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## European Asylum Policy: Rehabilitating Solidarity

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Recent years have been marked by the significant deficiency of the asylum policy and a cruel lack of solidarity within the European Union (EU). The rules that were enacted almost 30 years ago, as formalized in the current Dublin regulation, have proved to be inefficient. Leaving the responsibility of the assessment of asylum seekers' applications to the sole Member States of the first entry, equates to delegating to EU border states (Italy, Greece, Hungary, etc.) the responsibility of coping politically, administratively and operationally with the growing migration flows, resulting from multiple humanitarian and geopolitical crises. Such an increase in the number of asylum seekers was not anticipated when the foundations for current European procedures were laid. As a result, when the number of applications for asylum skyrocketed, frontline countries were largely abandoned, including by France, which even took the decision to close the Franco-Italian border.

This lack of solidarity was coupled with a defective implementation of the Dublin regulation, as most asylum seekers who should have been deported back to Member States of first entry, ended up staying in the country where they found themselves.

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Moreover, the lack of coordination between the different national asylum policies has paved the way for an inadmissible "lottery". The acceptance rate for asylum varies sensibly according to the country of origin, the country in which the asylum seeker is, and the date on which he or she applies. The same Afghan, had he or she applied to Hungary, Germany or France, in September 2015, January 2016 or May 2017, would have seen her or his chances of acceptance vary between 10% and 90%. The sole Geneva Convention allows for 27 diverging and fluctuating interpretations!

These problems, added to the extreme difficulty of sending back rejected asylum seekers to their countries of origin, led thousands of people, who in the end can neither be deported nor be given a legal status, wandering, hopeless, on European territory. The disparity in the application of the Geneva Convention according to the country ends up encouraging those whose application has been rejected to try their luck with another authority.

In its attempt to face this chaos, the European Commission first implemented in 2015 a relocation mechanism between Member States for asylum seekers, in order to temporarily relieve the States having been most affected. At the same time, the European Union signed an agreement with Turkey to contain the migrants who transit through the country. Yet, the first initiative, based on a mandatory quota system, encountered resistance. The second, on the other hand, allowed for the containment of migration flows, which only approximately respects the Geneva Convention, and comes with the cost of a growing dependency on Ankara's financial - but also political - demands.

Overall, this situation led to the political division of Europe and to its distancing from the values at the very core of the European project: solidarity and respect for individual rights and international commitments. This is what must be fixed, starting with the thorough revision of the European right to asylum.

Institut Montaigne and Terra Nova have decided to join forces to formulate proposals on this issue in the following months. In the meantime, they have chosen to publicly express their position on the matter, without delay, on the eve of the European Council of 28 and 29 June 2018.

## **1. THERE CAN BE NO EXCEPTION TO SOLIDARITY, AN ESSENTIAL PRINCIPLE FOR THE EU**

While it might be perfectly understandable that the efforts imposed to different countries take into account their different levels of development, from an economic viewpoint as well as from the viewpoint of the efficiency of administrative structures, it is unacceptable that EU Member States may unilaterally decide to avoid obligations decided by European institutions. Such a policy harms the system of solidarity between countries, which is the very foundation of our cohesion. It is also unacceptable that national egoisms trump our collective interest, which should be to implement a coherent migration policy and to give an efficient response to the most impacted countries.

In this context, we must not prevent ourselves from connecting the respect of the solidarity principle - including policies on the right to asylum - to the allocation of European financial aid, and in particular structural funds. This is what the Commission proposes, for instance, regarding the rule of law for the future of the Union's multiannual financial framework. Creating such a political power balance seems necessary to foster the evolution of some countries' positions and reinforce the duty of solidarity, which has been at the heart of the EU's values since its creation.

The EU must be capable in parallel of supporting countries at the forefront of migration flows, due to historical and geographical contingencies. This requires mobilizing the budgetary funds required for missions of European border guards and coastguards

(Frontex). Such funds should also support Member States of first entry, which are de facto in charge of dealing administratively with the majority of asylum applications and of granting decent life conditions to asylum seekers, for as long as their applications are assessed.

