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Panel Discussion

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Panel: Rights without borders: Is the concept of asylum alive and well in a post- truth world?

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Asylum and the European Asylum System

Asylum rights were firstly established by the 1951 Geneva Convention on the Status of Refugees. Ratified by 145 State parties, it defines the term 'refugee' and outlines the rights of the displaced, as well as the legal obligations of States to protect them**.** It is the primary basis upon which asylum seekers make their claims to the majority of host states today and, as a key text of the human rights framework, has come to be associated with the very idea of a universalised rights-bearing human being (Mayblin, 2014). In the Convention the concept of asylum has been defined as "*the protection granted by a state to someone who has left their home country under the threat of persecution or serious harm*".

Since 1999 the EU has established a *Common European Asylum System* (CEAS) with the aim to harmonize common minimum standards for asylum. During the years several measures were adopted until new common EU rules have been reached. These sets high standards and enhanced co-operation to ensure that asylum seekers are treated equally and fairly.
It is to be note the creation of the European Refugee Fund as well as the issuance of the Temporary Protection Directive - COUNCIL DIRECTIVE 2001/55/EC of 20 July 2001 - in 2001 (further to conflicts in the former Yugoslavia, in Kosovo and elsewhere and in response to large number of displaced people unable to return to their country of origin) and the extension of the Family Reunification Directive (Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification) to refugees.

The Common European Asylum System (CEAS) is now based upon three main directives:

- **Revised Qualification Directive** (Directive 2011/95/EU of the European Parliament and of the Council of 13th December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted)
- **Revised Asylum Procedure Directive** (Directive 2013/32/EU of the European Parliament and of the Council of 26th June 2013 on common procedures for granting and withdrawing international protection)
- **Revised Reception Conditions Directive** (Directive 2013/33/EU of the European Parliament and of the Council of 26th June 2013 laying down standards for the reception of applicants for international protection)

This complex of legislation clarifies:

a) the grounds on which a person qualifies as a refugee or as a beneficiary of subsidiary protection in order to be granted asylum;

b) it sets common standards of safety measures and. guarantee access to fair and effective procedures; and

c) it establishes common standards of conditions of living and ensures that there are suitable reception conditions across the EU for asylum applicants (access to housing, food, health care and employment, as well as medical and psychological care), respecting fundamental rights.

Non Refoulement: its potential role

The Non-Refoulement is a fundamental principle of international law, which forbids a country receiving asylum seekers from returning them to a country in which they would be likely in danger of persecution based on factors such as race, religion, nationality, membership of a particular social group or political opinion. Unlike political asylum, which applies to those who can prove a well-grounded fear of persecution, non-refoulement refers more generically to the repatriation of people, including refugees into war zones and other local devastated areas.

The principle of Non-Refoulement is at the foundations of the **Dublin III Regulations** (Regulation 604/2013)**,** that defines which State has the obligation to evaluate the asylum claims presented by people who arrive in Europe. As a matter of fact, the Dublin Regulation ratify that the asylum request by a third country national is to be presented in the first European country the person arrives in,

often Greece, Italy, Spain and Hungary (which are the main doorways to enter the EU), and where he/she was identified by local authorities. The Dublin Regulation introduces several inconsistencies, as:

a) Individual preferences – that is, where people arriving into Europe actually want to go to and where do they wish to live – are bound to not be properly taken into account;
b) the States who save people at sea are then bound to take in those persons and grant them protection; at the same time, people who are saved at sea get no choice in determining where they will live and build their future.
c) At the current state of affairs, a person who is accorded international protection by a European state is then obliged to live in that country, as he/she is allowed to travel through Europe only for a limited amount of time – that is, three months – she cannot settle down in other countries neither for work or study reasons. In practice, someone who gets recognized as a refugee in Italy has no such status in Germany or Sweden: exceptional cases aside, the State competent to examine the asylum request according to the Dublin III Regulation is indeed the one and only state where the future refugee has the right to live in. The current boundaries of the European Union thus do not allow for the application of the principle of mutual recognition and beneficiaries of international protection are not granted freedom of residence in Europe.

The Non-Refoulement principle in parallel with the Dublin Regulation introduce a certain degree of complexity within the EU considering its geographical borders. As a matter of fact, some EU states operate in the management of the EU's external borders, but actually in a physical domain where borders, simply do not exist as at sea or in contiguous areas of other states.

It follows, therefore, that a **common approach** should be adopted in the matter of state responsibility to interception operations conducted in the sea or in contiguous areas belonging to another state, to practices of disembarkation of those intercepted, and even to the exercise of official functions, such as processing people on the territory of another state, for example, at air or seaports.

From a state responsibility perspective, the only variable of interest, is the possibility of **joint responsibility**. Migrants, refugees and asylum seekers in distress must be rescued, irrespective of their status. Refugees and asylum seekers may not fit easily within the established framework of practice regarding disembarkation, care and consular assistance, but the principles of protection are there to provide guidance *(Goodwin-Gill,* 2011).

