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**Human Rights Council****Twenty-third session**

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development****Report of the Special Rapporteur on the human  
rights of migrants, François Crépeau****Regional study: management of the external borders of the  
European Union and its impact on the human rights of  
migrants\****Summary*

The Special Rapporteur dedicated the first full year of his mandate to a study on the management of the external border of the European Union, and its impact on the human rights of migrants. He held consultations with the European Union in Brussels, and carried out visits to countries on both sides of the European Union's external border: Greece, Italy, Tunisia and Turkey. While welcoming the inclusion of migrants' rights in the policy framework, the Special Rapporteur remains concerned that the protection of the human rights of migrants, and in particular irregular migrants, is often not implemented on the ground. The report further addresses challenges in relation to the securitization of migration and border control; the use of detention as a tool in border control; the externalization of border control; and insufficient responsibility-sharing with external border States.

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\* The annex to the present report is circulated as received, in the language of submission only.

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## **I. Introduction**

1. The present report is submitted pursuant to Human Rights Council resolution 17/12. It briefly outlines the activities of the Special Rapporteur on the human rights of migrants from 1 June 2012 to 30 April 2013.

## **II. Activities carried out by the Special Rapporteur**

### **A. Participation in conferences and consultations**

2. On 28 September 2012, the Special Rapporteur participated in the Committee on the Rights of the Child day of general discussion on the rights of children in the context of migration. On 21 and 22 November 2012, he attended the Global Forum on Migration and Development in Mauritius, and the side events on its margins. On 21 and 22 February 2013, he attended the 11th Coordination Meeting on International Migration and Development in New York. On 18-19 April, he participated in a seminar organized in Brussels by the Office of the High Commissioner for Human Rights (OHCHR) on the implementation by European Union Member States of recommendations of human rights mechanisms with regard to migration.

### **B. Country visits**

3. In 2012, the Special Rapporteur visited Brussels, at the invitation of the European Union, and carried out country visits to Tunisia, Turkey, Greece and Italy, at the invitation of their respective Governments. These country visits inform the thematic section of this report.

### **C. Preparation for the High Level Dialogue**

4. The Special Rapporteur looks forward to the High Level Dialogue on Migration and Development scheduled for 3-4 October 2013, which will be a unique opportunity to take stock of the progress accomplished in the global discussions about migration policies worldwide.

## **III. Regional study: management of the European Union external border and the impact on the human rights of migrants**

### **A. Introduction**

5. The Special Rapporteur recognizes that the challenges regarding border management and irregular migration are neither new nor unique phenomena to the European Union. Migrants seeking safety from persecution or better opportunities for their future have forever been crossing borders throughout the world. The Special Rapporteur notes however, that in recent years, and in particular with the albeit contained spike in irregular migration flows following the Arab Spring, it is perhaps in the Mediterranean Sea where this phenomenon has gained the most visibility, due to the ever more dangerous trajectories used and the number of deaths and the human rights abuses which occur en route, at sea and in deserts.

6. The Special Rapporteur therefore decided to dedicate the first full year of his mandate to carrying out a study on the European Union's management of its external border and the impact thereof on the human rights of migrants. The study, developed in consultation with the European Union and relevant member States, has the objective of assessing the progress made, as well as the obstacles and challenges which remain in protecting and promoting the human rights of migrants, paying particular attention to the human rights of migrants in an irregular situation.

7. The Special Rapporteur travelled to Brussels in May 2012, where he carried out initial consultations with representatives of relevant European Union institutions, including: the Commissioner for Home Affairs, the Directorate-General for Justice, the Directorate General for Enlargement, the Directorate-General for Development and Cooperation – EuropeAid, the European External Action Service, members of the European Parliament, including the Parliamentary Sub-Committee on Human Rights, the Human Rights Working Group, the Presidency of the Council of the European Union/Chair of the High Level Working Group on Migration and Asylum, the EU Counter-Terrorism Coordinator and Frontex. He also held meetings with the European Union Agency for Fundamental Rights in Vienna.

8. Throughout the year, he liaised with intergovernmental organizations including the Office of the United Nations High Commissioner for Refugees (UNHCR), the International Organization for Migration (IOM), and the International Centre for Migration Policy Development (ICMPD). He also maintained ongoing engagement and discussions with academics, civil society organizations, and migrants themselves.

9. The Special Rapporteur then undertook four visits to countries on both sides of the European Union's external border to examine examples of border management policy in practice. Whilst the external border of the European Union is very large, the Special Rapporteur chose countries at the southern Mediterranean border, due to the fact that the southern border not only remains one of the key points of entry for migrants to the European Union, but also entails a treacherous sea journey across the Mediterranean Sea and dangerous overland routes. The Special Rapporteur visited both sides of two of the main points of entry for migrants to the European Union: Turkey and Greece, and Tunisia and Italy. He visited Tunisia and Turkey in June 2012, Italy in October 2012 and Greece in November-December 2012. In February 2013, the Special Rapporteur returned to Brussels to consult with relevant European Union institutions on his preliminary conclusions and to seek further clarifications.

10. In each country, the Special Rapporteur visited detention centres, shelters and other accommodation for migrants, and border crossings. He also met with relevant national authorities responsible for border control and migration, as well as civil society actors focused on these matters.

11. The findings and recommendations emerging from these visits are presented in the four addenda to this report. Using the country visits as real case examples at the national level, this thematic report seeks to highlight some of the ongoing challenges in the development and implementation of policies, and to provide recommendations to assist the European Union and its member States in overcoming such challenges individually, bilaterally and regionally.

12. The Special Rapporteur would like to thank everyone who took the time to meet with him and for sharing information about their perspectives and experiences. In particular, the Special Rapporteur expresses his appreciation for the support and cooperation extended by the European Union, and the member States he visited, in assisting with his study. He would also like to sincerely thank the OHCHR Regional Office for Europe for their indispensable support and assistance.

## B. Overview of migration in the European Union

13. Migration has always been a fundamental part of European history: migrants are undoubtedly a key element of the cultural, economic and social fabric of the European Union, and contribute to European society in countless ways. Yet, in recent decades, migration within Europe has become an increasingly sensitive topic, often leading to polarized and heated public debates and becoming a decisive election issue in national elections. Moreover, although migration policies were traditionally the domain of individual member States, the European Union has, over the past two decades, engaged in a process of coordination of the rules of admission and on border management, including common rules on residence of third-country nationals. With 42,673km of external sea borders and 7,721km of land borders, the Schengen free-movement area, comprising 26 countries (including four non-European Union States) with over 700 million crossings at the external borders in 2011 alone, is a unique experiment in regional border management.<sup>1</sup>

14. The European Union first moved towards cooperation and coordination in areas strictly linked to security, focusing first on the prevention of cross-border crime. Gradually, this expanded to harmonization of some rules both in the area of border management and returns, and the area of asylum and regular migration continues to be developed. However, it should be noted that key determinants of migration policy, including the ever important factor of numbers of admissions, including of both regular migrants and refugees for resettlement, remain within the decision-making power of individual European Union member States (EUMSs).

15. On the one hand, the Special Rapporteur welcomes this progressive harmonization of European Union policy, as migration is certainly a sphere that can benefit from coordinated regional governance. However, he observes that the development of European Union-wide standards regarding management of migration at the regional level has not been matched by a parallel coordinated guarantee of the rights of migrants. While there have been advances related to rights of regular migrants, including the directives on long-term residence and on the single permit, and related to the rights of persons in need of international protection, harmonization in terms of the rights of migrants in an irregular situation has been insufficient. Rather, the Special Rapporteur observes that a corollary of the harmonization of migration law and policy at the European Union level appears to be the rise of increasingly complex and restrictive rules around conditions of entry, and far stricter border management policies.

16. The stricter approach to border control has also been accompanied by more stringent entry requirements to the Schengen Area. Prior to Schengen, relatively flexible entry requirements or specific guest worker programmes enabled unskilled migrants to travel to European Union Member States, to seek out opportunities and then adjust their administrative status accordingly. Presently, however, the possibilities for such opportunities remain quite limited as the Schengen system requires most non-European Union unskilled migrants, particularly from countries of the Global South, to obtain a visa in order to enter the European Union to look for work.<sup>2</sup> This has created a reality whereby migrants from non-European Union countries, and in particular those from developing countries without visa facilitation programmes with the European Union, are increasingly unable to regularly enter the European Union to look for work in person.

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<sup>1</sup> See also, European Commission, 3rd Annual Report on Immigration and Asylum (2011), Brussels, 30.5.2012, COM (2012) 250 final.

<sup>2</sup> The European Union requires citizens of all Maghreb countries, for example, and most countries in Africa to be in possession of a visa. See generally: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0539:20110111:EN:PDF>

17. The Special Rapporteur also notes that the demand within EUMSs for temporary, unskilled labour in several sectors, including agriculture, hospitality, construction and domestic work, remains high, although generally unrecognized. This kind of work is offered by local employers and participates in the informal economy, often at exploitative wages and conditions. The Special Rapporteur notes however that, while programmes do exist to encourage skilled migration to the European Union,<sup>3</sup> the rise of the European Union migration framework has not yet been accompanied by a parallel development of possibilities for unskilled migrants to seek regular channels for temporary unskilled work opportunities in EUMSs. Such unrecognized labour needs create a major pull factor for unskilled migration. In the public debate, irregular migrants are often accused of “stealing jobs” or of contributing to lowering wages for regular workers, but States seem to invest very few resources in trying to reduce the informal sector and sanction “irregular employers”, who profit from the exploitative conditions of work to boost their competitiveness. The Special Rapporteur hopes that the Employer Sanctions Directive (ESD)<sup>4</sup> will have a positive effect in this respect. Similarly, he notes that negotiations on the Seasonal Workers Directive<sup>5</sup> are under way.

18. As a result, growing numbers of migrants are embarking on dangerous journeys in order to enter the European Union irregularly to carry out this work. They are doing so by taking unseaworthy vessels not only across the Mediterranean and Atlantic oceans, but also by risking their lives through precarious overland routes, in order to seek out such opportunities. Indeed, it is estimated that in 2011, over 1,500<sup>6</sup> persons lost their lives in attempting irregular border crossings in the Mediterranean Sea. Between 1998 and 2012, more than 16,000 persons have been documented to have died in attempting to migrate to the European Union.<sup>7</sup> It should be noted that this statistic includes not only deaths caused at sea, but also in various other ways, including suffocation in trucks, car accidents, frostbite, police violence, hunger strikes, landmines, or suicide in detention, highlighting many of the dangers involved in irregular migration pathways.

19. The Special Rapporteur acknowledges however that those entering by irregular border crossings by sea or land make up only a fairly small percentage of persons who reside irregularly in the European Union. In fact, statistics indicate that the majority of migrants with irregular status within the European Union are those who are issued an entry permit, enter regularly and then overstay their visa. In this context, it can be considered that there is disproportionate focus, by both the European Union and other commentators, on irregular arrivals by land and sea, in particular in the policy context.

20. However, the Special Rapporteur notes that this focus on migrants who undertake irregular border crossings has significant relevance, as this is where the most egregious human rights abuses appear to take place. Of the utmost concern are the deaths of irregular migrants attempting to cross into the European Union. Other concerns are the mistreatment

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<sup>3</sup> For example, Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment. See also paras. 72-73 below.

<sup>4</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

<sup>5</sup> Proposal for a Directive of the European Parliament and of the Council of 13 July 2010 on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment, COM(2010) 379 final.

<sup>6</sup> As estimated by the Council of Europe Committee on Migration, Refugees and Displaced Persons, “Lives lost in the Mediterranean Sea: Who is responsible?”, April 2012.

<sup>7</sup> See generally: <http://www.unitedagainstracism.org/pdfs/listofdeaths.pdf>

of migrants at the border, including practices which infringe their liberty and security, and detention regimes on both sides of the border that fail to adequately respect minimum human rights standards. Furthermore, even before crossing the border to the European Union, whether by sea or by land, migrants are often exposed to serious risks of abuse and exploitation en route, including by smugglers. This is particularly true for women and girls who wait in transit countries and who may be exposed to sexually based violence.

21. The Special Rapporteur further observes that irregular migration took on a particular meaning in the aftermath of the Arab Spring. In particular, in the summer of 2011, there were some significant movements of migrants across the Mediterranean to Italy. The arrival of these boats, however, appears to have been a unique event and the Arab Spring, over the longer term, has not produced any significant inflow of new migrants to Europe. Nevertheless, the events sparked heated debate in Europe about management of irregular migration movements.

