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Towards an Effective and Principled EU Migration Policy

Recommendations for Reform

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The arrival of over one million asylum seekers and migrants in 2015 set off a political crisis in the European Union (EU), the effects of which are still being felt today. The chaos at borders and the strain on unprepared and under-resourced national asylum systems laid bare serious deficiencies in the EU asylum system.

EU institutions and national governments are drawing the wrong lessons from the challenges of managing mixed migration flows since 2015. The focus of EU policy over the past three years has been on preventing arrivals, outsourcing responsibility to countries outside the EU, and downgrading refugee protection inside the EU.

The current policy responses to migration and asylum from EU institutions and governments pose serious human rights concerns and threaten the integrity of the international refugee protection system. A different approach is possible and necessary. The paper presents Human Rights Watch's recommendations towards an effective and principled approach that ensures EU global leadership on refugee protection, preserves the right to asylum, more equitably shares responsibility among EU member states, safeguards the rights of all migrants and allows EU governments to control their borders.

The EU's Current Approach

Outsourcing Responsibility

“Externalization”—the prevention of irregular arrivals by outsourcing migration management and border controls to regions and countries outside the EU, including the processing of refugees and asylum seekers—has become a central plank in the EU's response to mixed migration flows. Externalization is not per se harmful as a policy approach. It can lead to

improvements in protection capacity in transit countries and countries of first arrival. However, in practice, EU externalization policy often leads to the violation of people's rights.

It involves frustrating the right of any person to leave a country, whether their own or another, leading people to be trapped in abusive situations. It undermines the right to seek asylum, by forcing people to seek protection in countries that lack functioning asylum systems. It exacerbates human rights abuses that drive migration instead of ameliorating them, by providing support for abusive security or border forces or by muting human rights diplomacy with third countries in the name of migration cooperation.

The EU-Turkey statement

Agreed in March 2016, the deal seeks to provide a mechanism that would result in the return to Turkey of all asylum seekers who arrived after the deal entered into force without first having their protection claims determined, while increasing Turkey's ability to humanely host and fairly process asylum seekers and refugees. It is based on the presumption that Turkey is a safe third country or a safe first country of asylum, despite the fact the country lacks a properly functioning asylum system. Syrian asylum seekers benefit from a temporary protection regime but since the deal entered into force they continue to face obstacles to employment, healthcare, and, despite some improvements, education. As of the end of April 2018, only 23 Syrians had been returned to Turkey on grounds of their asylum application being inadmissible because Turkey is a safe country for them. Almost 1,600 others had been removed to Turkey, but only after their claims were rejected on the merits or because they did not file an asylum claim or agreed to return voluntarily.

The European Union and its member states have largely failed to address the negative human rights impact of the EU-Turkey agreement in Turkey and on the Greek Islands. Human Rights Watch has documented violent push-backs, including live fire shootings by Turkish authorities at the effectively closed Syrian border, and summary deportations of Syrians and Afghans. We have documented the human toll of containing asylum seekers on the Greek islands, which happened because the deal relates exclusively to asylum seekers and migrants entering Greece via the Aegean Sea, even though there is no evidence so far to indicate that most of them will be returned to Turkey.

There is also little evidence that the deal has delivered much improvement in Turkey's protection of asylum seekers and refugees, especially for non-Syrians. While EU member states have resettled 12,000 Syrians from Turkey, the number is dwarfed by the 3.6 million Syrian refugees in Turkey.

Migration cooperation with Libya

The EU and individual member states are providing training, equipment and funds to Libyan coast guard forces. Italy is increasingly enabling Libyan coast guard forces to assume control over operations in international waters, and ordering NGO rescue vessels to stand down,

despite ample evidence of reckless, dangerous behavior by Libyan coast guard forces and the knowledge that everyone intercepted by Libyan forces will be disembarked in Libya and placed in indefinite, arbitrary and abusive detention. EU support for UN agencies and NGOs working to improve conditions and treatment in Libyan detention centers is positive, as is the European Commission's pledge in March to work to end systematic detention of migrants in Libya. Efforts by the UN refugee agency UNHCR to evacuate refugees to Niger for resettlement elsewhere and by the International Organization for Migration (IOM) to assist people to return to their home countries also represent important progress. However, aid groups do not have full and regular access, and Libya has yet to sign a Memorandum of Understanding with UNHCR, the UN refugee agency.