## **2. THE FORTRESS OF “SAFE THIRD COUNTRIES” IS INCOMPATIBLE WITH OUR VALUES AND INEFFECTIVE IN THE LONG TERM**

In order to deal with the future flows of incoming asylum seekers, the European Commission proposed to adopt a new regulation, according to which Member States would have to proceed to a preliminary screening of admissibility of the asylum seekers' applications. This quick and superficial assessment would consider as inadmissible any application from individuals who have stayed in a so-called “safe third country” before reaching the EU. “Safe third countries” are countries in which, asylum seekers, in theory, run none of the risks mentioned in the Geneva Convention. Such applications should thus be rejected by EU Member States, before they are even assessed, and asylum seekers should be deported to “safe third countries” through which they have transited, provided that the EU has signed readmission agreements with these countries.

While this solution has been celebrated by some for its alleged efficiency, it would in fact lead to outsourcing the way we deal with incoming asylum seekers to buffer States, located between countries of origin and the EU, in particular on the Southern shore of the Mediterranean and in Turkey. We believe the implementation of such a system would be contrary to our values, our laws and our interests.

Is there not a contradiction between aspiring to be perceived as a “Europe of Human Rights” and at the same time considering that the arrival of a small amount (relatively speaking) of refugees can be of danger to it? How can the phenomenon be understood as such a threat, to the point of buying our safety and tranquility, at the cost of human lives? Bearing in mind that “safe third countries” are in fact far poorer than European countries,

can we really ask them to stock in appalling conditions the migrants we reject, including when they qualify for international protection? And all this, in exchange for money?

Furthermore, this solution would be contrary to both the Geneva Convention's expectations and essence, the respect of which is mentioned in the Charter of fundamental rights of the European Union (Article 18). Indeed, the Convention forbids signatory States to discriminate between asylum seekers, especially on the basis of countries of origin, and to limit the right to asylum once all criteria have been fulfilled. More broadly, the European Commission's proposal is misjudging the eminently individual nature of all asylum applications, as defined by the Geneva Convention, the goal of which is to protect those who have personal fears of persecution. Finally, as reminded by the United Nations High Commissioner for Refugees, in charge of supervising the application of the Convention according to its article 35, "asylum should not be refused solely on the ground that it could be sought from another State".

Finally, the European Commission's proposal would directly infringe upon the constitutional laws of some countries, such as France, which have decided to label asylum as an intangible fundamental right. In the decision of 13 August 1993, the French Constitutional Council reminded that the right to asylum includes the right to have one's asylum application assessed. Consequently, asylum seekers have the right to stay on the territory until their application has been processed. This allows them to effectively make use of their rights to defence. In the same decision, the French Constitutional Council deemed that preventing asylum seekers from appealing to OFPRA (the French Office for the Protection of Refugees and Stateless Persons) was contrary to the French Constitution, on the grounds that the assessment of such an appeal would rather be: "the competence of another State, in accordance with the provisions of the Dublin Convention of 15 June 1990". This decision has led the French government to review the Constitution, and to introduce Article 53-1, thanks to the Constitutional law of November 1993: "The Republic may enter into agreements with European States which are bound by undertakings identical with its own in matters of asylum and the protection of human rights and fundamental freedoms, for the purpose of determining their respective jurisdiction as regards requests for asylum

submitted to them.” Yet this article does not involve “safe third countries”, which are, by definition, outside the EU. Therefore, as said by the Conseil d’Etat in its opinion of May 16 2018, the proposal of the Commission would be, given the place asylum holds in our fundamental values, as defined by the French Constitution’s preamble of 1946, contrary to France’s constitutional identity. The Commission’s proposal would prevent it from implementing this regulation and trigger an important crisis, unless the Constitution is amended.

This proposal also raises political difficulties. In order for it to be operational, it implies that readmissions agreements be reached with “safe third countries”, so that candidates who have been rejected can be sent back to these countries. Such readmissions agreements are not novel, as demonstrated by the agreement signed between the EU and Turkey. Yet counterparties are often significant and they increase with time. There are financial compensations of course: Turkey has received 3 billions euros and is asking for an additional three, and one can assume it is likely to continue this way. However, with time, there will also be diplomatic and political compensations. In the case of Turkey, the visa issue is on the agenda. Ankara has also shown interest in tackling other issues, such as negotiations on its EU membership, Cyprus, and more. Multiplying this type of agreement could considerably increase blackmailing tactics against Europe, as it would allow for the threat of reopening the roads of asylum. Moreover, the solution promoted by the Commission might lead Europeans towards a delicate path to tread, leaving them at the mercy of governments willing to leverage the migration issue in order to securing various compensations.