22. Within this context, the Special Rapporteur notes the unique position of the European Union with regard to management of the complex phenomenon of a common migration system. The European Union is a singular economic, social and political partnership among 27 Member States, many of whom have developed domestic legal traditions with strong human rights protections. In addition, at the regional level, the European Union has developed a comprehensive system of legislation, with strong human rights protections that complement domestic fundamental rights law and international human rights law. Thanks to this system, long-term third-country nationals legally staying in European Union Member States enjoy similar rights to those of European Union citizens with regard to free movement, establishment and work conditions. The Special Rapporteur thus notes that the European Union is uniquely placed to address human rights of migrants regarding management of its borders.

23. The strengths of the regional system also bring with them their own challenges. The Special Rapporteur also recognizes that member States are still largely driven by the strong influence of domestic public opinion, which is easily swayed against migration. This attitude to migration policy, which often does not include a human rights perspective, is then often replicated at the regional level, given the important role of the Council, and hence in member States, in developing European migration policy and legislation. In addition, the Special Rapporteur notes that the complex interplay between European Union and national competence in the field of migration is often exploited, which often means that human rights slip through the gaps: member States advocate for opaque policies at the regional level, then use those standards to enable the implementation of more restrictive domestic policies with regards to migration, and subsequently seek to attribute this to the regional system. This can perhaps be highlighted by the fact that while the Commission's original proposal for the European Union Return Directive set six months as the maximum period of detention it was, at the insistence of the Council, extended to up to 18 months in exceptional cases, following which both Italy and Greece increased their maximum length of detention in accordance with the maximum standard allowed by the directive. It is hoped that the new ordinary legislative procedure with regard to migration may assist in avoiding the politicization of migration at the legislative level.

24. The Special Rapporteur also observes that another corollary of the common European Union border management system is that those member States geographically situated at the external border of the European Union free movement (Schengen) area, find themselves not only responsible for the management of their national borders, but also custodians of the external border of the entire European Union, which often encompasses large tracts of land or sea frontiers. The Special Rapporteur notes that the European Union has acknowledged the magnitude of this task for individual border States, and established Frontex to assist them with the challenging task of border management. Nevertheless there

is clearly a disproportionate impact on member States situated at the external border, which can impact the human rights of migrants entering these countries.

## **C. Analysis of the European Union's approach to the management of its external borders**

25. Since the 1990s, the European Union has developed an important and complex apparatus of legislation, institutions and policies in the area of border control. Given the broad nature of migration policy within the European Union, it is beyond the scope of this report to provide a comprehensive overview of all the policies, programmes and departments involved. However, the annex to this report outlines some of the key legal, institutional and policy arrangements that influence European Union policymaking in this regard.<sup>8</sup>

### **1. A welcome inclusion of migrants' rights in the policy framework**

26. The integration of migration programmes and policies into the European Union's institutional and policy framework indicates a clear understanding of the significant role that migration not only currently plays, but will also continue to play, within the region. This must certainly be welcomed as a positive measure. In particular, recent advances have witnessed the broadening of a rights-based approach within European Union migration policy, mainly in relation to regular migration.

27. The Stockholm Programme of the European Council has taken some important strides forward in terms of incorporation of human rights into migration policy. Within the Stockholm Programme, the importance of migration as a way to ensure the European Union's competitiveness and economic vitality and solve demographic concerns is highlighted. The Stockholm Programme explicitly provides that one of its key political priorities is "that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced."

28. The Special Rapporteur also welcomes the Global Approach to Migration and Mobility (GAMM) as an important overarching policy document aimed at shaping and influencing all other management decisions by all entities of the European Union regarding policies and programmes which impact upon the external dimension of migration. Reflecting a more rights-focused agenda, the Special Rapporteur notes that one of the key changes in the renewed GAMM of 2011 was to move towards a more global approach which takes into account the human rights at stake in movements across borders, by placing emphasis on establishing legal channels of migration and protecting human rights, including international protection. Importantly, GAMM expressly purports to be migrant-centred, and place at its core the concerns of migrants themselves. The human rights of migrants are specifically mentioned as a cross-cutting dimension, of relevance to all four pillars of GAMM, with special attention paid to protecting and empowering vulnerable migrants, such as unaccompanied children, asylum-seekers, stateless persons and victims of trafficking.<sup>9</sup> GAMM also has as its stated aims maximizing the positive impact of migration on development, and migrants' rights.

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<sup>8</sup> See the annex, which provides a summary of European Union programmes, policies, legislation and other initiatives related to migration management.

<sup>9</sup> GAMM, p. 6.



29. Furthermore, important human rights advances within the context of European Union external border management must not be overlooked. For example, the European Union has taken considerable steps to ensure that Frontex improves its compliance with international human rights law. Following the CJEU judgement annulling Council Decision 2010/252/EU<sup>10</sup>, the European Union will establish new rules and guidelines for Frontex Sea Operations, and the Special Rapporteur has been assured that the Commission's proposal will fully incorporate respect for fundamental rights and non-refoulement during Frontex operations, and clear disembarkation rules in line with international refugee law and international human rights law. In 2011, the Frontex Regulation was also revised, and the institution was mandated to appoint a Fundamental Rights Officer to monitor its operations' impact on migrants' and refugees' fundamental rights, and to establish a Consultative Forum on Fundamental Rights with an advisory role in providing policy advice.

30. In the same vein, the European Union Agency for Fundamental Rights (FRA) has recently completed some important work with regards to the rights of migrants within the European Union.<sup>11</sup> The Special Rapporteur further notes that the European Union Charter of Fundamental Rights is now an important source of European Union law, and respect for the Charter, by virtue of its status as a binding treaty, must be a key component of European Union policies on migration.

## **2. Major shortcomings regarding the effective protection of migrants' rights**

### *(a) The exclusion of irregular migrants from the migration and human rights nexus*

31. Despite the advances set out above, the Special Rapporteur regrets that within the European Union policy context, irregular migration remains largely viewed as a security concern that must be stopped. This is fundamentally at odds with a human rights approach, concerning the conceptualization of migrants as individuals and equal holders of human rights.

32. With regard to GAMM, the Special Rapporteur regrets the linking of irregular migration with human trafficking, which may falsely give the impression that irregular migration is a criminal offence, in line with trafficking. While the smuggling of migrants may constitute a criminal offence, irregular migration does not, and should thus not be linked to security issues and crime.

33. Similarly, the "EU Action on migratory pressure - A strategic response" action paper, approved by the Justice and Home Affairs Council in April 2012, focuses on easing "migratory pressures", rather than examining the causes of irregular migration. The Special Rapporteur notes however, that scant attention is given in these documents to the push factors, which include under-development and weak rule of law in the countries of origin and transit, or the pull factors.

34. While welcoming the Commission's commitment to use the term "irregular" migrants, the Special Rapporteur notes that numerous European Union migration policy documents, and especially Council conclusions and legislative acts, also continue to use the expressions "illegal migration" and "illegal migrants". Even the Stockholm programme emphasizes that the European Union "must continue to facilitate legal access to the territory of its Member States while in parallel taking measures to counteract illegal immigration and cross-border crime and maintaining a high level of security."

<sup>10</sup> Court of Justice of the European Union, Case C-355/10, 5 September 2012.

<sup>11</sup> FRA, Fundamental rights of migrants in an irregular situation in the European Union, November 2011. FRA, Fundamental rights at Europe's southern sea borders, 2013.

35. The Special Rapporteur regrets this terminology, and laments the linking of irregular migration with crime and security concerns. Using incorrect terminology that negatively depicts individuals as “illegal” contributes to the negative discourses on migration, and further reinforces negative stereotypes of irregular migrants as criminals. Moreover, such language legitimates the discourse of criminalization of migration, which in turn, contributes to the further alienation, discrimination and marginalization of irregular migrants, and may even encourage verbal and physical violence against them. This is further exacerbated by European Union legislation such as the Facilitation Directive,<sup>12</sup> which, although not explicitly criminalizing irregular migration, may discourage the provision of assistance to irregular migrants, due to potential criminal sanctions.

(b) *The gap between policy and practice: the absence of a rights-based approach on the ground*

36. Yet perhaps the most striking aspect for the Special Rapporteur has been the gap between policy and practice. For, despite the above noted shortcomings, the European Union has certainly progressively developed a more rights-friendly approach with regard to migration policy, in particular with regard to regular migration. However, the Special Rapporteur did not necessarily see this reflected in measures adopted on the ground. Rather, in the context of his missions undertaken, the Special Rapporteur observed that the implementation of a rights-based approach remains largely absent.

37. The focus remains on control and surveillance of the European Union’s external borders. Activities around migration management, as he observed, were predominately focused on the identification, development and financing of measures which focus on the security aspects of irregular migration, including formalizing cooperation agreements on “illegal” immigration, improving external border controls through logistical and technological means, capacity-building in third countries towards stopping irregular migration (such as the Memorandum of Understanding between Frontex and Turkey), and the criminalization of migration through both legislative acts and practical programmes, including the promotion of detention of irregular migrants both within and beyond the European Union territory, and the funding of detention centres both in European Union countries and transit countries.

38. Another concern of the Special Rapporteur is the lack of an available independent oversight mechanism that can easily be applied in order to ensure full compliance with international human rights law by all programmes and institutions in the field of migration. For example, although GAMM cites human rights as a cross-cutting concern, it does not establish any enforcement mechanism that would enable an evaluation of practices that might infringe human rights. FRA of course plays an important role in providing expert advice to the European Union by collecting data, undertaking research and issuing opinions from a human rights perspective. And although the European Court of Justice may now be able to strike down policies that do not meet minimum human rights standards, this is a slow and lengthy process. In the meantime, there is no oversight or systematic evaluation as to how the policies are implemented by individual European Union entities, or national authorities who are charged with implementing European Union law.

39. Moreover, contrary to the dominant trend in the development of the international human rights doctrine, migrants themselves, in particular irregular migrants, are rarely empowered effectively to fight for the proper respect and protection of their human rights: their access to remedies and independent decision-making bodies is very rarely facilitated. Most often, they experience difficulties with access to information, to courts, tribunals or

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<sup>12</sup> Council Directive 2002/90/EC.

national human rights institutions, to interpreters and translators, to legal aid or judicial assistance programmes, to NGOs or other community organizations. Most programmes favour “efficient” management of “illegal” migration premised on quickly processing cases for return through voluntary departure, readmission or deportation.

40. Overall, the Special Rapporteur notes that the European Union approach in addressing irregular migration has failed to devote adequate attention to the protection of the rights of migrants in an irregular situation. The challenge for the European Union is thus to explore how it might be able to better provide a common policy response – beyond security-related agendas – in compliance with the rule of law and fundamental human rights standards.

41. The Special Rapporteur also noted that where strong human rights standards are incorporated into European Union policy and legislation, there is often a wide discrepancy between the texts and member-State implementation. The Commission thus should remain vigilant in monitoring the full and proper implementation of these standards by Member States.

### 3. Securitization of migration and border control

“It is not the existence of a police force that makes a system of ... law strong and respected, but the strength of respect for the law that makes it possible for a police force to be effectively organised.”<sup>13</sup>

42. The Special Rapporteur notes that within European Union institutional and policy structures, migration and border control have been increasingly integrated into security frameworks that emphasize policing, defence and criminality over a rights-based approach.

43. The focus on police and security is evinced most practically through the investment in Frontex and other new surveillance technologies such as EUROSUR. Despite the financial crisis, Frontex’s budget has steadily increased from €19.2 million in 2006, to nearly €42 million in 2007, topping €87 million by 2010. EUROSUR, which will improve the information exchange and cooperation between border control authorities, also promises increased surveillance of the European Union’s sea and land borders using a vast array of new technologies, offshore sensors and satellite tracking systems, at a high cost. Moreover, through its “smart borders package”, the European Union would be creating one of the world’s largest biometric databases, with as one of its key aims the identification of individuals who have overstayed their visas, together with the prevention of irregular migration. The securitization of border control is further evidenced by the recent decision to make the External Borders Fund a part of the new Internal Security Fund.

44. The Special Rapporteur acknowledges that the draft legislation to create EUROSUR requires Member States and Frontex to “give priority” to the special needs of persons in distress at sea, as well as children, asylum seekers, victims of trafficking, and those in need of medical attention, and the Commission has repeatedly stressed EUROSUR’s future role in “protecting and saving lives of migrants”. Yet the Special Rapporteur regrets that the proposal does not, however, lay down any procedures, guidelines, or systems for ensuring that rescue at sea is implemented effectively as a paramount objective. Moreover, the proposed Regulation fails to define how exactly this will be done, nor are there any procedures laid down for what should be done with those “rescued”. In this context, the Special Rapporteur fears that EUROSUR is destined to become just another tool that will

<sup>13</sup> Brierly, *Law of Nations*, 7th Ed. (Oxford University Press), p. 81.

be at the disposal of member States in order to secure borders and prevent arrivals, rather than a genuine life-saving tool.

