, thanks to cooperation with Niger, emergency evacuations of refugees from Libya to Niger.
- A case that involves drownings and maltreatment by the Libyan coastguard is now before the European Court of Human Rights.

Search and rescue

Due to a lack of engagement abroad and also difficult circumstances in recent years, the EU has allowed a situation to develop where people, often with the support of their families, risk their lives and hope they will be rescued in the sea and brought to Europe.

Several member states, especially Italy, as well as EU bodies, have been putting considerable resources into search and rescue operations in the Mediterranean

³⁹ A. Cuddy, 'Prompted by EU, Libya Quietly Claims Right to Order Rescuers to Return Fleeing Migrants', *Euronews*, 6 July 2018, accessed at <https://www.euronews.com/2018/07/06/prompted-by-eu-libya-quietly-claims-right-to-order-rescuers-to-return-fleeing-migrants> on 4 October 2018; T. E. Aalbertsa and T. Gammeltoft-Hansen, 'Sovereignty at Sea: The Law and Politics of Saving Lives in the Mare Liberum', *Journal of International Relations and Development* 17 (October 2014), 14.



Sea. However, in 2018 the Italian government began breaking the customary link between search and rescue and bringing rescued passengers to a port in Europe.

Operation Sophia

Having obtained a UN Security Council mandate, the EU set up EUNAVFOR MED in 2015. Later renamed 'Operation Sophia', the mission was aimed at countering migrant smuggling in the Mediterranean. It generally operates *within* the Libyan search and rescue zone, but outside Libyan territorial waters.⁴⁰ The mission also trains the Libyan coastguard and navy, and contributes to the implementation of the UN embargos on arms and on the illegal trafficking of oil exports from Libya.

Critics contend that the mission has been rather ineffective in catching people smugglers or drug and oil traffickers. According to one source, not a single ship smuggling narcotics has been intercepted. An unintended consequence of Operation Sophia is that it has improved conditions for people-smuggling operations. This is due to the presence of EU ships near the Libyan coast, which are obliged to rescue migrants that are released into the open sea by the smugglers. At the end of 2017, Sophia ships had confiscated more than 500 of the people smugglers' vessels.⁴¹ This resulted in Libya-based smugglers putting migrants on inflatable dinghies of poor quality and sending them north. As a result, the death toll for migrants has risen.

Since 2016, Sophia, Frontex and national operations have saved and brought to the EU a total of around 690,000 irregular migrants.⁴² The vast majority were brought to Italy. Attempts to explain the election of the current populist government in the country cannot ignore this fact.

Disembarkation

The situation is complicated by disagreements over the rescue of migrants and their disembarkation. These disagreements play out on (at least) two levels: (1) between the governments of Mediterranean countries and (2) between border forces and coastguards, on the one hand, and non-governmental organisations (NGOs), on the other. Although these organisations' operations in the Mediterranean save lives that would otherwise have been lost, these same operations can have the effect of increasing the demand for Africa-based people smugglers. At the time of completing this text, the activities and the number of private rescue operations were much reduced in comparison to their peak in 2015.

EU attempts to help build 'disembarkation platforms' in non-EU countries have so far been unsuccessful. This is due to a lack of partner countries interested in creating such platforms.

⁴⁰ European Commission, *Irregular Migration via the Central Mediterranean: From Emergency Responses to Systemic Solutions* (2 February 2017).

⁴¹ N. Nielsen, 'Libyan Militia Cash In on EU's Anti-Smuggling Strategy', *EUobserver*, 5 October 2018.

⁴² This figure is from J. C., 'State of the Union 2018: The Hour of European Sovereignty' (Strasbourg, 12 September 2018), 7.



Australia

The Australian approach to offshore processing is based on the premise that irregular migrants should be prevented from ‘jumping the queue’ ahead of regular migrants. The legality of the model has been confirmed by the country’s courts. This model includes interception at sea by the Australian navy or border force, detention, and processing in a third country: Nauru⁴³ or, until recently, Manus Island in PNG.⁴⁴ Both PNG and Nauru are signatories to the Refugee Convention. Asylum seekers on their territories have their freedom of movement restricted.

In contrast, the High Court of Australia declared government plans to transfer asylum seekers to Malaysia for processing unlawful because the country has never ratified the Refugee Convention and does not offer asylum protection.