Humanitarian Visas: Option or Obligation?

Humanitarian visas fall within the category of so the called Protected Entry Procedures, which, "[…] from the platform of diplomatic representations, [allow] a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final". Humanitarian visas are distinct insofar as:

the individual autonomy of the protection seeker is accorded a central role: the third-country national directly approaches the diplomatic representation of the potential host state outside its territory with a claim for a humanitarian visa;

the eligibility assessment procedure may be conducted extraterritorially: the diplomatic representation of the potential host Member State may process a humanitarian visa application in-country to identify, inter alia, protection needs (pre-screening) before the third-country national reaches the border of the Member State concerned. Humanitarian visas thus aim to complement other extraterritorial migration control measures;

humanitarian visas are designed to provide safe and legal access to territory: the granting of a humanitarian visa aims to secure the physical transfer and legal protection (orderly entry) of bona fide third-country-national protection seekers and thus constitutes a legal alternative to irregular migration channels;

the final determination procedure is conducted territorially: once a humanitarian visa has been issued and the third-country national has entered the territory of the destination state, he/she may lodge an application for asylum or for other residence permits (e.g. a humanitarian residence permit). The individual asylum procedure or other procedure for a residence permit is therefore conducted within the territory of that state. The humanitarian visa thus complements the CEAS, rather than substitutes it

Due to the lack of legal routes of entry to EU territory, the protection and rights mechanisms of the EU acquis are rendered inaccessible to genuine refugees, potential asylum seekers and other vulnerable migrants. These persons therefore resort to irregular, dangerous and undignified journeys to gain entry to the EU. The EU and its Member States are, however, bound by refugee and human rights obligations. Given that there is a humanitarian visa scheme laid down in the Visa Code, the study concludes that Member States have an obligation to make use of the existing provisions on humanitarian visas. (Jensen, 2014)

Treatment of Asylum seekers, threat or resource?

The number of refugees worldwide is now 12 million, up from 3 million in the early 1970s. And the number seeking asylum in the developed world has increased tenfold, from about 50,000 per annum to half a million over the same period (Hatton & Williams, 2006). European liberal democracies share a common commitment to granting asylum to those in need of protection, a commitment made legally binding by signing the 1951 Geneva Convention relating to the Status of Refugees. They also share a commitment to principles of equality and non-discrimination. However, in recent years European states have embraced practices that permit discrimination against and unequal treatment of asylum-seekers, and recent British government proposals, involving detention (Welch & Schuster, 2005; Malloch & Stanley, 2005), threaten the 1951 Convention itself (Schuster, 2003).

But what price are Eu nations prepared to pay? The mechanisms of exclusion and discrimination against asylum seekers are deportation, detention and dispersal. As a matter of fact, although deportation, detention and dispersal have formed an occasional part of the migration regimes of European countries throughout the twentieth century, they have now become 'normalised', 'essential' instruments in the ongoing attempt to control or manage immigration in European states (Schuster, 2004).

The above-mentioned mechanisms of exclusion and discrimination are deeply restrictive as they might involve:

a) Deportation is an explicit form of physical exclusion from the territory of the state;
b) while detention is both 'enclosure' within a camp or prison, and exclusion from the receiving society;
c) Dispersal, perhaps counter-intuitively, is also a form of exclusion, at least when it is coercive, one that at the moment applies only to asylum seekers, though in the past (especially in the Netherlands) (Arnoldus et al. 2003) there have been attempts to disperse non-white people away from particular areas. Dispersal takes away asylum seekers' freedom to choose where they settle in the receiving state and in so doing it removes them from kinship and other social networks as well as community organisations that are known to be crucial in the early stages of settlement. As a result, it can leave asylum seekers marginalized and socially excluded.

As it is also pointed out by numerous medical studies (Silove 2000, Robjant et al.,2009) asylum seekers facing the above mentioned restrictive measures are very prone to manifest psychiatric illnesses, suicidal behaviour, hunger strikes, and outbreaks of violence. The medical profession has advised both governments and the public regarding the potential risks of imposing excessively harsh policies to asylum seekers.

Challenges to a comprehensive EU migration and asylum policy

The EU has been criticised by many for a lack of leadership and coherent and coordinated policy-making in the face of the refugee crisis and for poorly designed response mechanisms, all of which have severely constrained timely solutions and effective implementation. Short term approaches have failed to address the long-term nature of the migration and refugee problem.

There are three fundamental structural reasons for the failure to deliver a comprehensive and effective EU approach to the refugee crisis:

a) the system of parallel competences that allows Member States to pursue their own policies alongside EU policy;
b) the co-existence of too many actors who want their say in policies and who come from very different policy areas with varying if not conflicting interests;
c) and fragmented, and in some cases, overlapping funding instruments.