45. Moreover, even when certain safeguards with regard to human rights at the border appear to be guaranteed in principle, the concern in relation to implementation remains, especially with regard to specific needs of vulnerable migrants and asylum seekers. For example, while the Stockholm Programme provides that the activities of Frontex and of the European Asylum Support Office (EASO) should be coordinated when it comes to the reception of migrants at the Union's external borders, the Special Rapporteur notes that this is presently not the case. In Greece – while Frontex screens migrants at the border, in order to establish their nationality to facilitate their expulsion, EASO is not present, and the European Union does not assist member States with the screening of migrants at the border in order to identify protection needs. Similarly, in Italy, Frontex guest officers were permitted to interview migrant detainees in detention centres, without any supervision. The recent working arrangement between Frontex and EASO allows for the possibility of establishing common or mixed teams of border management and asylum experts. This could be further explored as a way to mainstream effective and timely identification of persons with international protection needs in Frontex operations, provided that such mixed teams are subject to effective human rights monitoring and involve UNHCR.

46. Furthermore, as the Mediterranean is a busy sea, private vessels could potentially provide invaluable assistance to migrants in distress at sea. Border guards mentioned to the Special Rapporteur that boats in distress are often sighted by private vessels prior to getting into danger. However, the criminalization of migration has contributed to the reluctance of private vessels in assisting migrants in distress. In particular, known difficulties in disembarking migrants, the high costs associated with such intervention, and the lack of cooperation by States with private entities seeking to provide such humanitarian assistance, as well as the potential repercussions for private individuals, has resulted in the reluctance of private vessels to take responsibility for boats in distress, thus compounding the risk of death at sea.

#### **4. Detention as a tool in border control**

47. At the outset, the Special Rapporteur recalls his doubt that detention is ever an effective deterrent for irregular migration, and that in order not to violate international human rights law, detention must be prescribed by law and necessary, reasonable and proportional to the objectives to be achieved.<sup>14</sup> However, in the context of his country visits and his research, the Special Rapporteur has observed that, within the discourse of securitization of migration and border control, the systematic detention of irregular migrants has come to be viewed as a legitimate tool in the context of European Union migration management, despite the lack of any evidence that detention serves as a deterrent. Indeed, a notable increase in the use of immigration detention as a tool for European Union border control over the past 10 years corresponds to the development of European Union migration law in this area. In some senses, the harmonization of European Union law, and in particular the passing of the Return Directive, can be said to have institutionalized detention within the European Union as a viable tool in migration management.

48. It should of course be noted that, in fact, the Return Directive stipulates that detention should be a measure of last resort. Yet, in practice, few viable alternatives to detention appear to be explored by the European Union institutionally and by European Union member States individually. In the countries visited the Special Rapporteur

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<sup>14</sup> Report of the Special Rapporteur on the human rights of migrants, A/HRC/20/24.

witnessed an almost complete absence of readily implementable wide-scale alternatives to detention, including for children.

49. To the contrary, the Special Rapporteur observed a proliferation of detention regimes supported by the European Union for border States. For example, Sicily recently saw the construction of a brand new detention centre, Milo, funded and supported by the European Union. Unfortunately, it was built in a highly securitized and almost militaristic style, with almost no possibilities for detainees to enjoy even the minimum human rights guarantees, with very poor living conditions and with maximum periods of detention being regularly applied.<sup>15</sup> Greece has adopted a new policy of detaining all irregular migrants on its territory, and is in the process of building a number of new detention centres, with a view to expanding the capacity to 10,000 beds. This is partly financed by the European Union Return Fund.<sup>16</sup> While expanding the detention capacity may ease the overcrowding of Greek detention centres, this would not have been necessary if irregular migrants were not systematically detained.

50. Of further concern is that the detention of irregular migrants appears increasingly to be practised, not only within European Union member States, but also in neighbouring States at the external border, often at the behest of, or with encouragement by, the European Union. Indeed, the Special Rapporteur noted that detention appears to be increasingly encouraged, financed and promoted by the European Union in non-European Union border countries as a means of ensuring that irregular migrants in third countries are stopped prior to entering the European Union. For example, in Turkey, the Special Rapporteur learned of plans to develop more detention centres, using the template of the European Union-designed so-called “model” detention centre visited in Edirne. The Special Rapporteur also learned of two new detention centres in Turkey that were to be funded by the European Union.<sup>17</sup> Furthermore, the Special Rapporteur learned that Italy has proposed, within the context of its agreement with Libya, the construction of a first aid centre for irregular migrants in Kufra, which is particularly concerning given the precarious rule of law there and repeated reports of mistreatment of migrants.<sup>18</sup> In a prior visit to Albania in November 2011, the Special Rapporteur had witnessed a brand new detention centre which sported a large European Union flag at the entrance, in recognition of European Union funding for its construction, but which lacked a passable access road and a courtyard, and which was built as a mid-security prison.<sup>19</sup>

51. Of paramount concern to the Special Rapporteur is the fact that the increasing practice of migration detention both within and outside of the European Union is not automatically accompanied by the assurance of legal guarantees and basic human rights protection for detainees. While the European Union Return Directive contains fundamental rights guarantees for persons who are not removed (articles 14-18), in practice the Special Rapporteur observed a lack of adherence to these principles in all of the countries visited.

52. For example, the Special Rapporteur repeatedly witnessed inadequate procedures for detention, including the failure to guarantee proper legal representation, lack of access for detainees to consular services, and interpretation or translation services, lack of appropriate detection procedures for vulnerable individuals and lack of recourse to effective remedies. Conditions of detention were also precarious, with inadequate health care or psychosocial

<sup>15</sup> See the Special Rapporteur’s report on his mission to Italy (A/HRC/23/46/Add.3).

<sup>16</sup> See the Special Rapporteur’s report on his mission to Greece (A/HRC/23/46/Add.4).

<sup>17</sup> See the Special Rapporteur’s report on his mission to Turkey (A/HRC/23/46/Add.2).

<sup>18</sup> International Federation for Human Rights (FIDH), “Libya: The Hounding of Migrants Must Stop”, 2012, available at: <http://www.fidh.org/IMG/pdf/libyemignantsuk-ld.pdf>

<sup>19</sup> See the Special Rapporteur’s report on his mission to Albania (A/HRC/20/24/Add.1).

support, and prison-like conditions. In Tunisia, Turkey and Greece, he also witnessed the detention of children and families, and the lack of a proper system of guardianship for children. In all countries visited, he observed the detention of persons without prospect of removal, and a quasi-total absence of meaningful alternatives to detention mechanisms.

53. In addition, he observed inconsistencies in the abilities of irregular migrants' access to asylum procedures whilst in detention. The Special Rapporteur welcomes the recast Reception Conditions Directive for including an exhaustive list of restrictive grounds for the detention of asylum seekers. He notes, however, that the broadly phrased provisions may in fact allow for the increased detention of asylum seekers, which must be avoided.

54. Another recurring problem encountered was that of situations of prolonged detention due to non-removability. It should be noted that the European Court of Justice has clarified that in the European Union an irregular migrant cannot be detained for the sole reason that he or she is irregularly staying in the country, even if he or she has not followed an order to leave the country.<sup>20</sup> Detention in the absence of deportation proceedings was thus found to be contrary to the aim of the European Union Return Directive. Despite this important affirmation by the Court clearly specifying how these provisions should be interpreted, the Special Rapporteur regularly witnessed the detention, for prolonged periods, of persons who had no real prospect of removal. This was certainly the case in Greece and Italy, and to a lesser extent and for shorter periods of time in Tunisia and Turkey.

## 5. Externalization trend

55. The Special Rapporteur further observed that, through a range of sophisticated policies and programmes, European Union policy also increasingly operates to ensure that border control no longer takes place at the physical borders of the European Union. Achieved through a variety of means, the phenomenon, which has been termed "externalization" of border control, involves shifting the responsibility of preventing irregular migration into Europe to countries of departure or transit.

56. While "push-backs" have been condemned by the European Court of Human Rights in the *Hirsi Case*,<sup>21</sup> the Special Rapporteur notes that the European Union appears to be finding more creative ways to ensure that migrants never reach Europe's borders. While increased surveillance may assist in the saving of lives, it is thus feared that institutionalized cooperation with third countries, especially in North Africa and along the Turkish coast, in particular with regard to supporting their coastguards' interception capacities, has the practical objective of simply stopping boats from entering European territory altogether.

57. Moreover, a network of European Union member States' Immigration Liaison Officers has been set up to enable representatives of European Union member States to establish and maintain contact with the authorities of the host country with a view to contributing to the prevention and combating of "illegal" immigration.

58. The European Union thus appears to be attempting to ensure that foreign nationals never in fact reach European Union territory, or, if they do so, are immediately returned. This is particularly troubling as it means that the responsibility for migration control is shifted to countries outside the European Union and that, consequently, the recourse of those migrants to human rights mechanisms within the European Union becomes legally restricted or practically impossible. Moreover, the externalization process seems to aim at

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<sup>20</sup> Case C-61/11 PPU, *El Dridi*, 28 April 2011, OJ C 186, 25.06.2011; Case C-357/09 PPU, *Kadzoev*, Judgment of the Court (Grand Chamber) of 30 November 2009.

<sup>21</sup> European Court of Human Rights, *Hirsi Jamaa and Others v. Italy*, 23 February 2012.

placing the migrants within the firm control of non-European Union countries, without the European Union providing commensurate financial and technical support for human rights mechanisms in such countries, thereby allowing the European Union to wash its hands of its responsibility to guarantee the human rights of those persons attempting to reach its territory.

59. This worrying shift of border control to other States is not accompanied by appropriate human rights guarantees. Emphasis seems to be increasingly placed on the capacities of countries to stop irregular migrants exiting their territories, rather than ensuring that migrants' rights are adequately protected within a legitimate migration control process.

(a) *Capacity-building of foreign border control*

60. One key way in which the European Union has promoted the externalization of border control has been through assisting with capacity-building for foreign agents responsible for border control. The Special Rapporteur heard of numerous programmes supported by the European Union for improving cooperation and training for coastguards, border guards and other government officials in countries of transit and of origin responsible for border control.

61. This is not to say that improving the capacity of countries in which migration management has not always been a priority is necessarily the wrong approach. To the contrary, effective training that emphasizes human rights as a core component of migration management can be an important tool for safeguarding the rights of migrants. In particular, better coordination and skills in terms of search and rescue operations at sea may have the fundamental effect of saving the lives of migrants at risk. Yet although increased search and rescue capacity in the Mediterranean is undoubtedly of paramount importance in order to save the lives of migrants in distress at sea, strengthening the capacities of neighbouring States coastguards may simply be an attempt to ensure that boats are not permitted ever to leave the territorial waters of that country, and to facilitate quick return of migrants aboard such ships to the territory of the State from which they departed. This is particularly the case where infrastructure that adequately respects the human rights of migrants does not exist in countries to which migrants are being returned. This preoccupation is reinforced by the fact that such policies have the effect of driving further underground attempts to reach European Union territory. Smuggling rings are reinforced, migrants are made more vulnerable, corruption is made more potent, exploitation more rife, human rights violations are more prevalent and graver, and ultimately lives may be more at risk than before.

(b) *Readmission agreements*

62. The most favoured tool for European Union-wide cooperation with third countries on the question of irregular migration is readmission agreements. Such agreements aim to ensure the return of irregular migrants to countries of origin and transit. Importantly, European Union readmission agreements often include the additional obligation of being able to return third-country nationals and stateless persons to the country from which they entered the European Union. To date, 13 European Union readmission agreements have entered into force.<sup>22</sup>

63. In particular, the Special Rapporteur remains concerned about the negotiation and conclusion of these agreements, specifically as to how human rights guarantees are

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<sup>22</sup> Furthermore, readmission provisions are included in several other European Union agreements, including the Cotonou Agreement signed with 79 African, Caribbean and Pacific countries (ACP).

incorporated therein. It appears that readmission agreements have been developed with third countries despite the lack of a well-functioning asylum system or the lack of resources or infrastructure to manage large inflows of migrants in a manner that would effectively ensure proper protection of human rights. Moreover, the agreements operate to oblige signatory countries to take back not only their own nationals but also third-country nationals, which may pose particular human rights concerns for those persons.