The US

The US government considers interception in the Atlantic Ocean a national security measure. In contrast to rulings by the European Court of Human Rights, the US Supreme Court ruled in 1993 that the Refugee Convention does not apply to US coastguard activities in international waters (‘on the high seas’). Instead, it ruled that US refugee legislation prevails. This ruling authorised intercepting Haitian immigrants and returning them directly to Haiti, without their asylum claims being examined. During large migrant waves in the recent past, people from boats intercepted by the US navy have been taken to the Guantánamo Bay Naval Base, a US military base in Cuba.

In contrast to the maritime routes, the US land border with Mexico has been relatively porous, allowing large numbers of undocumented immigrants to enter the country. The US economy relies on illegal labour, and sanctions against offending employers are laxly enforced. Undocumented migrants make up 5% of the US workforce but only around 1% of the labour force in the EU.

Asylum and resettlement

Asylum and resettlement constitute an additional category of contentious migration issues. The EU processes more than half of the world’s asylum claims.⁴⁵ However, most of the world’s refugees are located outside the EU as most countries do not have functioning asylum systems and do not offer legal asylum. Part of the

⁴³ Nauru is a small independent island in the Pacific, about 3,000 kilometres north-east of Australia.

⁴⁴ Papua New Guinea is an island nation close to Australia. It was formerly under Australian administration.

⁴⁵ UNHCR, *Global Trends: Forced Displacement in 2017* (2018), 41.



European problem is the EU's overarching policy to register all irregular arrivals. This policy has incentivised migrants to ask for asylum in the EU countries of their choice. And contrary to what national governments in front-line states claim, they often avoid registering arrivals.

Unlike Syrian migrants, most Africans that head for Europe are economic migrants. Some 25% qualify for humanitarian protection, but only a small fraction are convention refugees. Due to the existing EU and national legislation, they are all treated primarily as asylum seekers.

The creation of the EU's asylum buffer zone on several Greek islands, such as Lesbos, has not resulted in speedy asylum procedures. Many irregular migrants have been surviving on the islands with only bare necessities and without the prospect of learning within a short period of time whether their asylum applications have been accepted. At the end of 2018, the Greek government began moving the migrants to the Greek mainland. Despite the almost €1 billion in asylum funding that the EU has given Greece since 2014,⁴⁶ the Greek asylum system is dysfunctional.

The German coalition agreement of 2017 set an annual indicative ceiling of 180,000 to 220,000 for the number of refugees that the country is ready to accept. This figure presumably covers both resettlement and irregular arrivals.

EU asylum procedures

The EU has not yet succeeded in harmonising its asylum and resettlement policies. One sticking point is the distribution of asylum seekers between the member states. Another is the harmonisation of asylum standards. Despite attempts at harmonisation, national asylum procedures across the EU continue to differ in many aspects, including recognition rates, appeals and the length of the asylum procedure. Without agreement on these issues, external action will continue to be complicated. The EU cannot escape this discussion because, despite its efforts, irregular migrants continue to arrive and at least some of them qualify for asylum.

In the Netherlands most asylum claims are decided in less than two months, including appeals. In most other countries, the typical asylum procedure takes months, sometimes years. Nevertheless, where asylum claims are rejected, the fast Dutch asylum procedure does not result in improved returns to the countries of origin. The Dutch return rate does not exceed the EU average, which means that illegal migrants remain in the Netherlands.⁴⁷

⁴⁶ European Commission, *Managing Migration: EU Financial Support to Greece* (April 2018).

⁴⁷ S. Mananashvili, 'EU's Return Policy: Mission Accomplished in 2016? Reading Between the Lines of the Latest EUROSTAT Return Statistics', International Centre for Migration Policy Development (May 2017), accessed at <https://www.icmpd.org/publications/policy-briefs/> on 9 February 2019.



Asylum processing abroad

As a complement to the existing principle of territorial asylum, the EU and several member states have launched small-scale initiatives aimed at providing asylum to select individuals in the territories of North African states. France is interviewing asylum seekers, prescreened by the UNHCR, at a processing centre in Niger. Historically some countries—including Denmark, Germany, France and Belgium—have offered limited capacity for asylum interviews at embassies.