Premising development aid and diplomatic ties on migration cooperation

The EU adopted in June 2016 a Partnership Framework with third countries signalling an intention to recast the EU's external relations by placing migration cooperation at the core of foreign policy and development aid. A central goal of the framework is to provide positive and negative incentives to countries of origin and transit to improve border controls and accept the return of migrants and rejected asylum seekers. This includes cooperation with countries such as Sudan, Eritrea, and Afghanistan. Making development aid and EU foreign relations conditional on countries' agreement to cooperate with EU migration control objectives represents a sharp turn away from a forthright defense of human rights as a central plank of EU foreign policy, in ways that could ultimately prove self-defeating by failing to address the human rights abuses that often drive forced migration and by bolstering the very security forces that violate rights, including the right to leave.

Insourcing Misery

Across the EU, governments appear determined to create a hostile environment for migrants and asylum seekers. National governments seek to impede access to territory and asylum procedures, as well as to limit the rights of asylum seekers and refugees. At EU-level, efforts led by the European Commission to modify the Common European Asylum System risk downgrading protection, despite some positive aspects.

Failing to share responsibility internally

The starkly unequal distribution of responsibility for incoming migrants and asylum seekers among EU member states—laid bare during the fall of 2015—is at the heart of the divisive political debate around EU policy. The Dublin Regulation imposes the general rule that the first EU country of entry is responsible for processing asylum claims, placing a significant responsibility on countries at the EU's external borders, and repeated efforts by the Commission to reform it have yielded few results. A temporary relocation plan to alleviate the burden on Greece and Italy failed to meet even one-third of its objectives—30,310 people had benefitted from it by the official end of the program, in September 2017, out of the original 106,000 target. At the same time, a number of EU countries have reinstated border controls

and Dublin returns, while pressuring Greece to contain asylum seekers on the Greek islands and weaken its asylum safeguards to facilitate returns to Turkey.

Downgrading protection

The European Commission has proposed a raft of adjustments to EU asylum laws, including measures to make it harder to qualify for protection in EU countries, punish asylum seekers for moving between EU countries, and impose compulsory reviews to facilitate revoking protection and forced returns. More positively, the proposals would increase safeguards in asylum procedures and include siblings and families formed during the migration journey or in transit countries in the definition of family. Of particular concern is the proposal to make obligatory the application of the “safe country of origin,” “safe third country” and “safe first country of asylum” concepts, with watered-down requirements and safeguards. Numerous EU countries have adopted or proposed domestic legal or policy changes that effectively limit the rights of asylum seekers and refugees to appeal decisions and to family reunification and have rolled back entitlements.

Making life miserable

Across the EU region, migrants and asylum seekers face pushbacks at borders, unlawful and/or degrading detention, containment in specific designated areas or in the case of Greece, on its island, and local measures designed to create a hostile environment by limiting or denying access to basic services. The European Commission and member states have largely failed to condemn or take action against deliberate policies aimed at harming asylum seekers or making access to asylum at borders meaningless such as implemented by Hungary at its border with Serbia and Poland at its border with Belarus. Nongovernmental organizations providing direct services face harassment in countries like France and Italy, while groups performing search-and-rescue in the Mediterranean are the subject of concerted smear campaigns and criminal cases alleging facilitation of irregular migration. Proposed legislation in Hungary would cast a person seeking asylum in Hungary as a threat to national security, and penalize and restrict groups working with migrants, asylum seekers and refugees.

What the EU and its Member States Should Do

In the New York Declaration for Refugees and Migrants, adopted by the United Nations General Assembly in September 2016, EU governments joined the global call for “a shared responsibility to manage large movements of refugees and migrants in a humane, sensitive, compassionate and people-centred manner,” and committed themselves to “a more equitable sharing of the burden and responsibility for hosting and supporting the world’s refugees, while taking account of existing contributions and the differing capacities and resources among

States.”¹ European Union member states are also bound by EU law, including the EU Charter of Fundamental Rights, and by human rights and refugee law.

To live up to these commitments and duties, the EU should save lives at sea, expand safe and legal channels, create a fair mechanism for sharing responsibility within the EU, ensure fair asylum procedures, pursue the safe return of irregular migrants in a way that respects rights, and invest diplomatic and economic capital in ways that help tackle the abuses that drive migration and to improve protection in regions of origin.