Finally, from a practical viewpoint, we cannot be absolutely sure of the effectiveness of these agreements with “safe third countries”. The mechanism would in large part depend on the effectiveness of the police in the given country. No “safe third country”, no matter how safe it is deemed by the Geneva Convention, will be as structured and well-equipped as Turkey to monitor its borders. However, if a third country deemed safe by the UE is not able to control its borders, it will rapidly seem useless to send anyone back to that country. The

“third safe country” solution will thus soon be confronted with the limits of its so-called effectiveness.

Refusing automatic inadmissibility on the basis that one has transited through a “safe third country” does not necessarily imply that the EU should not seek, alongside the countries of origin and transit, agreements to secure the asylum seekers’ journey and offer decent accommodation solutions to other migrants. This is a key element of the focus of this work.

### **3. THE TIME HAS COME FOR EUROPE TO DEFINE A BALANCED AND AMBITIOUS MIGRATION POLICY**

Not only will migrants continue to arrive in coming years, but more of them will do so as well. This is due to political, military and humanitarian crises and the global impact of climate change. Failing to define a European strategy to deal with such movements means condemning ourselves to suffer powerlessly. Yet we need a shared diagnosis to build a more solidary European policy. We must therefore let go of any taboo about the mid-term evolution of migration phenomena as a whole. We must not forget to take into account the evolutions of migration flows towards Europe, and the demographic and economic transformations of our privileged countries.

This effort of objectivation can only be successful if it is based on statistics and reliable information. We cannot simply look at data collected by Ministries of Member States - even if they are harmonized by the European Asylum Support Office - to define the framework of the European migration policy. The measurement of population flows, which necessarily exceed the legal data of regular immigration, always comes too late. In this case, scientific rigour contradicts the political imperative of efficiency. Cross-referencing files used by the Member States’ administrations would allow, for instance, to significantly improve the objectivity of the policies carried out, as well as the system’s overall reactivity. Such a practice should be complemented by academic research, which would allow to articulate a consensus on the facts and predictable evolutions of migration flows.

Europe must indeed give itself the means to understand and analyze the way the current migration system works, and go beyond basic statistics and general comments in order to develop a long-term academic approach. This is the only way to contribute to a more serene and informed democratic debate, based on rational explanations and anticipations, not ideological assumptions.

In such a context, it is evident that the asylum policy and the migration policy must be designed jointly. Counters processing asylum applications are clogged because most of our countries, including France, both display and act upon their willingness to restrain the access to their territories. And it is because resettlement programs for refugees are both ineffective and insufficient that hundreds of people flee conflict zones to try to reach Europe and be granted asylum.

It goes without saying that a European response to this issue is the only reasonable way forward. Those who pretend to believe in the relevance of a strictly national approach are deluded. A coordinated approach must help to restore the trust between our national administrations, as well as to anticipate a long-term migration policy, taking into account its own economic, social and political impact in countries of origin and host countries.

To remain both effective and appropriate, these national and European policies regarding the right to asylum and immigration must be complemented by other measures. The latter should allow for a prompt assessment of asylum applications, based on harmonized criteria, the effective support of those who are accepted, and the organization of the effective return to their country of origin for people who will neither be able to benefit from asylum, nor from the right to legal immigration. The right to asylum policy will have lost all meaning if those who are not allowed to stay on the territory end up doing so anyway. The opening of negotiations between the EU and the main countries of origin (except, of course, countries at war or governed by regimes violating Human Rights) to ensure that readmission procedures respect the dignity and fundamental rights of the people involved,

could be a first step towards a balanced migration policy. If this is failed to be done, none of the policies will be successful, and we will leave the door open to clandestine networks of smugglers, who feed on the world's misery.