The EU has also been involved, temporarily, in large-scale extra-territorial asylum processing. Locations have included the Nouadhibou centre in Mauritania, which was set up in the mid-2000s in cooperation with Morocco and was used for several years until its closure. The legal status of this temporary centre was never clarified during its existence.⁴⁸

Finally, the EU–Turkey agreement has been possible due to Turkey’s reliability as a partner and its administrative capacity. The Turkish government implements its own asylum and border control policies; therefore, no EU asylum-processing centres have had to be set up outside the EU.

Resettlement

Resettlement is the selection and transfer of refugees from a country of refuge to a third state which has agreed to admit them as refugees with permanent residence status. The status provided ensures protection against refoulement and provides a resettled refugee and his/her family or dependants with access to rights similar to those enjoyed by nationals.⁴⁹ Resettlement allows for security checks before a person reaches the territory of the receiving state. It is important to state that in the global and European context, resettlement represents a very small part of the refugee movements. For example, in 2017 only 65,000 refugees were resettled under the UNHCR, which administers the vast majority of global resettlements.⁵⁰

Resettlement to the EU has a long history, with national embassies typically selecting individuals after UNHCR prescreening. However, except for countries such as the UK, Norway, Sweden and Germany, EU states do not resettle significant numbers of applicants. The EU–Turkey deal has a resettlement component,

⁴⁸ G. Laganà, *Does Offshoring Asylum and Migration Actually Work?*, Open Society European Policy Institute (September 2018).

⁴⁹ UNHCR, ‘Information on UNHCR Resettlement’, accessed at <https://www.unhcr.org/information-on-unhcr-resettlement.html> on 4 December 2018.

⁵⁰ UNHCR, ‘70,601 UNHCR Submissions and 51,143 Departures: January–November 2018’, accessed at <https://www.unhcr.org/resettlement-data.html> on 1 February 2019.



although due to the EU's inactivity on this front, this component has been miniscule when compared to the numbers hosted by Turkey. Only some 18,000 refugees have been resettled in the EU under the deal and two other EU–Turkey schemes.

Australia

Australia and the US have combined the offshore asylum processing of irregular arrivals with robust refugee resettlement programmes. (The countries' generous policies on the immigration of skilled labour constitute an important additional element.) The resettlement element covers

- those refugees who have been prescreened by the UNHCR,
- groups that are the focus of humanitarian concern,
- individuals admitted through family reunification,
- small numbers of 'irregular arrival' refugees from other refugee-receiving countries, based on bilateral deals.

The existing Australian model penalises irregular ('spontaneous') immigration and encourages a controlled asylum process conducted by third countries outside Australia with UNHCR support. The model, whose future is not clear, has included the following components:

1. The Refugee Convention is interpreted in such a manner that it does not apply to more than 3,500 Australian islands. If migrants arrive at those islands, they cannot apply for asylum.
2. Asylum claims by irregular migrants are processed outside the Australian mainland. Only medical cases are transferred to the mainland. Between 2012 and 2017, the figure for those transferred to the mainland was 494,⁵¹ which represents about a sixth of those interned on the islands. In return for financial support, the nations of Nauru and PNG provide basic welfare while the UNHCR processes asylum claims. A private company runs the processing centre in Nauru. Asylum seekers with successful claims are transferred from Nauru and PNG to third countries, including the US. (The International Organisation for Migration (IOM) has arranged for unsuccessful applicants to be transferred back to their home countries.)
3. This component has recently been derailed. Neither Nauru nor PNG has ever offered permanent settlement to successful asylum seekers. In 2016 the Supreme Court of PNG ruled that the detention of people at the male-only centre on Manus Island was unconstitutional. The agreement in Nauru also ran into legal difficulties. In response the Australian government has closed the PNG processing centre. The PNG-based refugees have been forced out of the compound, and no other country is willing to accept them.

⁵¹ UNHCR, 'UNHCR Urges Australia to Evacuate Off-Shore Facilities as Health Situation Deteriorates' (12 October 2018).



The recent withdrawal of PNG from the scheme shows that there are certain risks of conducting the asylum process under a host country's legislation. For Australia it has meant that the country can no longer use Manus Island as an offshore processing centre.