Save Lives at Sea

According to the International Organization for Migration, over 15,800 people have died in the Mediterranean since the beginning of 2014. As of early May, 619 people had died or gone missing since the beginning of 2018. The EU and member states have implemented various policies over the years, including everything from physical pushbacks to Libya to a vast humanitarian rescue operation. Overall, the default response has been to ignore, to prevent, and to shift responsibility. The focus now is on building capacity of Libyan coast guard forces and enabling them to intercept boats in international waters as well as preventing departures from Libyan waters. Increased insecurity in the central Mediterranean, smear campaigns, legal action and restrictions on their ability to operate effectively have led several major rescue NGOs to pull out. The Italian maritime rescue coordination center is increasingly shifting coordination of rescue operations to Libyan forces, and delaying disembarkation in Italy from NGO boats, citing breaches of a code of conduct the Italian government imposed last year. A German and a Spanish NGO are under investigation in Italy on charges of facilitating “illegal migration.”

Regional agreements on search-and-rescue and disembarkation can help ensure timely rescues and predictable procedures. Such an agreement in the Mediterranean region could include disembarkation in a country outside the EU only if there is prior independent verification that the country is capable of ensuring fair treatment for all migrants, including procedural guarantees around detention and unsafe returns, and of access to a fair and efficient asylum procedure with a chance to be recognized as a refugee in line with the 1951 Convention. Any such regional agreement and its implementation must be consistent with states’ obligations under regional and international human rights, refugee and maritime law.

There are no definitive data to support a strong correlation between presence of rescue NGOs and boat departures. To the contrary, a detailed statistical analysis by the Italian think-tank ISPI found no correlation between the presence of NGO rescue boats and departures.² The

¹ New York Declaration for Refugees and Migrants, UN General Assembly, A/RES/71/1, adopted September 19, 2016, http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/1

² Elena Corradi et al., “Fact Checking: migrazioni 2018”, Italian Institute for International Political Studies (ISPI), May 7, 2018, <https://www.ispionline.it/it/pubblicazione/fact-checking-migrazioni-2018-20415>

push factor argument ignores the complexity of forced migration and the myriad reasons why people migrate; it also assumes a level of information and expectation among asylum seekers that is not borne out by field research. And even if a greater chance of rescue has an impact on some people's decisions, the alternative—letting people drown—is unacceptable. Trapping people in Libya or favouring policies that send them back where they face torture, ill-treatment, rape, sexual violence and forced labour is neither consistent with EU values nor saves lives, since many later escape and attempt the boat journey again.

The EU and its member states should:

- Adopt a commitment of shared responsibility for saving lives at sea. This means supporting, not smearing, NGOs performing search-and-rescue in the Mediterranean.
- Refrain from enabling Libyan coast guard forces to intercept boats in international waters until Libya can be considered a place of safety within the meaning of international maritime law, human rights law, and refugee law.
- Implement a dedicated rescue mission with an operational plan that provides for disembarkation in a place of safety in EU countries including but not limited to Italy.
- Prioritize ending systematic, abusive detention of migrants and asylum seekers in Libya.

Expand Safe and Legal Channels

While even significantly expanded safe and legal channels will never satisfy all demand, they could help to avoid some dangerous migrant journeys, and allow for appropriate planning, preparation, and orderly arrivals. There are a range of policy options for safe and legal channels for asylum seekers, refugees, and migrants. We focus here only on refugee resettlement.

The EU has improved over its dismal previous record on resettlement, but the numbers are still far too low. As of mid-March 2018, EU countries had resettled just over 29,300 people through a temporary resettlement plan adopted in July 2015 and the resettlement provision of the April 2016 EU-Turkey Statement.³ Since November 2017, the UNHCR has evacuated almost 1,500 vulnerable refugees out of Libya to a transit facility in Niger with a view to resettling them in EU countries and elsewhere. Evacuations resumed in May following a two-month suspension due to Nigerien government concerns that resettlement was not keeping pace with arrivals. As of late April, UNHCR had received 2,681 pledges, with France pledging 1,500 places through October 2019, Sweden 400 places, and Germany 300 (other European countries have pledged smaller numbers, and Canada has offered 200 places).

The UNHCR also facilitated, in December 2017, the direct resettlement out of Libya to Italy of 162 refugees, and has received 1,100 more pledges for this program, the majority (650) from

³ Progress report on the Implementation of the European Agenda on Migration, European Commission, COM(2018) 250, March 14, 2018, https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/20180314_annex-5-progress-report-european-agenda-migration_en.pdf

Canada. Out of the current 24,436 pledges for resettlement from countries along the Central Mediterranean migration route, only 30 percent have come from European countries.

A permanent EU resettlement program, proposed by the European Commission, is a good step in the right direction, but includes conditionalities and restrictive criteria that will undermine the overall goal. The Commission proposed that the EU resettle refugees from countries that demonstrate “effective cooperation” with EU migration control imperatives. It also laid out restrictive criteria, such as “integration potential,” and the exclusion of anyone who tried previously to enter the EU irregularly.