64. Furthermore, the Special Rapporteur observes that these agreements are increasingly used as a negotiating tool by both the European Union and the signatory States – with strong incentives for both parties, including visa liberalization or facilitation agreements for the signatory, and readmission for the European Union. Neither consideration automatically incorporates human rights. As an example, before initialling the European Union-Turkey readmission agreement, Turkey stated that it expected a mandate to be given to the European Commission to initiate negotiations on visa exemption for Turkish citizens in the Schengen Area, and the Council invited the Commission to take steps towards visa liberalization as a gradual and long-term perspective, in parallel with the signing of the readmission agreement. However, the agreement focuses almost exclusively on combating immigration, and does not sufficiently ensure respect for the human rights of migrants. The Special Rapporteur has learnt that the Commission has recommended including a suspension clause in every readmission agreement that would provide for temporary suspension of readmission agreements in the event of persistent and serious risk of violation of human rights.<sup>23</sup> This is an important mechanism that should certainly be systematically implemented. Moreover, the Special Rapporteur has been assured that visa liberalization processes are typically accompanied by action plans with sets of detailed benchmarks. The Special Rapporteur notes that these should also include explicit provisions for the human rights of migrants, including irregular migrants.

65. Secondly, there has been a proliferation of bilateral agreements between European Union member States and countries of origin or transit, often with the same goal – essentially to ensure the rapid return of migrants arriving in an individual European Union member State to the country from which they entered. As noted, in Italy, this trend became increasingly apparent, with readmission agreements signed between Italy and Egypt and Tunisia without the incorporation of proper human rights guarantees for persons returned.<sup>24</sup> The same applies to the Greece-Turkey readmission agreement.

(c) *Mobility partnerships*

66. The Special Rapporteur further notes that within the framework of GAMM, the mobility partnership model has been hailed as an innovative and sophisticated political tool to enhance tailor-made dialogue and cooperation with non-European Union countries in a wide range of fields related to migration and mobility.

67. However, the Special Rapporteur notes that the partnerships appear to be used as a means for the European Union to further pursue its agenda of strengthening border controls through preconditioning limited labour opportunities, largely for skilled migrants, and the promise of visa liberalization/facilitation, and on measures which effectively operate to externalize migration control. These include border control reforms, the conclusion of readmission agreements with the European Union, and the signing of working arrangements with Frontex. Moreover, the mobility partnerships seem to be premised on exchanging these measures against temporary migration opportunities for certain categories of workers. Viewed in this way, the mobility partnership can be described as a mechanism

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<sup>23</sup> COM(2011) 76 final, 23 February 2011.

<sup>24</sup> See A/HRC/23/46/Add.3.



for ensuring the externalization of border controls, in exchange for tightly controlled and limited migration opportunities.<sup>25</sup>

68. The Special Rapporteur is concerned at the lack of clarity about the legal nature of such agreements. Not a binding treaty, they are essentially soft law instruments with a high degree of flexibility. Moreover, given their non-binding nature, there is no guarantee that participating member States, or the third country, will engage or comply with the initiatives or the commitments made, as no enforcement exists and there is no independent evaluation. In this context, there is no clear framework within which human rights are automatically incorporated into the mobility partnerships. To the contrary, their inherent nature as tailor-made instruments will in fact prevent them from being an efficient instrument to promote a uniform human rights policy on migration with third countries. In addition, the opaque nature of the negotiations also means that human rights may not necessarily be mainstreamed therein. For example, mobility partnerships are negotiated with the Directorate-General Home Affairs, but also with the External Action Service (EEAS), which may in fact lead to some confusion between priorities, competences and eventually impact upon a coordinated integration of human rights into each of these programmes, particularly as the Directorate-General Home Affairs negotiates the readmission agreements, while it is EEAS which has the mandate on general human rights cooperation.

#### **6. Insufficient responsibility sharing with external border States**

69. The Special Rapporteur further observed the need for more responsibility-sharing with regards to migration within the European Union. Greece and Italy are two countries tasked with managing important external European Union borders, and are thus the recipients of large numbers of irregular migrants. Yet, under the current system, migrants found to be irregular at their point of entry to the European Union are fingerprinted in a biometric database (EURODAC). This can create a de facto situation where irregular migrants become stuck in border countries such as Italy and Greece. The Special Rapporteur met many such migrants, who, after entering the European Union and being fingerprinted, then moved on to establish lives for themselves in other EUMSs. However, upon being detected as irregular, they are returned to the border State which constituted their first point of entry, where often they had no ties or viable prospects. Moreover, these migrants often become trapped in these border States, as they are unable to travel to other countries within the European Union, or safely return home.

70. Secondly, the Dublin II regulation provides, as a general rule, that asylum claimants can only apply for asylum in their country of first entry to the European Union. As potential asylum seekers are often aware of this fact, they may avoid lodging a protection claim, and thus being fingerprinted, in their country of first entry to the European Union, in order to seek international protection in a member State where they believe they will have better long-term integration prospects and opportunities. In practice, this leads to persons with protection concerns avoiding lodging their claims, and seeking to continue their journeys, often by dangerous routes, to other European Union member States, thereby rendering them more vulnerable.

71. The Special Rapporteur thus notes that the operation of the Dublin system may, in fact, exacerbate the challenges for border States in managing an already overloaded asylum system, both in terms of reception conditions and the asylum procedure itself. And although article 80 of the Treaty on the Functioning of the European Union provides for responsibility-sharing amongst European Union member States, the system devised under

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<sup>25</sup> European Commission, 3rd Annual Report on Immigration and Asylum (2011), Brussels, 30.5.2012, COM (2012) 250 final, pp. 9-10. See also annex para. 10.

Dublin does not appear to be in line with such a principle. To the contrary, obliging the country which is the first point of entry to be responsible for processing most asylum claims is not sustainable for the countries at the external borders of the European Union, and this may contribute to the difficult access to the asylum system, as the Special Rapporteur observed in Greece. While noting that the recast Dublin regulation will lead to some improvements, including the establishment of an early warning mechanism, the Special Rapporteur points out that it does not remedy the underlying structural problems in the Dublin system.

72. Another overarching problem is the lack of institutionalized family reunification for irregular migrants, beneficiaries of subsidiary protection, asylum seekers, and, in particular, unaccompanied migrant children. While it is true that the Dublin Regulation provides that unaccompanied minors are to be sent to a member State where a parent or guardian is present, this is often not carried out in practice due to lack of capacity and coordination. Unaccompanied children, whatever their administrative status, should always be sent to countries where they have some family ties, when this is in their best interests. The Special Rapporteur hopes that the new Common European Asylum System (CEAS) will assist in remedying these issues.

## **7. Acknowledging and addressing the “pull factors”**

73. Furthermore, the European Union must not shy away from addressing the pull factors for irregular migrants. In particular, the demand in Europe for a seasonal, low-skilled, easily exploitable workforce must be addressed. The European Union must prioritize the development of effective programmes for working visas in low-skilled sectors,<sup>26</sup> such as seasonal agricultural work, *inter alia*. Indeed, the Commission itself recognizes that opening legal channels of entry to the European Union may prove to be more efficient and less costly than punitive measures, and may also contribute to a reduction in irregular migration. In this respect, the Special Rapporteur notes that the Seasonal Workers Directive may make seasonal migration easier for low-skilled workers. He notes however that the number of visas issued under this programme will remain at the discretion of member States. A further shortcoming of the directive is that it does not provide any long-term solutions and may in fact lead to migrants ending up with irregular status if they overstay their visas.

74. Moreover, measures must be taken in order to effectively sanction employers who abuse the vulnerability of migrants, and in particular irregular migrants, by paying them low or exploitative wages and forcing them to work in dirty, difficult or dangerous conditions. In this connection, Employer Sanctions Directive (ESD) and the Victims of Crime Directive can play an important role protecting migrants in an irregular situation from exploitation. The first question of course is the full and proper implementation of these Directives in national law, and the Commission has assured the Special Rapporteur it will not hesitate to use its powers as guardian of the treaties to ensure correct and effective implementation of ESD. However, it is also imperative that the European Union invest more energy to ensure that migrants are able to access the mechanisms envisaged for their protection, without fear of systematic deportation. For example, while article 6 of ESD contains a number of provisions enabling irregular migrants to lodge complaints, these are not used in practice.<sup>27</sup>

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<sup>26</sup> For which numerous initiatives exist, e.g. the Blue Card Directive, see annex, paras. 38-39.

<sup>27</sup> FRA Annual Report 2012, forthcoming 2013.

## IV. Conclusions and recommendations

### A. Conclusions

75. Despite the existence of a number of important policy and institutional achievements in practice, the European Union has largely focused its attention on stopping irregular migration through the strengthening of external border controls. An overarching political discourse that posits irregular migration within the realm of criminality and security, reiterated by member States, has further legitimated practices of externalization of border control through mechanisms such as migration detention, “pushbacks” and readmissions.

76. The Special Rapporteur acknowledges that many of these mechanisms are not, in and of themselves, illegitimate. Yet, in each of his four country missions, he observed that human rights and legal guarantees have not been adequately developed, thereby undermining the legitimacy, legality and validity of such mechanisms.

77. For example, the Special Rapporteur repeatedly witnessed inadequate procedures for detention, including the failure to respect legal, procedural and substantive guarantees, the detention of persons without prospect of removal, the detention of children, and an absence of alternatives to detention. Similarly, return procedures, particularly when facilitated through readmissions agreements, failed to provide the necessary safeguards.

78. In addition, the influence of the European Union as a regional organization with competence in the field of migration cannot be overlooked. Given the importance for neighbouring countries of securing visa facilitation or liberalization regimes for their own development, the European Union must insist on a human rights framework in all its negotiations on migration. Any approach that omits to fully integrate human rights and legal guarantees can be termed repressive, and undermines the capacity of the European Union to act as a model for the protection of human rights worldwide.

79. Moreover, such an approach will only serve to fuel xenophobia, discrimination and marginalization of migrants, which may have the effect of enabling a culture of impunity around the violation of migrants’ rights, and cement an anti-migration attitude, as well as contributing towards the rise of verbal and physical violence against migrants, as is presently being experienced in Greece.

80. Furthermore, any failure to address the pull factors for irregular migrants, and in particular Europe’s demand for a seasonal, easily exploitable workforce, must be addressed. Combating irregular migration will be much more targeted and effective when a genuine effort is made to treat migrants with dignity and offer them processes that include robust legal guarantees and economic and social support. Migration policies based on deterrence are fundamentally at odds with human rights obligations. Rights must be respected, processes be transparent, and access to justice not inhibited, to ensure that migrants are guaranteed the same human rights as every other individual. Such an approach would not only be in accordance with legal obligations under international human rights law, but would also represent an important step towards recognizing the positive contribution of migrants to Europe.

## B. Recommendations

81. If a common European Union migration policy is to provide added value with regard to migrants' rights, then special attention should also be paid to better guaranteeing the legitimacy and evaluating the soundness of the foundations upon which the current programmes have been built, with particular emphasis on the rule of law and protection of human rights, including for irregular migrants.

### General recommendations:

82. Further implement a human rights-based approach to migration and border management, ensuring that the rights of migrants, including irregular migrants, are always the first consideration.

83. Recognize the fact that sealing the external borders of the European Union is impossible, that migrants will continue arriving despite all efforts to stop them, and that, at some point, repression of irregular migration is counterproductive, as it drives migrants further underground, thereby empowering smuggling rings, and creating conditions of alienation and marginalization that foster human rights violations, such as discrimination and violence against migrants.

84. Consider opening up more regular migration channels, including for low-skilled workers, thus reflecting the real labour needs of the European Union, which would lead to fewer irregular border crossings and less smuggling of migrants.

85. Create a harmonized set of minimum standards of rights for migrants in an irregular situation, in compliance with international human rights law. In this regard, take due account of the report of the European Union Agency for Fundamental Rights (FRA) on "Fundamental rights of migrants in an irregular situation in the European Union", and urge all European Union member States to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

86. Encourage more solidarity and responsibility-sharing among European Union member States in relation to borders, asylum and migration, in accordance with article 80 of the Treaty on the Functioning of the European Union and the Communication on enhanced intra-EU solidarity in the field of Asylum. In this respect, consider fundamentally revising the recast Dublin regulation and the underlying principles thereof, which in its current form counterproductively overburden the asylum system of external border States.

87. Streamline migration policy within the European Union, ensuring that the human rights of migrants are observed in practice, together with accountability and transparency. In this respect, consider the establishment of a permanent evaluation and independent monitoring mechanism as an integral part of European Union migration control policies and practices.

88. Make public and transparent any agreements on migration control, and do not uphold nor enter into agreements with countries which are unable to demonstrate that they respect and protect the human rights of migrants.

89. Avoid criminalization of irregular migrants in language, policies and practice, and refrain from using incorrect terminology such as "illegal migrant".

90. Develop procedures and guidelines for ensuring that rescue at sea is implemented effectively. In this context, adopt rules to motivate private vessels to help boats in distress.