4. There is a separate programme for resettlement to Australia, and this encourages asylum seekers to follow legal routes. In terms of the number of refugees resettled, in 2017 Australia ranked fourth in the world, after the US, Canada and the UK.

Importantly, the 'ferocious policing' of Australia's borders serves as a condition for public acceptance of high levels of labour immigration into the country.⁵²

The US

Like their Australian counterparts, US asylum practices have changed over time and have differed depending on the groups of asylum seekers concerned. The US model is more lenient than the Australian one when it comes to both irregular arrivals on land and those already present on US territory. Asylum applications are accepted from those who have entered the country illegally and even during a removal hearing.⁵³

Irregular arrivals by sea are strongly discouraged. Asylum procedures for those already present on US soil or intercepted at sea are complemented by a significant resettlement programme: for refugees entering by regular routes, the US ranks first in the world in terms of the number of refugees resettled. When it comes to interceptions at sea, the following should be noted.

The US Supreme Court ruled in 1993 that the Refugee Convention does not apply outside US territory. US practice is governed by national legislation, rather than the Refugee Convention. It allows a degree of discretion to border patrol officers. Individuals intercepted on the sea are subject to return, unless they meet the 'credible fear' test. If migrants want to seek asylum, they need to demonstrate a 'physical manifestation' of fear—otherwise, they are required to return to their home countries. Although details of the practice are not clear, it seems that border patrol officers can use their discretion in deciding who passes this 'shout test'. Those who do are referred to a trained asylum officer. In a private interview (typically during detention at the US military base at Guantánamo Bay),

⁵² *The Economist*, 'Not Huddled, but Masses', Special Report Australia, 27 October – 2 November 2018, 10.

⁵³ J. Zong and J. Batalova, 'Frequently Requested Statistics on Immigrants and Immigration in the United States', Migration Policy Institute (26 February 2015), accessed at <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-0/> on 4 October 2018.



this officer then assesses whether there is a credible fear of harm if they are returned. Where asylum claims are successful, refugees are resettled to third countries that have agreed to take them, including Australia, Nicaragua and Spain.

- The migrants who do not pass the ‘shout test’ (i.e. the majority) are returned directly to the country of origin.
- In Cuba potential asylum seekers headed for the US are interviewed at the US Embassy and resettled to the US when successful (until 2015, interviews were also conducted at the Embassy of Switzerland). During the Obama administration, the US set up asylum centres to examine claims by children in El Salvador and other Central American countries.⁵⁴
- As in Australia, the resettlement of successful asylum seekers from offshore centres to the US is an exception rather than the rule.
- The US takes in far more refugees through resettlement than any other country.
- The US has a long-term policy of setting annual ceilings on the number of resettled refugees. These ceilings can change with each presidential administration and reflect both the international and domestic situation. Sometimes the number of admitted refugees is slightly below the annual ceiling. In 2016 the US resettled approximately 85,000 refugees, which was in line with the annual ceiling. The ceiling for 2019 will be 30,000, according to a recent announcement.
- Both Australia and the US redirect parts of their resettlement programmes to third countries with which they have entered into agreements (such an agreement exists between Australia and the US themselves). This is to discourage targeted asylum seeking, to which no refugee is entitled.

Finally, in early 2019, the US began implementing a policy whereby migrants who have crossed the US southern border have to wait in Mexico indefinitely while their US asylum ‘requests are processed.’⁵⁵ Like in the EU, the US asylum system remains overwhelmed, with hundreds of thousands cases pending in 2019.⁵⁶

Returns and readmissions

Despite being expensive and unpleasant, return policies are a necessary component of the EU’s asylum and border control system. Without effective returns, an EU internal migra-

⁵⁴ Laganà, *Does Offshoring Asylum and Migration Actually Work?*

⁵⁵ N. Miroff, ‘Trump Administration Reaches Deal That Will Force Asylum Seekers to Wait in Mexico as Cases are Processed, DHS’s Nielsen Says’, *Washington Post*, 20 December 2018.

⁵⁶ J. Gibney, ‘Asylum Is as American as Apple Pie: Lawmakers Should be Trying to Fix the System, Not Dismantle It’, *Bloomberg Opinion*, 9 December 2019.



tion policy begins to lose meaning. So far the EU has not been very successful in returning rejected asylum seekers and overstayers to their countries of origin. The overall return rate is currently around 36%. This low rate has been due to uncooperative countries of origin, the unduly lenient interpretations of migrants' rights, the costs involved, difficulties with establishing identity and the police effort required.