There are a number of incremental steps the EU could take to overcome these constraints, including by appointing a senior political advisor to build bridges between the external and internal dimension of migration and asylum policies across the EU system and between the EU institutions and the Member States. To be effective, the proposed measures would require far greater political recognition of the fact that a joint response is in the interests of EU Member States and the EU as a whole.

The role of immigration: deterrent or incentive to a steady economy?

As brilliantly underlined by some recent articles in *The New York Times* (Binyamin Appelbaum AUG. 3rd, 2017; Eduardo Porter AUG. 8th, 2017), economists have argued in the last decades regarding the impact that immigration has on national and local economies without reaching a broad consensus neither among each other nor with the public opinion. Disagreement has also strongly arisen regarding nations 'choice to welcome highly-skilled vs low-skilled workers as some countries are

already doing, namely Australia and Canada. Beyond political or social preconceptions, it appears increasingly evident from numerous recent studies that at national levels the economy of many countries could benefit from inputs of both worker categories, even if some restrictions on the inflow of low-skilled workers should be posed in light of economic demands.

To mention few of these benefits, for instance low-skilled immigrants often work in jobs that exist only because of the availability of such cheap labour; therefore, creating jobs in the tertiary service usually filled by skilled nationals. Whereas, the inflow of highly-skilled workers releases the hosting countries from the expensive burden of their scholarly education, but these same countries can reap the benefits deriving from the prompt integration of these workers into highly productive fields such as the high-tech industry or the scientific research.

What to expect next?

Recently, some light on immigration processes, and more specifically on the inflow of highly-skilled workers, has been shed by the International Migration Institute (IMI), that operates at the University of Oxford and is committed to developing a long-term and forward-looking perspective on international migration as part of global change.

In regard to the migration policy trends of highly skilled migrants, the IMI has released three main outlines:

a) The assimilation of migrant- and employer-driven policy instruments into hybrid systems, which guarantee the best possible outcome in terms of the number and employability of internationally recruited skilled and high-skilled migrants;
b) talent-recruiting countries are increasingly targeting foreign students. Early career recruitment is increasingly seen as a strategy with the highest pay-off in terms of socio-economic integration outcomes of labour migrants. In this respect, liberalisation of study visa issuance, including a more generous provision of post-study visas and student job seeker visas, has been a major policy development during the 2000s;
c) Most governments have rather intensified their efforts to make their countries a more attractive place for internationally mobile human capital including investors and businessmen, who are increasingly regarded as a further group of valuable subjects to be attracted.

The International Organization for Migration (IOM) has also published in December 2014 an overview on global migration trends. In particular, with respect to labour migration, the report shows that:

a) Almost 50% of the global migrant stock are labour migrants;
b) By 2020, there will be 90-95 million more low-skill workers than employers will need (11% oversupply; Ibid.). But, there will be a 38-40 million potential shortage of workers with tertiary education (13% of demand);
c) There will be estimated surpluses of low-skill workers, 32-35 million in advanced economies, and 58 million in India and Young Developing Economies. This means that millions of people will be trapped in subsistence agriculture or urban poverty in developing countries (namely India), if job opportunities at home or abroad are not created for them.
d) According to research from the Boston Consulting Group, Germany could experience a labour shortage of up to 2.4 million workers by 2020. Australia could have a shortfall of 2.3 million workers by 2030. Brazil will have a shortage of up to 8.5 million workers by 2020. China is expected to have a surplus of 55.2 to 75.3 million workers by the same year, but by 2030 the surplus could turn into a shortage of up to 24.5 million people. The U.S. is expected to have a surplus of between 17.1 million and 22 million people in 2020. France, Italy and the UK are projected to have surpluses in 2020 but face shortages thereafter. South Africa has a projected surplus of 36% of the labour supply in 2020, and expectations are it will grow to 39% by the following decade.

The report has also some interesting data about the development of Government policies, namely:

a) National immigration policies are arguably not increasingly restrictive;

In 2011, among 195 countries with available data, 73% of governments either had policies to maintain the current level of immigration or were not intervening to change it, while 16% had policies to lower it and 11% had policies to raise it.

b) More and more governments have been increasingly open to regular migration in the last 2 decades;

Globally, the share of governments with policies to lower immigration declined from 40% in 1996 to 16% in 2011, while those seeking to raise immigration increased from 4% in 1996 to 11% in 2011.

c) In developed regions, the trend toward greater openness to immigration is particularly pronounced;

Only 10% of countries in 2011 implemented policies to lower immigration, down from 60% in 1996. In developing regions, the percentage of governments with policies to lower the level of immigration

declined to 18% in 2011 from 34% in 1996 (UN-DESA). An increasing number of countries have adopted policies to promote the integration of non-nationals.