91. Ensure that the human rights of all migrants concerned is the primary consideration in the negotiation of any migration cooperation agreements with non-European Union countries, including readmission agreements, technical cooperation with coastguards, or mobility partnerships. This should include, but not be limited to, technical and financial support for:

- Access to justice by migrants
- Support for migrants rights civil society organizations.
- Training for all cooperation partners on human rights law.

92. Promote viable alternatives to detention, and not insist on further entrenching detention as a migration control mechanism through support for expanded networks of detention centres. Detention should always be a measure of last resort, and children should never be detained.

93. Ensure the full implementation of the Return Directive in all member States in order to improve the procedural safeguards and minimum standards and conditions of detention, in accordance with international human rights standards. In addition, ensure effective access to justice for all migrants in detention, including:

- Access to competent lawyers
- Access to competent interpreters and translators
- Timely and effective access to justice, i.e. courts, tribunals, national human rights institutions, etc.
- Access to legal aid and judicial assistance programmes
- Access to NGOs
- Access to consular authorities
- Access to asylum procedures
- Effective and independent external monitoring of all migrant detention facilities.

94. Ensure access to justice for all migrants. In particular, ensure that complaint mechanisms for irregular migrants as set out the Employer Sanctions Directive are properly implemented to enable their effective use and do not in practice penalize complainants on account of their administrative status.

95. Establish durable solutions for migrants who, due to the situation in their country of origin or non-cooperation of consular authorities, cannot be returned. This should include providing them with an appropriate status.

**Specific recommendation to European Union institutions:**

**To the Council of Ministers:**

96. Reconsider the terminology used, and apply the term “irregular” rather than “illegal” migrants.

97. Consider issuing negotiation directives for readmission agreements only with countries of origin, as recommended by the Commission in its Communication on the Evaluation of EU Readmission Agreements.

**To the European Commission:**

98. **Actively initiate infringement procedures against member States which do not correctly implement European Union legislation with regard to the rights of migrants.**

99. **Further mainstream human rights within the Directorate-General Home Affairs, and in this respect consider establishing a human rights focal point within the Directorate-General.**

**To the European Parliament:**

100. **Ensure, using its power as co-legislator with regard to migration matters, that human rights guarantees are effectively implemented in all legislation that impacts migrants.**

101. **Continue to insist upon correct terminology with regard to migration policy.**

**To the Special Representative for Human Rights and the EEAS:**

102. **Take steps to frame the debate around irregular migration differently with non-European Union States, moving away from the security discourse towards a human rights-based approach.**

103. **Insist on the integration of human rights in the negotiation of mobility partnerships.**

**To Frontex:**

104. **Fully include respect for the human rights of all migrants, including those in an irregular situation, during all its operations, including by applying a human rights-based approach to activities such as capacity-building, training, monitoring, reporting of incidents and deployment of guest officers.**

105. **Consider strengthening the role and independence of the Fundamental Rights Officer.**

106. **Ensure the effective implementation of the Fundamental Rights Strategy and Action Plan.**

107. **Ensure that all interviews conducted with migrants by Frontex guest officers in detention centres are conducted within a legal framework that provides appropriate human rights guarantees.**

**To the Fundamental Rights Agency:**

108. **Continue its crucial work reporting on human rights gaps and challenges for migrants, including irregular migrants, in the European Union and at its external borders, and provide recommendations on how to improve the situation.**

## Annex

*[English only]*

### **Legal, institutional and policy framework related to migration and border management**

#### **A. Legal, institutional and policy framework with regard to migration**

1. With the entry into force of the 1999 Amsterdam Treaty, migration and asylum policies including the Schengen Acquis were officially incorporated into the legal framework of the EU, and this led to Member States' agreement to extend the competence of the EU to make binding rules in almost all areas of migration and asylum law. Title IV provided the EU with the competence to enact legislation on visa policy, border control, as well as "illegal immigration and illegal residence, including the repatriation of illegal residents" (Art. 62 and 63 (3b) EC). The EU also decided to adopt a series of directives on asylum, refugees and displaced persons (Art 63 (1) and (2)).

2. The Lisbon Treaty coming into force in 2009 further extended the scope of EU migration and asylum law. Article 67.1 of the Treaty on the Functioning of the EU (TFEU) provides that the EU shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Article 67.2 provides that the EU shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. Article 68 tasks the European Council with defining the strategic guidelines for legislative and operational planning within the area of freedom, security and justice. Article 79.1 provides that the EU shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, "illegal" immigration and trafficking in human beings.

3. Article 80 TFEU requires that the principle of solidarity and fair sharing of responsibility, including its financial implications, govern all policies enacted under articles 77-79 (border checks, asylum and immigration).

4. The TFEU article 4.2(j) provides that the EU and its Member States share competence in the area of freedom, security and justice. Member States may thus exercise their competence to the extent that the EU has not exercised its competence, or has decided to cease exercising it (TFEU article 2.2). The principle of subsidiarity requires that the EU does not take action in areas of shared competence unless "the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level" (Article 5.3 of the Treaty on European Union).

5. Member States maintain the right to determine volumes of admission of third-country nationals coming from third countries to their territory in order to seek work, whether employed or self-employed (TFEU Article 79.5).

##### **1. The European Council's five-year programmes**

6. The European Council has adopted three programmes on justice and home affairs since 1999: Tampere (1999-2004), The Hague (2005-2009) and Stockholm (2010-14). The

Tampere Programme established initial common immigration and asylum policies, common rules for family migrants, access to long-term residence, and the first phase of the Common European Asylum System. Building on this, the Hague Programme designed an agenda for migration-related issues, which incorporated the second phase of the Common European Asylum System; legal migration and combatting illegal employment; integration of third-country nationals; the importance of cooperating with third countries in asylum and migration policy (the Global Approach to Migration in 2005); and management of migration flows. The Hague Programme recognized that “[l]egal migration will play an important role in enhancing the knowledge-based economy in Europe, in advancing economic development, and thus contributing to the implementation of the Lisbon strategy”, and asked the Commission to present a policy plan on legal migration “including admission procedures, capable of responding promptly to fluctuating demands for migrant labour in the labour market”. The Hague Programme also created the EU border agency, Frontex, in order to develop integrated management of the EU’s external borders.

7. The Stockholm Programme outlines the policy and legislative agenda for the EU on migration, integration of migrants, asylum and external border controls for 2010-2014, and implements the new provisions on migration and asylum provided by the Lisbon Treaty. Its priorities include: improving external border management by strengthening cooperation between EU States and introducing stricter border controls to combat “illegal” immigration and cross-border crime; developing EU visa policies to facilitate legal access to Europe; ensuring that people in need of international protection and vulnerable people are granted entry into Europe; creating the Common European Asylum System; strengthening Frontex and coordinating its work with the European Asylum Support Office (EASO); building partnerships with non-EU countries; and designing a migration policy that benefits EU States, countries of origin and migrants and which incorporates both integration initiatives and a sound return policy.

8. Furthermore, the Stockholm Programme recognizes the need to develop a comprehensive and flexible migration policy, centred on solidarity and responsibility, and addressing the needs of both EU countries and migrants. It should take into consideration the labour-market needs of EU countries, while minimising brain-drain from non-EU countries. Vigorous integration policies that guarantee the rights of migrants must also be put in place. Furthermore, it notes that a common migration policy must include an effective and sustainable return policy, while work needs to continue on preventing, controlling and combating “illegal” immigration. It also notes the need to strengthen dialogue and partnerships with non-EU countries (both transit and origin), in particular through the further development of the Global Approach to Migration. It also calls for the further development of integrated border management, including the reinforcement of the role of Frontex in order to increase its capacity to respond more effectively to changing migration flows. An action plan provides a roadmap for the implementation of political priorities set out in the Stockholm Programme.

## **2. Global Approach to Migration and Mobility**

9. The Global Approach to Migration (GAM) was adopted in 2005, as the EU’s framework for dialogue and cooperation with non-EU countries of origin, transit and destination. In November 2011, the Commission put forward a renewed Global Approach to Migration and Mobility (GAMM) which confirmed that migration is at the top of the EU’s political agenda, and that the GAMM should be considered the overarching framework of EU External Migration Policy. The renewed GAMM has four priority areas: i) better organizing legal migration and fostering well-managed mobility; ii) preventing and combating “illegal” migration and eradicating trafficking in human beings; iii) maximising the development impact of migration and mobility; and iv) promoting international protection and enhancing the external dimension of asylum. The protection of human rights



of migrants is enshrined as a cross-cutting priority in the GAMM. Constant attention ought to be dedicated to the human rights of migrants, in particular vulnerable groups.

10. The most developed bilateral instrument of the GAMM is the “mobility partnership” (MP) with third countries, offering a political framework for an enhanced and tailor-made dialogue and cooperation with third countries in a wide range of fields related to migration and mobility, with concrete actions covering the four priority areas of the GAMM. The MPs provide a broad range of measures including development cooperation, visa facilitation, circular migration, and the fight against irregular migration, including readmission. MPs have been signed with Armenia, Cape Verde, Georgia and Moldova. Negotiations for the conclusion of MPs with Azerbaijan, Morocco and Tunisia are underway. Furthermore, a structured dialogue on migration, mobility and security has been launched with Jordan, which possibly can also lead to establishing a Mobility Partnership. Similar dialogues will follow with other countries in the Southern Mediterranean region, when the political situation so permits.

### **3. The Common European Union Migration Policy**

11. In 2008, the Commission presented a Communication entitled “A Common Immigration Policy for Europe: Principles, actions and tools”. The Communication puts forward 10 common principles with concrete actions for their implementation, on the basis of which the common EU migration policy will be formulated. These principles are mainstreamed under the three main strands of EU policy, i.e. prosperity, solidarity and security. Under “prosperity”, the Commission puts forward the promotion of legal immigration, which should be governed by clear, transparent and fair rules; matching skills with EU labour market needs; and integration of legal immigrants. Under “solidarity”, the Commission puts forward mutual trust, transparency, shared responsibility and joint efforts; efficient and coherent use of available means, considering the particular challenges that the external borders of certain EU countries are confronting; and partnership with non-EU countries. Under “security”, the Commission puts forward the development of a common visa policy; integrated border management; the development of a consistent policy for fighting “illegal” immigration and trafficking in human beings; and effective and sustainable return policies.

### **4. European Pact on Immigration and Asylum**

12. In the light of the Commission’s Communication on a Common Immigration Policy, the European Council decided to adopt the European Pact on Immigration and Asylum.

13. The European Pact on Immigration and Asylum was adopted in 2008, and forms the basis for immigration and asylum policies common to the EU and its Member States. Its principles, which were reaffirmed by the Stockholm Programme, set out five basic commitments: to organize legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration; to control “illegal” immigration by ensuring that “illegal” immigrants return to their countries of origin or to a country of transit; to make border controls more effective; to construct a Europe of asylum; and create a comprehensive partnership with the countries of origin and of transit in order to encourage the synergy between migration and development.

14. The Pact restated that “illegal” immigrants on Member States’ territory must leave that territory, giving preference to voluntary return. It also agreed to use only case-by-case regularization, rather than generalized regularization, and to conclude readmission agreements at EU or bilateral level, to ensure that “illegal” immigrants are deported.

15. The Pact further provided for an increase in aid for training and equipping migration officials in countries of origin and transit. Furthermore, the European Council agreed to

complete the establishment of a Common European Asylum System, including a European Asylum Support Office, and noted that the strengthening of European border controls should not prevent access to protection systems by those people entitled to benefit under them.

16. The Pact reaffirmed its attachment to the GAMM, and agreed to conclude EU-level or bilateral agreements with countries of origin and transit, including on opportunities for legal migration; the control of “illegal” immigration; readmission; and the development of the countries of origin and transit.

17. Finally, the European Council prescribed annual debates on immigration and asylum policies, and invited the Commission to present an annual report on the implementation of this Pact and of the Stockholm Programme.

## **5. EU Action on Migratory Pressures**

18. The consequences of the Arab Spring, mainly in Italy and Malta, as well as the migration flows at the Greece-Turkey border during 2011, led to reflections within the EU on how to best respond to these “migratory pressures”. The “EU Action on migratory pressure - A strategic response” was adopted by the Justice and Home Affairs Council in April 2012. Its cover note refers to the “political commitment of Member States in the fight against illegal immigration”, and it includes a list of priority areas where efforts need to be stepped up and monitored in order to prevent and control existing pressures that derive from irregular immigration as well as abuse of legal migration routes, including strengthening cooperation between the EU and third countries of origin and transit on migration management; enhancing migration management, including cooperation on return practices; enhanced border management at the external borders; particularly preventing “illegal” immigration at the Greek-Turkish border; addressing abuse of legal migration channels; and safeguarding and protecting free movement by preventing abuse by third country nationals.