Moreover, cooperation between the EU member states has not been ideal in this regard, with scheduled Frontex flights sometimes flying half-empty after they have stopped in several EU airports.

Successful national-level readmission agreements have been reached by offering powerful incentives to cooperating third countries. First, Morocco was motivated to sign the 1992 agreement with Spain by its desire to obtain an advanced status in its political and economic relationship with the EU, one that was eventually granted in 2008. To development assistance Spain linked migration management, provisions for labour migration and border protection. The Spanish effort was part of its 'migration diplomacy' offensive of the 2000s.⁵⁷ Second, the 2007 Italy–Egypt readmission deal offered Egypt a bilateral debt swap agreement and trade concessions on agriculture. The Italian government used temporary entry quotas on legal migration for Egyptian nationals as leverage in negotiating the deal.⁵⁸

To date it has been easier for individual EU states, rather than the EU, to establish effective return and readmission agreements with other countries. This is because an individual government can wield significant leverage while collective EU efforts tend to be slow and marred by conflicting interests. EU-brokered deals might be less costly than the deals that multiple member states close with individual third countries. As regards the way in which the EU–Turkey deal was negotiated, this agreement stands between these two extremes. That is, it was closed by Germany but subsequently approved by the EU28. To date, the number of failed asylum seekers who have been returned from the Greek islands to Turkey has been disappointing. This is due to administrative difficulties on the Greek side.

Separately from returns from the EU territory, the EU is funding voluntary returns to home African countries from Libya. These returns are conducted with the

⁵⁷ K. Senge, 'Co-Responsibility Between Countries of Origin, Transit and Destination: Lessons from Spain's Experience with Migration', *European View* 17/1 (2018), 67.

⁵⁸ P. Cuttita, 'Readmission in the Relations between Italy and North African Mediterranean Countries', Middle East Institute (1 August 2010), accessed at <https://www.mei.edu/publications/readmission-relations-between-italy-and-north-african-mediterranean-countries> on 30 January 2019.



assistance of the IOM and the UNHCR.⁵⁹ Many returns are voluntary only in the sense that the individuals in question have learned that they will not be allowed to stay. In addition, EU governments are increasingly offering migrants cash incentives to return to their countries.

Australia and the US

Like the EU, the US struggles with deporting illegal migrants. During the eight years of the Obama administration, some 5.3 million were removed from US soil (the precise numbers are a matter of dispute). Some immigrants are subject to a 'catch and release' policy (in practice, this means bussing Mexicans back to their country). Others are fingerprinted and formally removed.

One important reason for the relative effectiveness of the US return policy is the link with US visa policy. Although the literature on migration provides no evidence that the existence of legal channels reduces irregular migration,⁶⁰ the US government makes use of the legal migration channels by threatening to suspend them for governments that are reluctant to accept their own nationals when the US attempts to return them.

Australia is also facing challenges in its return policy from the mainland. Between 2010 and 2016, the number of deportees increased from 877 to 1,752 per year (it is important to note that the total number of irregular arrivals is incomparably lower than in the US).

Detailed recommendations

It should be noted that the implementation of some of the ideas presented in this section would require substantial political will, concerted long-term effort and cooperation between EU governments.

Expanding the area of migration governance

- Without a substantial presence and multilateral ties in Africa, the EU will not create the trust that is needed to found functioning cooperation on migration. Therefore, a long-term goal for the EU and its member states should be to establish more **embassies, consulates, trade representations and cultural centres** on the African continent. Setting favourable tax policies for African countries is a must, and so is ensuring that they have access to EU markets, including capital markets.

⁵⁹ European External Action Service, 'EU-Libya Relations'.

⁶⁰ International Centre for Migration Policy Development, *Vienna Migration Conference 2018, From Crisis Management to Future Governance, Background Paper* (October 2018), accessed at <https://www.icmpd.org/about-us/vienna-migration-conference/vienna-migration-conference-2018/> on 9 February 2019.



