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Understanding the EU Response to the Migrant Crisis:

Why it Should Not Surprise us and Why it is Unlikely to Change

Alan Desmond

Dear Editor,

Discussions concerning the much-criticised response of the EU to the ongoing migrant and refugee crisis¹ have overlooked the wholly predictable nature of the EU approach. By describing in general terms the treatment of migrants by the EU and its Member States, I would like to show why hand-wringing about the failure to do more is unlikely to result in anything apart from well-wrung hands.

Painted in broad brush strokes, the EU response consists of, on the one hand, efforts to prevent unwanted migrants from entering its territory by tightening EU external borders and, on the other hand, deporting those who have successfully entered. This two-pronged prevention and expulsion approach has most recently been exemplified by the establishment of the European Border and Coast Guard² to ensure an ever stronger and better controlled external EU border and by the highly questionable deal struck by the EU with Afghanistan whereby the latter, a country still embroiled by violent internal strife, is to accept the return of an unspecified number of the tens of thousands of Afghans whose asylum applications in EU states have been rejected.³

There is, however, nothing new in this approach. It is entirely consistent with the policy pursued by the EU since it gained law-making powers in the field of migration and asylum in 1999 which has seen the protection of migrants' human rights take a back seat to the EU's

¹ See for example Editorial, 'Greece's Refugee Crisis and Europe's Failure' *New York Times* (6 August 2015) <<http://www.nytimes.com/2015/08/06/opinion/greeces-refugee-crisis-and-europes-failure.html>>; Editorial, 'Europe's Continuing Shame' *New York Times* (22 July 2016) <http://www.nytimes.com/2016/07/22/opinion/europes-continuing-shame.html?_r=0> accessed 1 November 2016.

² Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC [2016] OJ L251/1.

³ European Commission, 'Joint Way Forward on Migration Issues between Afghanistan and the EU' (Joint Action, 4 October 2016) <https://eeas.europa.eu/sites/eeas/files/eu_afghanistan_joint_way_forward_on_migration_issues.pdf> accessed 31 October 2016.

focus on controlling migration.⁴ This antipathy to unsolicited migration is also abundantly evident in individual Member States. The disaffection so vociferously displayed by a number of states to EU attempts to introduce a quota system for the distribution of a modest number of refugees⁵ cannot be seen in isolation from the treatment of migrants already present in EU states. Those seeking asylum in Ireland, for example, are subjected to what some claim amounts to inhuman and degrading treatment in the state's direct provision system.⁶ Ireland's shameful treatment of these most vulnerable of migrants is of a piece with the UK's policy of creating a 'hostile environment' for migrants who are unlawfully present:⁷ laws are passed to make life so difficult for undocumented migrants that they will effectively self-deport.

While states employ the law to prevent entry and to regulate and control the lives of migrants who have managed to enter, they simultaneously attempt to exclude migrants from the potential protection of the law. This pattern of trying to remove migrants from the scope of protection of human rights has created a situation of what I call migrant exceptionality. A key feature of this is the marked reluctance of states to ratify treaties whose focus is the protection of migrants' rights. The UN Migrant Workers Convention is a case in point.⁸ Though designated as one of the ten core international human rights instruments, the Convention has been ratified by only 48 states, a number which does not include a single EU country. The egregiousness of this state of affairs is brought into sharp relief by comparison with the ratification record of one of the other core instruments adopted by the UN General Assembly around the same time: the UN Convention on the Rights of the Child,⁹ which has 196 states parties. When it comes to dealing with issues of international migration, states eschew binding multilateral treaties in favour of informal dialogue and voluntary, non-binding processes.¹⁰

⁴ Alan Desmond, 'The Development of a Common EU Migration Policy and the Rights of Irregular Migrants: A Progress Narrative?' (2016) 16 Human Rights Law Review 247.

⁵ See for example James McAuley, 'Central European Countries Resist New EU Refugee Quota Proposal' *Washington Post* (4 May 2016) <https://www.washingtonpost.com/world/europe/central-european-countries-resist-new-eu-refugee-quota-proposal/2016/05/04/5be5a32c-120e-11e6-a9b5-bf703a5a7191_story.html> accessed 31 October 2016.

⁶ See for example, *CA v Minister for Justice and Equality* [2014] IEHC 532.

⁷ Myriam Cherti, 'Does Immigration Enforcement Matter? Irregular Immigrants and Control Policies in the UK: The Policy Framework for Immigration Enforcement in the UK' (COMPAS 2014) 11–13.

⁸ UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁹ United Nations Convention on the Rights of the Child. This Convention was adopted by the UN General Assembly in November 1989, while the Migrant Workers Convention was adopted in December 1990.

¹⁰ See generally François Crépeau, *Report by the Special Rapporteur on the Human Rights of Migrants* (A/68/283, United Nations General Assembly 2013) <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/421/15/PDF/N1342115.pdf?OpenElement>> accessed 31 October 2016.

The tack taken by states toward migrants and their rights is facilitated by the deference paid by the courts to state powers of migration control. Thus the European Court of Human Rights, for example, though seen as an institution at the forefront of human rights protection, often seems to be at pains not to upset states in the migration-related rulings it delivers.¹¹ Indeed, the majority of migrant applicants before the ECtHR are unsuccessful.¹² This highlights the failure of the international system of human rights protection to successfully secure the rights of all persons, regardless of whether or not they are citizens of the country in which they are present. To paraphrase Hannah Arendt, it seems that it is still necessary to hold the citizenship of a state before being able to insist that that state respects and protects one's human rights.¹³

If the failure of the EU and the Member States to respond to the current migration crisis in a humane and human rights-oriented way is unsurprising, we must ask ourselves why. Why is it that the law allows states to so easily wriggle out of even the most modest of commitments towards even the most vulnerable of migrants? One possible explanation is that when it comes to migration, morality does not appear to align with self-interest.¹⁴ While in many areas of life doing the right thing either advances or coincides with our own interests, this does not appear to be the case when it comes to migration. Most migrants do not have the right to vote, and so cannot in this important regard command the attention of politicians and governments in destination states. Indeed, those who can vote, the citizens, are unlikely to reward politicians who are seen to be active in advocating for the admission of migrants and the protection of their rights once admitted. This is due to a varied array of fears that migrants will place an unsustainable strain on limited public resources and welfare provision; that they will bring with them values and belief systems irreconcilable with the value system of Western liberal democracies; that they will take our jobs and dilute the distinctive character of our culture.

Whether well-founded or not, these fears shape individuals' attitudes towards migration which, in turn, influences the approach of politicians and governments. If we want the EU and its Member States to do more for migrants, we ourselves have to want to do more for migrants. Only then will the EU and Member State governments change their approach and employ the law to better, more protective effect.

¹¹ Marie-Bénédicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint* (Oxford University Press 2015) 507.

¹² *ibid* 21.

¹³ Hannah Arendt, *The Origins of Totalitarianism* (Harcourt 1968) 292–93.

¹⁴ See further Joseph Carens, *The Ethics of Immigration* (Oxford University Press 2013) 222–24.

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