## **6. The European Neighbourhood Policy (ENP)**

19. The European Neighbourhood Policy (ENP) was first outlined in a Commission Communication on Wider Europe in March 2003 (COM(2003) 104 final), followed by a Strategy Paper on the European Neighbourhood Policy in May 2004 (COM(2004) 373 final), aiming to avoid new dividing lines at the borders of the enlarged EU. The Commission’s Strategy Paper noted that EU partners were facing increased challenges in the field of justice and home affairs, such as migration pressure from third countries, trafficking in human beings and terrorism, and that border management was likely to be a priority in most ENP Action Plans. Regarding regional and sub-regional co-operation in the Mediterranean, the Commission noted the importance of improving border management, including cooperation in the fight against “illegal” immigration.

20. The ENP framework is proposed to 16 of the EU’s closest neighbours – Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Occupied Palestinian Territory, Syria, Tunisia and Ukraine. The ENP remains distinct from the process of enlargement. Central to the ENP are the bilateral Action Plans between the EU and each of the 12 ENP partners. These set out an agenda of political and economic reforms with short and medium-term priorities. The ENP is not yet fully “activated” for Algeria, Belarus, Libya and Syria as no Action Plans have been agreed with these countries.

21. The ENP, which is chiefly a bilateral policy between the EU and each partner country, is further enriched with regional and multilateral co-operation initiatives: the Eastern Partnership (launched in Prague in May 2009), the Union for the Mediterranean

(the Euro-Mediterranean Partnership, formerly known as the Barcelona Process, re-launched in Paris in July 2008), and the Black Sea Synergy (launched in Kiev in February 2008).

22. In March 2011, the Commission and the High Representative for Foreign Affairs and Security Policy issued a joint Communication on a Partnership for Democracy and Shared Prosperity with the southern Mediterranean (COM(2011) 200 final), setting out the immediate response to the unfolding historic events of the Arab Spring. Combined with the revision of the neighbourhood policy, this resulted in a “New response to a changing neighbourhood” (COM(2011) 303). The new policy was also a response to the call of the EU’s Eastern European partners for closer political association and deeper economic integration with the EU (JOIN(2012) 14 final).

#### **7. High Level Working Group on Asylum and Migration**

23. The High Level Working Group on Asylum and Migration was established by the Council in 1998 to prepare cross-pillar action plans for countries of origin and transit of asylum seekers and migrants. Its objective is to strengthen the external dimension of the EU’s asylum and migration policies based on dialogue, cooperation and partnership with countries of origin and transit. The focus is primarily on the GAMM.

#### **8. Strategic Committee on Immigration, Frontiers and Asylum (SCIFA)**

24. Following the entry into force of the Amsterdam Treaty in 1999, the Committee of Permanent Representatives (COREPER) decided on the working structures for establishing an area of Freedom, Security and Justice. SCIFA was set up as part of a new working structure to prepare the Council’s discussions with regard to immigration, frontiers and asylum. SCIFA is comprised of senior officials of the Member States with responsibilities for determining strategic guidelines for EU cooperation on immigration, frontiers and asylum.

#### **9. General Programme on Solidarity and Management of Migration Flows (2007 – 2013)**

25. The General Programme “Solidarity and Management of Migration Flows” aims to ensure the fair sharing of responsibilities between EU countries for the financial cost that arises from the integrated management of the external borders of the EU and the implementation of common asylum and migration policies. The Programme consists of four funds:

- The External Borders Fund funds infrastructure and equipment for EU external borders and visa policy, and the national components of the Schengen Information System / the Visa Information System.
- The European Return Fund funds voluntary and forced returns, joint return operations, cooperation between EU countries and countries of return, improving return management, and reintegration assistance in the country of return.
- The European Refugee Fund funds capacity-building for asylum procedures and reception infrastructure, integration of refugees, resettlement, and emergency measures.
- The European Fund for the integration of third-country nationals funds integration measures, such as language courses, courses of civic orientation, and pre-departure measures in non-EU countries.

26. Through these four funds, the EU seeks to strengthen its common migration, asylum and border policies, and also to uphold European solidarity, to ensure that those EU countries that face the largest financial costs are adequately supported.

27. In addition, there are two programmes on Prevention, Preparedness and Consequence Management of Terrorism and other Security-related Risks; and on Prevention of and Fight against Crime.

28. The Commission has proposed to merge these six mechanisms into two: The Asylum and Migration Fund and the Internal Security Fund. The Asylum and Migration Fund will focus on people flows and integrated migration management, and will support actions addressing all aspects of migration, including asylum, regular migration, integration and the return of irregularly staying migrants.

29. The Internal Security Fund will support the implementation of the Internal Security Strategy and the EU approach to law enforcement cooperation, including the management of the EU's external borders. It will be used to finance the development and maintenance of IT systems ("Smart Borders Package", consisting principally of an Entry/Exit System and a Registered Travellers' Programme); introduction and operation of EUROSUR; reinforce the Schengen governance; boost the operational potential of Frontex; and support the development and implementation of relevant EU policies in the EU, as well as in and with third countries.

#### **10. The Facilitation Directive**

30. Council Directive 2002/90/EC defining the facilitation of unauthorized entry, transit and residence (the Facilitation Directive), aims "to combat the aiding of illegal immigration both in connection with unauthorised crossing of the border in the strict sense and for the purpose of sustaining networks which exploit human beings". It provides that all Member States shall adopt "appropriate sanctions" on any person who intentionally assists a person who is not an EU national to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned; or who for financial gain, intentionally assists a migrant to reside within the territory of a Member State in breach of the laws of the State concerned.

#### **11. The Carrier Sanctions Directive**

31. Council Directive 2004/82/EC on the obligation of carriers to communicate passenger data (the Carrier Sanctions Directive) notes that "In order to combat illegal immigration effectively and to improve border control, it is essential that all Member States introduce provisions laying down obligations on air carriers transporting passengers into the territory of the Member States." The Directive "aims at improving border controls and combating illegal immigration by the transmission of advance passenger data by carriers to the competent national authorities" (Art 1). Member States shall take the necessary steps to establish an obligation for carriers to transmit at the request of the authorities responsible for carrying out checks on persons at external borders, by the end of check-in, information concerning the passengers they will carry to an authorized border-crossing point through which these persons will enter the territory of a Member State (Art 3.1). Member States shall take the necessary measures to impose dissuasive, effective and proportionate sanctions on carriers which, as a result of fault, have not transmitted data or have transmitted incomplete or false data (Art 4.1).

#### **12. The Employer Sanctions Directive**

32. Directive 2009/52/EC of the European Parliament and of the Council providing for minimum standards on sanctions and measures against employers of illegally-staying third-country nationals (the Employer Sanctions Directive) aims at strengthening cooperation among Member States "in the fight against illegal immigration and in particular that measures against illegal employment should be intensified". The Directive prohibits "the

employment of illegally staying third-country nationals in order to fight illegal immigration,” and provides sanctions for those who employ them.

33. Member States shall prohibit the employment of illegally staying third-country nationals (Art 3.1) and oblige employers to require that a third-country national before taking up the employment holds and presents to the employer a valid residence permit or other authorization for his or her stay (Art 4.1.a). Sanctions shall include financial sanctions and payments of the costs of return of illegally employed third country nationals in those cases where return procedures are carried out (Art 5.2). Member States shall ensure that the employer shall be liable to pay any outstanding remuneration to the illegally employed third-country national (Art 6.1.a), and shall enact mechanisms to ensure that illegally employed third-country nationals may introduce a claim against their employer and eventually enforce a judgment against the employer for any outstanding remuneration.

34. Article 13.1 provides that Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers. Furthermore, Article 13.4 envisages the granting, on a case-by-case basis, of temporary residence permits to victims who are children, as well as to victims of particularly exploitative working conditions, who cooperate with the justice system. Member States shall ensure that effective and adequate inspections are carried out on their territory to control employment of illegally staying third-country nationals (Art 14.1).

### **13. The Seasonal Workers Directive**

35. On 13 July 2010, the Commission submitted a Proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment (Seasonal Workers Directive). It was presented as part of the EU’s efforts to develop a comprehensive immigration policy, and was the first proposal focused mainly on low-skilled workers. The Directive is currently at first reading.

36. The proposal sets out the criteria for admission of third-country seasonal workers, in particular the existence of a work contract or a binding job offer that specifies a salary equal to or above a minimum level; a valid travel document; sickness insurance; evidence of having accommodation; and sufficient resources during his/her stay to maintain him/herself without having recourse to the social assistance system of the Member State concerned. Third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted (Art 5).

37. Seasonal workers shall be entitled to working conditions, including pay and dismissal as well as health and safety requirements at the workplace, applicable to seasonal work as laid down by law, regulation or administrative provision and/or universally applicable collective agreements (Art 16). Employers are required to provide evidence that the seasonal worker will have accommodation ensuring an adequate standard of living during his/her stay (Art 14). To make enforcement more effective, complaints mechanisms should be put in place (Art 17). The maximum period of stay is set at six months in any calendar year, as well as the explicit obligation to return to a third country after that period (Art 11); there is no possibility of status change. Provision is made for facilitating the re-entry in a subsequent season (Art 12). The Directive does not provide for entry of family members.

### **14. The Blue Card Directive**

38. Council Directive 2009/50/EC on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (the Blue Card

Directive) aims to improve the EU's ability to attract highly qualified workers from third countries. It sets out the conditions of entry and residence for more than three months in the territory of the Member States of third-country nationals for the purpose of highly qualified employment as EU Blue Card holders, and of their family members (Art 1). The admission criteria include a valid work contract or binding job offer for highly qualified employment; documents attesting the relevant higher professional qualifications; a valid travel document; sickness insurance; and not being considered to pose a threat to public policy, public security or public health (Art 5). The Directive does not affect the right of a Member State to determine the volume of admission of third-country nationals entering its territory for the purposes of highly qualified employment (Art 6).

39. EU Blue Card holders shall enjoy equal treatment with nationals of the Member State issuing the Blue Card, as regards, *inter alia*, working conditions; freedom of association; education and vocational training; recognition of diplomas; branches of social security; pensions; access to goods and services, and free access to the territory of the Member State concerned (Art 14).

#### **15. The Single Permit Directive**

40. Directive 2011/98/EU of the European Parliament and of the Council on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (Single Permit Directive) was adopted in December 2011. The Directive lays down a single application procedure leading to a combined title encompassing both residence and work permits within a single administrative act, aimed at contributing to simplifying and harmonising the rules applicable in Member States. It also provides a common set of rights to third-country workers legally residing in a Member State, based on equal treatment with nationals of that Member State. The Directive is without prejudice to the Member States' powers concerning the admission of third-country nationals to their labour markets (Art 1).

41. The Directive applies to third-country nationals who apply to reside in a Member State for the purpose of work; as well as third-country nationals who have already been admitted to a Member State either for the purpose of work or for other purposes, as long as they are allowed to work (Art 3).

42. Third-country workers shall enjoy equal treatment with nationals of the Member State where they reside with regard to, *inter alia*, working conditions; freedom of association and affiliation; education and vocational training; recognition of diplomas; branches of social security; tax benefits; access to goods and services; and advice services afforded by employment offices (Art 12).

#### **16. The Long-Term Residence Directive**

43. Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents (Long-Term Residence Directive) created a single status for non-EU nationals who have been lawfully resident in an EU country for at least five years.

44. The Directive sets out the terms for conferring and withdrawing long-term resident status granted by a Member State in relation to third-country nationals legally residing in its territory, and the rights pertaining thereto. The Directive applies to third-country nationals residing legally in the territory of a Member State. It does not apply to students or seasonal workers (Art 3). Member States shall require third-country nationals to provide evidence that they have, for themselves and for dependent family members, stable and regular resources which are sufficient to maintain himself/herself and the members of his/her family, as well as sickness insurance. Additionally, Member States may require third-

country nationals to comply with integration conditions, in accordance with national law (Art 5).

45. Long-term residents shall enjoy equal treatment with nationals as regards, inter alia, access to employment and self-employed activity except exercise of public authority; conditions of employment and working conditions; education and vocational training; recognition of professional diplomas; social security, social assistance and social protection as defined by national law; tax benefits; access to goods and services; freedom of association and affiliation; and free access to the territory of the Member State concerned (Art 11). The Directive also provides protection against expulsion: Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security (Art 12).

46. In 2010, an agreement was reached to extend the scope of the Directive to the beneficiaries of international protection.