- To address migration problems at their roots, the EU should assist in improving the **quality of administration** in the countries that surround it. In this way the EU will contribute to state-building. Helping countries to fight organised crime is part of this effort.
- The EU should **enlarge the zone of coordinated migrant and refugee governance** so that it includes the countries in the Union's neighbourhood. This it can accomplish by incentivising these countries to adopt and implement asylum and border control legislation.
- Using the existing Regional Protection Programmes, these measures would focus on **durable solutions**: repatriation, local integration or resettlement in a non-EU country. They would serve the EU's short-term interest in stemming irregular migration. They would also serve the EU's long-term interest in there being functional governments in the countries in the EU's neighbourhood.
- The EU should tackle irregular migration by maintaining a law enforcement presence in the Saharan belt for the purpose of **training, improving capacity and equipping the local authorities**. Among other benefits this would improve the EU's early warning and prevention mechanisms.
- To encourage other countries to **implement asylum legislation**, the EU should provide financial and other incentives.

Assisting refugees and migrants abroad

- The EU needs to continue to acknowledge the tremendous **efforts being made by the countries in the vicinity of territories affected by war and conflict**.
- By **funding development in tandem with cooperation on migration**, the EU can prevent the risk of large migrant populations destabilising the partner countries.
- The EU should continue providing humanitarian funding and structural support to countries of first arrival. It should **mobilise the Western private sector and lower trade barriers** to allow refugees in the hosting countries not only to survive but to thrive.
- A large **portion of the required funding could be provided by the private sector**, provided that governments and international organisations work together. Sole reliance on Western government funding risks creating relationships of dependence.



- In Libya and elsewhere, the EU needs to **introduce robust methods for evaluating the migration-related projects** it finances, to ensure that recipients are held accountable for how they act. This is needed to protect the lives of migrants and to ensure that minimum welfare standards are maintained—but also to know what EU taxpayers' money is being spent on.

Protecting the EU's security interests inside the EU

- The black labour market in Europe creates demand for the migrant smuggling business. The EU's national governments need to **introduce tough sanctions that could be imposed on European employers**. Such measures could be introduced within several months. They would not need to be introduced across the entire EU at once.

Protecting the EU's security interests outside the EU

- **Without economic growth there can be no stability and no security.** Economic co-operation with non-EU countries is one of the conditions for improving external security.
- To avoid situations where neighbouring countries become disruptive—as is the case with Libya—the EU should **try to help ensure that order and peace reign in countries that could become unstable in the near future, such as Algeria and Egypt.**
- In relation to both forced and economic migration, the focus should be on **border control at the Mediterranean borders of the North African countries** and the development of national migration and asylum policies in the countries neighbouring the EU.
- The case remains strong for **freeing people from detention centres** and helping them return to their home countries—or where required, resettling them in the EU.
- The EU could **contribute to creating a more stable environment in Libya** by training the country's security forces and assisting in the development of efficient administration and courts. The EU needs to work with not only the internationally recognised government but also municipal governments and civil society.
- **Helping to set up better border controls inside Africa** means registering arrivals and facilitating legitimate commerce, not stopping regional migration. Africans have the same desire for free movement that Europeans have. Economic migration within Africa is beneficial and should be encouraged.⁶¹
- The EU needs to take steps to ensure that **people smugglers are sentenced** either in their home countries or in the EU. **The focus of anti-smuggling operations should**

⁶¹ European Commission, *A Renewed Impetus of the Africa–EU Partnership*, JOIN (2017) 17 final (4 May 2017), accessed at https://eeas.europa.eu/headquarters/headquarters-homepage_en/25429/Joint%20Communication%20for%20a%20renewed%20impetus%20of%20the%20Africa-EU%20Partnership on 19 December 2018.



be shifted from the Mediterranean to both the African and European continents. In this vein, the EU should expand the existing model of using **joint investigation teams** to disrupt smuggling routes.