The EU should:

- Establish a permanent EU-wide resettlement program commensurate with EU capacity and global need, with ambitious minimum targets rather than low maximums, based on UNHCR eligibility and exclusion criteria.
- Ensure that refugees with family members in the EU are processed under family reunification mechanisms to reserve resettlement places for people without other means to reach the EU. Resettled refugees should receive a secure status in keeping with the goal of providing durable solutions and encouraging integration.
- Ensure that resettlement out of countries of first asylum is not linked to the level of migration cooperation by those countries with the EU.
- Do not use resettlement as a substitute for asylum procedures or as a rationale for returning asylum seekers in the EU to countries of first arrival.

Share Responsibility Among EU Countries

The number of arrivals at Europe’s external borders is manageable across all member states, but not across two or three. The failure to share responsibility drives a sense that the numbers of arrivals are unmanageable and undermines public confidence in policy responses to migration. Fixing the system to share responsibility equitably requires reforming Dublin Regulation which generally requires the first country of arrival in the EU to examine an asylum application. Reform of the Dublin Regulation is on the table as part of the general overhaul of EU asylum laws, but negotiations are stalled. Arguably the most controversial aspect among member states is the creation of a mechanism to ensure fair distribution of responsibility for examining asylum claims among EU countries.

The European Commission proposal as well as ideas discussed under the aegis of successive EU presidencies envision a distribution mechanism only in emergency situations, that would be triggered only when a country surpasses a pre-determined threshold for accommodating and processing asylum seekers. Such emergencies-only responsibility-sharing proposals would likely increase the burden on member states at EU external borders and impose greater restrictions and penalties on asylum seekers who move onward, and make it more likely (in conjunction with other changes to EU asylum law) that individuals in need of protection may be rejected in mandatory admissibility assessments or accelerated procedures on the grounds

that they had or could have had sufficient protection in a country outside the EU. These admissibility and accelerated procedures based on safe country concepts could prevent applicants from being reunited with family members already in another EU country.

The European Parliament has issued a proposal for a permanent distribution mechanism that strikes a better balance between states' concerns and the rights and wishes of asylum seekers. At the time of writing, there is no agreement among member states on the modalities of such a solidarity mechanism.

A forward-looking reform of Dublin should:

- Create a permanent distribution mechanism that is not based on a triggering mechanism.
- Include incentives for asylum seekers to remain (e.g. swift access to right to work), take into greater consideration individual circumstances (e.g. social and/or family ties) in determining the state responsible, and provide incentives for member states to share responsibility.
- Refrain from punishing onward movement by limiting access to asylum procedures or limiting access to housing and decent material reception conditions.
- Do not impose mandatory admissibility or accelerated procedures based on safe country concepts.

Ensure Fair Asylum Procedures

Expanding safe and legal channels is not a substitute for ensuring the rights of those who arrive spontaneously to seek asylum. EU institutions and member states are currently debating significant reforms to EU asylum directives that will affect criteria for refugee status or other forms of protection, asylum procedures, and reception conditions for asylum seekers. Human Rights Watch believes that any reform of the Common European Asylum System should improve, rather than weaken, access to fair and efficient asylum procedures, as well as ensure adequate material support for those seeking protection.

As such, we have deep concerns about changes that would make the use of safe country concepts mandatory and systematic. Their use in accelerated procedures in national asylum systems based on existing EU asylum rules has given rise to concerns about rushed and poor-quality decision making, especially in complex cases, and resulted in extended detention and in some cases removals to risk of human rights abuse.

If safe country concepts are further entrenched in EU asylum law, EU governments and institutions should at a minimum ensure the following:

- Any list of safe countries of origin should be based on detailed, reliable information from a variety of authoritative sources and be subject to continuous monitoring and a flexible system for removing countries from the list due to changing circumstances.

- Applicants from countries on such a list should be able to rebut the presumption of safety, with their removal suspended pending result of any appeal.
- Only countries that have ratified without limitations and effectively implement the 1951 Refugee Convention should be included on any list of safe third countries, and applicants should be sent to such countries only where there is a meaningful connection (mere transit should not suffice to meet that criterion).

Conduct Safe Returns

EU countries have the right to return persons with no legal claim to remain, following fair procedures and in accordance with human rights and refugee law. While carrying out safe and timely returns for rejected asylum seekers who have exhausted their remedies is a reasonable policy objective alongside fair asylum procedures, removing people is difficult in practice and return rates are low. The Commission stated in September 2017 that the effective return rate stands at 36.4% but drops to 27% when returns to Western Balkans countries are discounted.