#### **17. The Family Reunification Directive**

47. Council Directive 2003/86/EC on the right to family reunification (Family Reunification Directive) determines the conditions for the exercise of the right to family reunification by third country nationals residing lawfully in the territory of the Member States. The Directive applies to third-country nationals (“the sponsor”) holding a residence permit issued by a Member State for a period of validity of one year or more, who has reasonable prospects of obtaining the right of permanent residence. It does not apply to asylum seekers or beneficiaries of temporary protection or subsidiary forms of protection (Art 3). However, Chapter V provides for family reunification of refugees.

48. The family members who may benefit from family reunification are the sponsor’s spouse, their minor children, and the children of the spouse. Reunification with an unmarried partner, adult dependant children, or dependant first-degree relatives in the direct ascending line may also be authorised (Art 4). An application for family reunification may be rejected on grounds of public policy, public security or public health (Art 6). Family reunification may be conditioned upon the sponsor’s adequate accommodation; sickness insurance; and stable and regular resources to maintain the family (Art 7). Member States may require the sponsor to have stayed lawfully in their territory for a period not exceeding two years, before having his/her family members join him/her (Art 8). The sponsor’s family members shall be entitled, in the same way as the sponsor, to access to education, employment and vocational guidance. After 5 years, the family members shall be entitled to an autonomous residence permit (Art 15).

49. In accordance with a ruling of the European Court of Justice (Case C-540/03), EU Member States must apply the Directive’s rules in a manner consistent with the protection of fundamental rights, notably regarding family life and the principle of the best interests of the child.

#### **B. Legal, institutional and policy framework with regard to border management**

50. Article 77 of the Treaty on the Functioning of the EU provides that the EU shall develop a policy with a view to ensuring that controls on persons, whatever their nationality, when crossing internal borders within the Union, shall be abolished; develop an efficient monitoring of the crossing of external borders; and the gradual introduction of an integrated management system for external borders.

51. In 2002, the Commission submitted a communication to the Council and Parliament, entitled “Towards Integrated Management of the External Borders of the Member States of the European Union”. The Commission noted that “coherent, effective common management of the external borders of the Member States of the Union will boost security and the citizen’s sense of belonging to a shared area and destiny. It also serves to secure continuity in the action undertaken to combat terrorism, illegal immigration and trafficking in human beings.”

52. The Commission then proposed the development of a common policy on management of the external borders of the EU, with five components: A common corpus of legislation; a common co-ordination and operational co-operation mechanism; common integrated risk analysis; staff trained in the European dimension and inter-operational equipment; and burden-sharing between Member States in the run-up to a European Corps of Border Guards. The Commission recommended creating “an External borders practitioners common unit”. This ultimately led to the adoption of the Schengen Borders Code, the establishment of Frontex and the creation of the External Borders Fund.

### **1. The Schengen system**

53. The Schengen Agreement was signed by five States in 1985, outside the legal framework of the then European Community. It was complemented in 1990 by the Convention Implementing the Schengen Agreement (Schengen Convention), which entered into force in 1995, abolishing controls at the internal borders. The Convention also provided common rules regarding visas, carriers’ sanctions, police cooperation, liaison officers, right of asylum and checks at external borders. Gradually, more EU Member States joined, and in 1999 the Treaty of Amsterdam incorporated the Schengen acquis into the EU legal order, effectively creating a territory without internal borders. The Schengen Area currently consists of 26 countries (including 4 non-EU Member States).

54. The Schengen Borders Code, established by Regulation (EC) no 562/2006 of the European Parliament and of the Council, governs the movement of persons across borders, and sets out common rules for border checks and surveillance, entry requirements and refusal of entry. It provides that the abolition of internal border controls does not affect a Member State’s powers to exercise police powers in the border regions and security checks at ports or airports or to adopt legislation containing an obligation to carry identification documents. Exceptionally, where there is a serious threat to public policy or internal security, a Member State may reintroduce border control at its internal borders. Such an action would only be taken as a measure of last resort, and only to the extent and for the duration necessary to mitigate in a proportionate manner the adverse consequences of the exceptional circumstances. The Schengen Borders Code introduced an obligation for border guards to respect human dignity and the non-discrimination principle when conducting border checks, and it sets out the principle of non-refoulement. It makes reference to the principles recognised by the Charter of Fundamental Rights, and provides that Member States shall provide for training on the rules for border control and on fundamental rights. It also provides that Member States shall introduce penalties for the unauthorized crossing of external borders at places other than border crossing points or at times other than the fixed opening hours, which shall be “effective, proportionate and dissuasive”. The Schengen Practical Handbook for Border Guards provides more detailed rules on carrying out checks at external borders.

55. The Schengen approach to border management is a four tiers access model to Integrated Border Management. The first tier consists of measures in third countries (of origin and transit) such as document experts. The second tier consists of cooperation with neighbouring countries. The third tier deals with control at the border. The fourth tier involves measures within Schengen, such as return.



56. Council Decision 2010/252/EU supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by Frontex at the external borders of the Member States of the EU (the external sea borders rule) provides rules on, inter alia, the seizing of ships and apprehending persons on board; and conducting the ship or persons on board to a third country or otherwise handing over the ship or persons on board to the authorities of a third country.

57. In a judgment of 5 September 2012, the European Court of Justice decided that the Council Decision must be annulled in its entirety because it contains essential elements of the surveillance of the sea external borders of the Member States which go beyond the scope of the additional rules governing surveillance which may be adopted in accordance with article 12.5 of the Schengen Borders Code, and only the EU legislature was entitled to adopt such a decision. The Court stated, inter alia, that “the fundamental rights of the persons concerned may be interfered with to such an extent that the involvement of the European Union legislature is required.” The Commission intends to present a legislative proposal in early 2013 to replace the external sea borders rule due to its annulment by the Court.

58. The Schengen Information System (SIS) was created as a shared database used by authorities of the Schengen States to exchange data on certain categories of people and goods, and provides information on migrants who are refused entry. If a person has been registered in SIS, they may be refused entry upon attempting to re-enter the Schengen territory, even if in possession of the required documents. Work on a new, more advanced version of SIS, known as the second generation Schengen Information System (SIS II), is ongoing.

59. The Visa Information System (VIS) is a Schengen instrument which allows Schengen States to exchange data on visa information. It consists of a central IT system and of a communication infrastructure that links this central system to national systems. It connects consulates in non-EU countries and all external border crossing points of Schengen States, and processes data and decisions relating to applications for short-stay visas to visit, or to transit through, the Schengen Area.

## **2. Frontex**

60. Frontex was established in 2005 to strengthen and coordinate the surveillance and control of the EU’s external borders and promote integrated border management by coordinating the operational cooperation of EU Member States and Schengen Associated Countries. Its activities were complemented in 2006 by the adoption of the Schengen Borders Code, and in 2007 by the adoption of the External Borders Fund.

61. Established by Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, Frontex is charged with coordinating operational cooperation between Member States in the field of management of external borders; assisting Member States on training of national border guards, including the establishment of common training standards; carrying out risk analyses; following up on the development of research relevant for the control and surveillance of external borders; assisting Member States in circumstances requiring increased technical and operational assistance at external borders; and providing Member States with the necessary support in organizing joint return operations. Frontex may upon request from a Member State deploy a pool of national border guards employed by Member States, called European Border Guard Teams (EBGT), for possible deployment during joint operations and pilot projects.

62. On 31 March 2011, the Frontex Management Board endorsed a Fundamental Rights Strategy, which considers that respect and promotion of fundamental rights are

unconditional and integral components of effective integrated border management, and states that Frontex is fully committed to develop and promote a shared understanding of fundamental rights among the entire EU border-guard community and integrate this also into the cooperation with third countries. The Strategy provides that a consultative forum, open also to representatives of the civil society, shall further enrich the overall evaluation and review processes. The Strategy is implemented by an Action Plan, integrated into the Frontex Programme of Work. An annual progress report informs the stakeholders about the implementation of the strategy and the Action Plan.

63. The amended Frontex Regulation (Regulation (EC) 1168/2011) mandated Frontex to draw up and further develop and implement its Fundamental Rights Strategy; establish a Consultative Forum to assist the Executive Director and the Management Board in fundamental rights matters; and designate a Fundamental Rights Officer. The Fundamental Rights Officer is an independent position within Frontex who reports directly to the Management Board and the Consultative Forum. The Fundamental Rights Officer was designated by the Management Board on 27 September 2012 and took office on 17 December 2012. She advises the Executive Director of Frontex on fundamental rights issues and reports on a regular basis and contributes to the internal Frontex mechanism for monitoring fundamental rights, and makes observations to the joint operations and projects from the planning and drafting phase, during implementation, and also to the evaluation. The Consultative Forum, which consists of representatives from the Fundamental Rights Agency, the Council of Europe, the Organization for Security and Co-operation in Europe, UNHCR, the European Asylum Support Office, the International Organization for Migration and nine civil society organisations, provides policy advice.

64. The amended Regulation foresees that Frontex shall draw up and further develop a Code of Conduct applicable to all operations it coordinates. The Code of Conduct shall lay down procedures intended to guarantee the principles of the rule of law and respect for fundamental rights (Art 2.a). Art 5 provides that Frontex shall ensure that all border guards of participating Member States and Frontex staff have received, prior to the participation in operational activities, training in relevant EU law and international law, including fundamental rights and international protection and guidelines for the purpose of identifying persons seeking and directing them towards the appropriate facilities. Moreover, Article 3 introduced an obligation for Frontex Executive Director to terminate or suspend joint operations and pilot projects if he considers that violations of fundamental rights are of a serious nature or likely to persist.

### **3. The External Borders Fund**

65. The External Borders Fund was established by Decision No 574/2007/EC of the European Parliament and of the Council as part of the General programme “Solidarity and Management of Migration Flows”.

66. Its general objectives include efficient organization of control, covering both checks and surveillance tasks relating to the external borders; efficient management by the Member States of the flows of persons at the external borders; uniform application by border guards of the provisions of Union law on the crossing of external borders; and improvement of the management of activities organised by the consular and other services of the Member States in third countries as regards the flows of third-country nationals into the territory of the Member States.

67. Its specific objectives include improving surveillance systems between border crossing points; gathering information with respect to the evolving situation on the ground; ensuring adequate registration of border crossings; introduction or upgrading of collection of data; improving coordination between authorities operating at border crossing points; improvement of the capacity and the qualifications of border guards; and improving

information exchange. The External Borders Fund provides for significant funding (1820 million euros over the period 2007-13) to support the efforts made by EU States to control its external borders. The Fund will be absorbed by the future Internal Security Fund.

#### 4. EUROSUR

68. In February 2008, the European Commission presented a roadmap (COM (2008) 68 final) for establishing the European Border Surveillance System (EUROSUR) by 2013. The Commission's Communication focused on "enhancing border surveillance, with the main purpose of preventing unauthorised border crossings, to counter cross-border criminality and to support measures to be taken against persons who have crossed the border illegally."

69. The Commission saw the implementation of EUROSUR as a decisive step in the further gradual establishment of a common European integrated border management system, and noted that the External Borders Fund should be the main solidarity mechanism for Member States in sharing the financial burden. In its Communication, the Commission points out the following objectives for the further development of border surveillance: reduction of the number of "illegal" immigrants who manage to enter the EU undetected; increase internal security of the EU as a whole by contributing to the prevention of cross-border crime; and enhancing search and rescue capacity. In order to meet these objectives, the Commission stated that it is necessary to envisage a common technical framework to support Member States' authorities to act efficiently at local level, coordinate at European level and cooperate with third countries in order to detect, identify, track and intercept persons attempting to enter the EU illegally outside border crossing points.

70. The Commission proposed three phases of implementation of EUROSUR: Phase 1 involved the interlinking and streamlining of existing surveillance systems and mechanisms at Member States level, including the setting up of National Coordination Centres with a communication network to exchange data between Member States and Frontex, and support to neighbouring third countries for the setting up of border surveillance infrastructure. Phase 2 involved the development and implementation of common tools and applications for border surveillance at EU level, including satellites and "unmanned aerial vehicles" (drones), noting that extending their operation to coastal areas of third countries would require appropriate agreements with those countries. Phase 3 involved the creation of a common monitoring and information sharing environment for the EU maritime domain, thus integrating all existing sectoral systems which are reporting and monitoring traffic and activities in sea areas under the jurisdiction of the Member States and in adjacent high seas into a broader network.

71. The European Council of 23-24 June 2011 requested the further development of EUROSUR as a matter of priority in order to become operational by 2013. In December 2011, the Commission tabled a legislative proposal for EUROSUR (COM(2011) 873 final), which is currently being negotiated in order to make EUROSUR gradually operational as of 1 October 2013. Once adopted, the EUROSUR Regulation will determine inter alia the competencies and responsibilities of the national coordination centres for border surveillance and of Frontex, requiring them to exchange information via so-called situational pictures at national and European level.