Securing the EU's external border and controlling search and rescue

- The EU has a legitimate interest in taking action to **prevent dangerous journeys across the Mediterranean**, thus saving lives and reducing the burden of obligations triggered by European search and rescue operations.
- The EU should keep looking for reliable third-country governments with which it can collaborate. To this end it should follow the model of **the EU–Turkey agreement and offer financial incentives**.
- In line with Article 79 of the Lisbon Treaty, and separately from the current moves to strengthen Frontex, **the EU should federalise external border control** in the long run. This could be done by endowing its border agency, Frontex, with the executive power. A border agency with this power would be able to step in when a member state fails to protect the EU's external border. However, this would **be limited to those sections of the external border that the national government in question could not secure**.
- As regards transit countries, the focus should be on border controls and intercepting migrants and returning them to the countries of departure. It should be left to the partner countries concerned to decide how this should be done: by creating '**disembarkation platforms**' to register the rescued passengers, or by means of **ad hoc disembarkation arrangements** for individual ships. This remains a long-term goal for the EU, despite the current lack of available partner governments.
- With regard to the Mediterranean, **the EU should consider halting Operation Sophia**. This would bring to an end the current situation where—albeit unintentionally—the operation is facilitating the smuggling of migrants and their transport to the EU. The training part of Sophia's mandate vis-à-vis the Libyan coastguard could be conducted by Frontex.
- Ships belonging to the member states' national border forces, Frontex and EU military missions must continue saving lives in the search and rescue zones of the EU member states. These ships should **stop active operations to rescue people in the search and rescue zones of non-EU countries**. Moreover, **the EU should encourage and assist the coastguards of other countries**



to undertake search and rescue operations and to bring the rescued individuals back to their own countries. Those saved in the search and rescue zones of the EU member states have to be brought to European shores.

- Irregular migrants intercepted at land borders and airports need to have their **asylum claims examined on EU territory according to the existing rules**. Provisions to facilitate returns need to be in place.

Determining asylum and conducting resettlement

- The Refugee Convention should not be amended as some have been suggesting and the **right of asylum must be preserved**. Nevertheless, the application of the convention needs to be carefully considered. The EU needs to make it clear that there is protection for refugees but not for purely economic migrants. A robust system of trained professionals would be required for this.
- The EU should give **preference to those who apply for, and are granted, asylum through regular channels**, as opposed to those who enter illegally or overstay their visas.
- In the long run, the **existing wide interpretation of the Refugee Convention is not sustainable**. As regards the 2012 court ruling on refoulement, which prohibited Italy from carrying out ‘push-backs’, the EU member states should devise legal strategies to further diminish the maritime area to which the Refugee Convention applies.
- The EU can only reduce its active search and rescue operations (in terms of territory and scope) **if it can encourage its partner countries in Africa to fulfil (1) their obligations in their respective search and rescue zones and (2) their obligations under the Refugee Convention**, the Organisation for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa (1969) and the Kampala Convention. The obligations under the last-mentioned conventions include the obligation to register asylum seekers or IDPs.
- The EU would need to assist African and other neighbouring governments in their efforts to make such a policy work. The EU has to bear in mind that the presence of large numbers of migrants can be as destabilising for other countries as it is for the EU itself.
- In line with the successful EU–Turkey deal, the EU should **develop a list of safe third countries**, common to all EU member states, from which asylum applications are accepted only in exceptional situations.
- **The extraterritorial asylum process should complement the current system** by allowing flexibility in responding to migration and humanitarian crises at the EU’s borders.



- A crucial question is whether the EU would have to assume legal responsibility for asylum processes conducted outside the EU territory.
 - In the short term, the EU member states **should continue applying their own legislation**. The small-scale asylum projects that member states have conducted in Africa and Turkey in collaboration with the countries concerned and the UNHCR and the IOM have so far been carried out under the premise that the member states are legally responsible.
 - In the medium to long term, the EU should assist its partners to increase their administrative capacity and **leave the legal responsibility for asylum to them**. This is currently being done under the EU–Turkey deal in relation to Syrians. EU-run asylum centres would inevitably become an EU problem. Asylum should therefore be administered by either the national administration in question or the UNHCR, but not by the EU or the member states.
 - o These non-EU partner countries could become part of **a vastly enlarged asylum system inspired by the EU’s Dublin rules**. In fact, the sea barrier would make it possible for one of the Dublin rules to work better than it currently works in Europe. Refugees registered in the first participating country would have their asylum claim examined there and could not easily make clandestine journeys into the heart of the EU.
 - o To avoid high concentrations of migrants in one place and the concomitant security threats, **asylum interviews should be conducted in a decentralised manner**. They should take place in a variety of locations in a given country and preferably not in large asylum centres, which can become targets for terrorists and where asylum seekers can be preyed upon by smugglers and slave traders. Small-scale asylum processing is less likely than a large centre to become a target of attack.
 - o By incentivising its partner countries to recognise and host refugees, the EU would **facilitate third-country asylum outside its borders** for applicants above and beyond the annual ceilings.
- Whatever legal method is chosen, **resettlement will remain a necessary element** of the EU’s extra-territorial asylum policy. From the total EU reset-