The European Commission and individual member states place a high priority on increasing effective returns of undocumented migrants and rejected asylum seekers. The removal of all irregularly-staying migrants is an unrealistic objective, and it has proven difficult to reach agreements with countries of origin for the identification and return of their nationals. The European Commission has repeatedly—most recently in March 2018—threatened to tighten visa requirements for citizens of countries that are not cooperating on returns. Increased returns may also not have the deterrent effect policy makers project.

A disproportionate emphasis on increasing returns without a sufficient focus on safeguards can lead to a series of negative rights consequences, including but not limited to: 1) increased resort to detention and lengthier detention; 2) emphasis on accelerated procedures and the overreliance on poorly defined safe country of origin, safe third country, and safe first country of asylum concepts to deem asylum applications inadmissible; 3) poor human rights safeguards in readmission agreements with other countries, including for the return of third-country nationals; and 4) shortcuts on procedural guarantees such as failure to ensure legal representation and interpretation services.

EU member states and institutions should:

- Ensure that appropriate safeguards are in place as they work to carry out safe and timely returns. High-quality asylum procedures across the EU space will help justify confidence that returns of rejected asylum seekers are permissible, as will strong safeguards against unsafe returns of rejected asylum seekers and undocumented migrants, who while not deemed beneficiaries of protection may face risks upon return or have other claims to remain, such as EU-citizen children, that should be factored into the removal decision.
- Ensure that readmission agreements with third countries include strong human rights conditions, particularly with respect to the return of third-country nationals to countries

they have transited. Removals should ensure procedural fairness, including the right to contest a removal decision.

- Offer incentives to countries of origin to cooperate on returns of their own nationals in the form of visa schemes for legal migration for students and workers at all skill levels. If such visas are offered in sufficient numbers they could provide a meaningful alternative to irregular migration.
- Ensure that detention pending removal is only used as a last resort, and only for the shortest time necessary for the purposes of deportation, during which time authorities should show due diligence in arranging the removal. The use of alternative measures to detention should be increased.
- Children as a rule should not be detained.

Marrying an adequate focus on safeguards and a credible asylum system will ensure that returns are safe and consistent with EU values and legal obligations.

Promote Safety and Dignity in Regions of Forced Displacement

EU financial and political support for efforts to tackle the root causes of forced migration, including hardship circumstances and lack of durable solutions for refugees in first countries of asylum, are vital. Around 84% of the world's refugees are hosted in the global south, and about twice the number of refugees are people internally displaced inside their own countries.

The EU and its member states are collectively the world's leading donors of development aid and have contributed significantly to UN humanitarian appeals to support victims of displacement and their host communities.⁴

The 2015 EU Agenda for Migration, the March 2016 EU-Turkey agreement and the June 2016 Partnership Framework for relations with third countries all privilege migration cooperation as a top priority in relations with countries outside the EU. The primacy of this objective raises concerns about the distortion of development and humanitarian aid, as well as the diversion of funds. The EU Trust Fund for Africa (EUTF) is financed predominantly by the European Development Fund, with only 12 percent of contributions coming from Member States and other donors (for example Norway and Switzerland, which are not EU countries). A portion of EUTF-funded programs focus explicitly on increasing border surveillance and security, such as the Italy-led 42 million euro project on “integrated border and migration management” in Libya.⁵ According to the European Commission, the EUTF is facing a €1 billion gap in funding for planned projects.

⁴ EU remains the world's leading donor of development assistance: €75.7 billion in 2017, European Commission, April 10, 2018, https://ec.europa.eu/europeaid/news-and-events/eu-remains-worlds-leading-donor-development-assistance-eu757-billion-2017_en

⁵ Support to Integrated border and migration management in Libya – First phase, EUTF, <https://ec.europa.eu/trustfundforafrica/node/494>

Long-term efforts to address forced migration should be informed by the commitment, explicitly laid out in the EU action plan on human rights, to ensure that human rights are a central plank in EU foreign policy. They should also be guided by principles of development effectiveness and refugee protection. Development assistance and aid to countries hosting large numbers of refugees and asylum seekers should not be linked to migration management objectives but focused instead on improving protection capacity and tackling human rights abuses in ways that may reduce the need for onward movement. These programs should be designed, implemented and monitored to ensure that cooperation does not trap people in abusive situations or contribute to human rights violations.