We are therefore sounding the alarm concerning the following three key aspects: the issue of "safe third countries", the crucial solidarity between all EU Member States, and the necessity of a joint approach allowing to anticipate present and future migration flows. On these aspects, we must not accept that European institutions discuss or adopt measures leading to the denial of our very nature.

To this end, we intend to continue our work and formulate alternative recommendations, inspired by our humanistic heritage, and which will respond to a requirement of real effectiveness. It is the only way to disarm populism throughout Europe, while respecting our values.

## **4. OUR FIRST AVENUES FOR REFLECTION**

### **4. 1. REGARDING THE RIGHT TO ASYLUM**

The first priority is to end the disparity of administrative methods and judicial decisions between Member States. While the complete harmonization of laws and national practices is a desirable, yet distant aim, we must not satisfy ourselves with the patent lack of coordination between European administrations. The implementation of a common agency, the mission of which would be to provide recommendations addressed to national authorities, would be a first step towards an effective solidarity. Countries undeniably distancing themselves from the common trajectory would have to justify their behaviour, or even be inflicted with corrective measures, which could lead to sanctions, were such attitudes to persist. The first task of this agency could be the unification of practices implementing the Geneva Convention.

The second priority will be to work within each Member State in order for asylum applications to be dealt with more efficiently, i.e. with more humanity and at a faster pace. The time lapse between the arrival on the territory and the submission of the asylum application ought to be reduced as much as possible, to allow people benefiting from protection to start their integration in the country as early as possible.

The construction of a European asylum system, responsible for its own coherence, impermeability to partisan issues and unity, including on the judicial front, requires that structures in charge of the allocation of protection be given a status that ensures their autonomy, similar to that of independent authorities of regulation. Abandoning these structures to the political contingencies of governments would spark conflicts of interest with the Geneva Convention's obligations. This new status granted to national authorities could lead to the creation of a European structure, accountable to the Parliament, in charge of the single interpretation and implementation of the Geneva Convention. This structure would adopt common guidelines on the notions that are most subject to interpretation, and would organize the dissemination and sharing of information on countries of origin. Moreover, a judicial mechanism imposing specific interpretations of the Convention's law to all national jurisdictions would represent a major step forward.

## 4. 2. REGARDING MIGRATION POLICIES

We aim to propose a European research and information policy focusing on migration, which would enlighten the public debate through objective figures on the nature, motives and trajectories of migration flows. It has become necessary to gain a comprehensive understanding of the factors at the root of these flows, to discern their varieties, and to critically assess through time the efficiency of the measures that will be undertaken.

A better understanding and anticipation of the phenomenon would probably lead us to consider the creation of civilian reconstruction capabilities, in order to remedy the consequences of military interventions causing uncontrolled migration. In collapsed States,

an integrated European security force for people and their property after the combat phase, and the reconstruction of basic public service infrastructures, would probably have more impact than public aid...

We must also promote the development of agreements on equal terms between the EU and the countries of origin, in order to deal jointly with flows, returns, and fundamental rights on both sides. We must understand that some returns to the border, decided in France, Italy or Germany, can be problematic for countries of origin. The difficulty they encounter in establishing civil status information or entirely reliable administrative record can serve as topics of cooperation, as can the sharing of some security files. Working together to better establish the fundamental rights of nationals of both parties in each other's territories is also a way of curbing certain flows and facilitating returns.

In this respect, the idea of statuses based on freedom of movement as opposed to freedom of establishment should be explored more thoroughly. The attractiveness of European healthcare systems, and the desire for children to access health services and be granted benefits, such as training, is understandable. After all, do we not all know the choices we would make and the aspirations we would have ourselves in such a situation? It is possible to grant this wish without, to a certain extent, increasing the presence of resident populations. For example, by reflecting on the portability of rights (when pension or insurance rights have been established, they can be transferred to beneficiaries, in exchange for a maintained contribution) or creating disseminated rights to residence (after a diploma and an initial period of professional experience, the right to return for 10 or 20 years, with a capped and fragmented length over the period).

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Asylum has become the outlet of the closing of borders. To overcome deadlocks, we wish to promote a different conception of Europe's relationship to the world.