tlement figure, each EU member state could be assigned **a portion of refugees**, based on its population. Each annual ceiling would represent a ‘*numerus clausus*’ for resettled refugees.

- The EU member states’ joint political engagement abroad is likely to generate limited but tangible national support for resettling the most vulnerable refugees in the countries of the EU.
- Where individuals are granted asylum following interception at sea, **they should not be allowed to settle in the EU**. Instead, the EU should negotiate with third countries about accepting these individuals and offer appropriate incentives. Following the example of the US–Australian exchange of refugees, the EU should offer resettlement in similar cases. For example, the EU could accept refugees recognised by the US, and the US could take in those recognised by the EU.
- Separately, the EU should reduce the application of **subsidiary protection** inside the bloc and reserve this instrument for those who are most vulnerable. These would include, at the discretion of the receiving EU member state, separated and unaccompanied children and victims of trafficking.

Increasing returns and ensuring readmissions

- With a view **to returning failed asylum seekers and visa overstayers** to their countries of origin, the member states need to improve their internal administrative procedures, cooperation between governments and cooperation with Frontex.
- It is important that **non-EU countries should accept their own nationals**. To this end the EU should provide financial and other incentives and assistance, and/or apply pressure. **Withholding diplomatic and education visas** for high government officials and their families and associates is a particularly effective tool. The EU should continue providing humanitarian assistance to refugees residing in the third countries even if the governments in question are not cooperative with regard to accepting their own nationals.
- The positive results of the 2007 Italy–Egypt readmission deal show the importance of legal channels of labour migration. **Quotas for labour migrants can be used as leverage** to get a country of origin to admit its own nationals.
- For those migrants who do not qualify for international protection, the EU should **encourage voluntary returns to the countries of origin and enforce compulsory returns**. The experience and field presence of the UNHCR and the IOM are indispensable in this regard.



- Frontex should (as is already the case) **coordinate returns** and incentivise the member states to cooperate with one another.
- Following the US example, as well as that of Italy's cooperation with Egypt, the EU should develop channels for legal migration to serve the EU economy. These channels could become important with regard to countries of origin for irregular migrants heading for the EU. In cases where a government refuses to take back its own nationals, **the EU could suspend the legal channels to exert pressure.**

Contingency measures

The 2015–16 migration crisis had specific causes: the Syrian civil war, its aftermath and the decrease in donor contributions to Syrian refugee related programmes in Turkey, Jordan and Lebanon in 2014. However, it was also caused by the absence of member-state and EU planning for migration emergencies and by insufficient communication with governments of the neighbouring states in the Middle East. Therefore, the EU and the individual member states need to prepare contingency plans for migration emergencies.

- These contingency plans should include setting up **hotlines between the EU and the governments** of the neighbouring countries and organising joint planning between immigration and border control agencies and crisis-management bodies.
- If such measures were to fail to stop the irregular migration flow, the EU might **consider civilian–military interventions** in the source or transit countries concerned. Before intervening, the EU would seek the agreement of the country in question or a UN Security Council resolution. (Here the EU could draw on the experience gained in its African missions to date, and especially the military missions to the Democratic Republic of the Congo, Chad and the Central African Republic.) The tasks of such interventions would include stabilising the country in question; providing armed protection for migrants in the country concerned; setting up refugee camps and asylum centres; protecting these camps and centres with arms; providing basic welfare (including health care and education for children); ensuring safe resettlement to the EU for the most vulnerable individuals; stopping people smugglers and traffickers; and contributing, as far as possible, to providing safety across the country concerned and/or safely returning people to their country of origin.
- In view of the EU's limited military capacity, it would be advisable to **include NATO** in situations involving large armed conflicts.



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