72. The legislative proposal states that the aim of EUROSUR is to reinforce the control of the Schengen external borders. EUROSUR will establish a mechanism for Member States' authorities carrying out border surveillance activities to share operational information and to cooperate with each other and with Frontex in order to reduce the loss of lives at sea and the number of irregular migrants entering the EU undetected, and to increase internal security by preventing cross-border crimes, such as trafficking in human beings and the smuggling of drugs.

73. The purpose of the legislative proposal is to improve the situational awareness and reaction capability of Member States and Frontex when preventing irregular migration and cross-border crime at the external land and maritime borders (Art 1). This shall be done by establishing a common framework (Art 4), with clear responsibilities and competencies for the national coordination centres for border surveillance in the Member States (Art 5) and Frontex (Art 6), which form the backbone of EUROSUR. These centres, which shall ensure an effective and efficient management of resources and personnel at national level, and Frontex shall communicate with each other via the communication network (Article 7), which would allow to exchange both non-classified sensitive as well as classified information. The cooperation and information exchange between the national coordination centres and Frontex is done via “situational pictures” (Art 8), which shall be established at national (Art 9) and European level (Art 10) as well as for the pre-frontier area (Art 11). Member States and Frontex shall comply with fundamental rights, including data protection requirements, when applying the Regulation (Art 2.3).

74. As regards the cooperation with neighbouring third countries, EUROSUR shall be interlinked with the regional networks set up by Member States with neighbouring third countries in the Baltic Sea, the Black Sea and around the Canary Islands. In addition, a regional network shall be set up with northern African countries in the Mediterranean Sea. The exchange of information which a third country could use to identify persons or groups of persons who are under a serious risk of being subjected to torture, inhuman and degrading treatment or punishment or any other violation of fundamental rights, shall be prohibited (Article 18.2).

75. The use of drones for border surveillance, which was originally proposed, is not an option as long as drones are not allowed to fly in civil airspace, which will still take several years to be accomplished.

76. Member States and Frontex are currently developing, implementing and testing the different components with a view to making EUROSUR operational as of October 2013. The total costs for EUROSUR for the period 2014-2020 have been estimated to amount to 244 million Euros.

## **5. The “Smart Borders” Package**

77. In its Communication of 13 February 2008 preparing the next steps in border management in the European Union, the Commission suggested the establishment of a Registered Traveller Programme (RTP) for pre-vetted, frequent third country travellers in order to allow for facilitated border crossings. The Commission also suggested the establishment of an entry/exit system (EES), entailing the electronic register of the dates and places of entry and exit of each third country national admitted for a short stay. The proposals were endorsed in the Stockholm Programme in December 2009.

78. A discussion was launched in a 2011 Communication between EU institutions and authorities about the implementation of new systems, in light of their added value, their technological and data protection implications, and their costs. Following up on this, on 28 February 2013, the Commission proposed a ‘smart borders package’ to speed-up, facilitate and reinforce border check procedures for foreigners travelling to the EU. The package consists of a Registered Traveller Programme and an Entry/Exit System, aimed at simplifying life for frequent third country travellers at the Schengen external borders and enhancing EU border security.

79. The Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme (RTP) (COM(2013) 97 final), provides that frequent travellers from third countries would be allowed to enter the EU using simplified border checks, subject to pre-screening and vetting. The RTP will make use of automated

border control systems (i.e. automated gates) at major border crossing points such as airports that make use of this modern technology. As a result, border checks of Registered Travellers would be much faster than at present.

80. The Proposal for a Regulation of the European Parliament and of the Council establishing an Entry/Exit System (EES) to register entry and exit data of third country nationals crossing the external borders of the Member States of the European Union (COM(2013) 95 final), provides that the time and place of entry and exit of third country nationals travelling to the EU will be recorded. The system will calculate the length of the authorised short stay in an electronic way, replacing the current manual system, and issue an alert to national authorities when there is no exit record by the expiry time.

81. The purpose of the EES will be to improve the management of the external borders and the fight against irregular migration, by providing a system that will calculate the authorized stay of each traveller; assist in the identification of any person who may not, or may no longer, fulfil the conditions for entry to, or stay on the territory of the Member States; and get a precise picture of travel flows at the external borders and the number of overstayers eg by nationality of travellers.

82. The Preamble states that the Regulation has to be applied in accordance with fundamental rights and principles recognised by the Charter of Fundamental Rights of the European Union, in particular the protection of personal data (Article 8 of the Charter), the right to liberty and security (Article 6 of the Charter), respect for private and family life (Article 7 of the Charter), right to asylum (Article 18 of the Charter), protection in the event of removal, expulsion or extradition (Article 19 of the Charter), and right to an effective remedy (Article 47 of the Charter).

## **6. The Common Visa Policy**

83. The EU has a common list of countries whose citizens must have a visa when crossing the external borders, and a list of countries whose citizens are exempt from that requirement. These lists are set out in Council Regulation (EC) 539/2001 and its successive amendments. Generally, a short-stay visa issued by one of the Schengen States entitles its holder to travel throughout the 26 Schengen States for up to three months within a six-month period. Visas for visits exceeding that period remain subject to national procedures.

84. In 2011 the Commission presented a proposal (COM(2011) 290 final) amending Regulation 539/2001. It proposes establishing a visa safeguard clause for suspending visa liberalization in the event one or more Member States is being confronted by an “emergency situation” characterised by the occurrence of either (a) a sudden increase of at least 50%, over a six month period, in the number of nationals of a third country found to be illegally staying in the Member State’s territory; (b) a sudden increase of at least 50%, over a six month period, in the number of asylum applications from the nationals of a third country for which the recognition rate of asylum applications was less than 3% over the previous six month period; or (c) a sudden increase of at least 50%, over a six month period, in the number of rejected readmission applications submitted by a Member State to a third country for its own nationals.

## **7. Immigration Liaison Officers**

85. On 13 June 2002, the Council agreed on a plan for the management of the external borders of the Member States of the EU, envisaging the setting up of networks of immigration liaison officers posted in third countries. In the conclusions of its meeting of 21 and 22 June 2002, the Seville European Council called for the creation of a network of immigration liaison officers of the Member States before the end of 2002. At its meeting of 28 and 29 November 2002, the Council adopted conclusions on the improvement of the

Immigration Liaison Officers Network, noting that a network of liaison officers was in place in most of the countries surveyed in the report, but noting also that there was a need to further strengthen this network. The Thessaloniki European Council of 19 and 20 June 2003 emphasized the need for acceleration of work on adopting the appropriate legal instrument formally establishing the Immigration Liaison Officers Network in third countries, at the earliest possible date.

86. Council Regulation (EC) 377/2004 formalises the network of immigration liaison officers (ILO), and defines “immigration liaison officer” as a representative of one of the Member States, posted abroad by the immigration service or other competent authorities in order to establish and maintain contacts with the authorities of the host country with a view to contributing to the prevention and combating of “illegal” immigration, the return of “illegal” immigrants and the management of legal migration. The immigration liaison officers are tasked with collecting information for “use either at the operation level, or at a strategic level, or both” particularly concerning, inter alia, flows of “illegal” immigrants, routes followed by those flows and their modus operandi.

87. Regulation 377/2004 was amended by Regulation (EU) 493/2011 of the European Parliament and of the Council providing, inter alia, that Representatives of the Commission and Frontex may participate in the meetings organised within the framework of the immigration liaison officers network.

### **C. Legal, institutional and policy framework with regard to the return of irregular migrants**

88. Article 79.2(c) of the Treaty on the Functioning of the European Union provides that the EU shall adopt measures in the area of “illegal immigration and unauthorised residence, including removal and repatriation of persons residing without authorisation”.

#### **1. The Return Directive**

89. In 2008, the EU adopted common rules for managing the return of irregular migrants (Return Directive, 2008/115/EC). The Directive sets out common standards and procedures for returning “illegally staying third-country nationals”, in accordance with “fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations” (Art 1). The Directive requires that a period for voluntary departure be granted (Art 7), and provides for non-custodial measures during this period (regular reporting to the authorities, deposit of an adequate financial guarantee, submission of documents or the obligation to stay at a certain place).

90. Return decisions and, if issued, entry-ban decisions and decisions on removal shall be issued in writing and give reasons in fact and in law, as well as information about available legal remedies, and Member States shall provide, upon request, a written or oral translation of the main elements of decisions related to return, including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand (Art 12). Art 13 provides the right to an effective remedy to appeal against or seek review of decisions related to return, before a competent authority, which shall have the power to review decisions related to return, including the possibility of temporarily suspending their enforcement. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.

91. Article 9 provides that removal shall be postponed when it would violate the principle of non-refoulement, or for as long as a suspensory effect is granted in accordance with Article 13(2). Removal may also be postponed due to specific circumstances such as

the person's physical state or mental capacity, or technical reasons such as lack of transport capacity, or failure of the removal due to lack of identification. When removal has been postponed, Member States should ensure family unity, emergency health care and essential treatment of illness and access to basic education for children, and that the special needs of vulnerable persons are taken into account.

92. Art. 15 provides that detention for the purpose of removal shall only be used if other sufficient but less coercive measures cannot be applied effectively in a specific case, particularly when there is a risk of absconding, or the person concerned avoids or hampers the preparation of return or the removal process.

93. Detention shall only be ordered by administrative or judicial authorities, in writing with reasons being given in fact and in law, and must be subject to speedy judicial review upon request. The third-country national concerned shall be released immediately if the detention is not lawful. The Directive further prescribes a maximum period of detention of 6 months, which may be extended exceptionally to maximum 18 months. When no reasonable prospect of removal exists, a person shall be released immediately.

94. Art. 16 imposes minimum conditions of detention. Detention shall take place as a rule in specialized detention facilities. Third-country nationals in detention shall be allowed - on request - to establish in due time contact with legal representatives, family members and competent consular authorities, and particular attention shall be paid to the situation of vulnerable persons. Emergency health care and essential treatment of illness shall be provided. Relevant and competent national, international and nongovernmental organisations and bodies shall have the possibility to visit detention facilities.

95. Art. 17 limits the detention of children and families, who should only be detained as a measure of last resort and for the shortest appropriate period of time. The best interests of the child shall be a primary consideration in the context of the detention of children pending removal.

96. A Commission Communication evaluating the implementation of the Return Directive is scheduled for December 2013.

## **2. The European Return Fund**

97. In its Decision 575/2007/EC, the European Parliament and the Council established the European Return Fund as part of the General Programme "Solidarity and Management of Migration Flows". The general objective of the fund is to support the efforts made by Member States to improve the management of return through the use of the concept of integrated management and by providing for joint actions to be implemented by Member States or national actions that pursue Community objectives under the principle of solidarity, taking account of Community legislation in this field and in full compliance with fundamental rights. The actions eligible for support include the facilitation of voluntary returns and the simplification and implementation of enforced returns.

98. The European Return Fund provides for significant funding (630 million euros over the period 2007-13) to support the efforts made by EU States for returns. It will be absorbed by the future Asylum and Migration Fund.

## **3. Readmission Agreements**

99. Article 79.3 of the Treaty on the Functioning of the European Union provides that the EU may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence or residence in the territory of one of the Member States.

100. The EU has entered into several readmission agreements with third countries, facilitating the readmission of irregular migrants, including own nationals as well as third country nationals. The Council has issued negotiating directives to the Commission for 19 countries, and so far 13 EU Readmission Agreements have entered into force. Readmission clauses have been incorporated in agreements such as the European Neighbourhood Policy and visa facilitation agreements. Most recently, an EU-Turkey readmission agreement was initialled in 2012.

101. Furthermore, the ability for EU Member States to continue to conclude bilateral readmission agreements is maintained in Protocol (no 23) to the Treaty on the Functioning of the EU “on external relations of the Member States with regard to the crossing of external borders”, as long as they respect EU law and other relevant international agreements.

102. In the Stockholm Programme, the Council invited the Commission to present an evaluation during 2010 of EU readmission agreements and ongoing negotiations, and to propose a mechanism to monitor the implementation of the agreements. On that basis, the Council should define a renewed, coherent strategy on readmission. Thus, in February 2011, the Commission presented a Communication to the European Parliament and the Council, aiming to evaluate the implementation of the EU Readmission agreements already in force; assess the ongoing readmission negotiations; and provide recommendations for a future EU readmission policy, including on monitoring mechanisms. The Communication recommended that as a rule, future negotiating directives should not cover third country nationals. Only in cases where there is a big potential risk of irregular migration transiting a country’s territory to the EU due to its geographical location, should the third country national clause be included, and only when appropriate incentives are offered. It further recommended that NGOs and international organizations should participate, on a case-by-case basis, in the Joint Readmission Committees, which should work much more closely with relevant actors on the ground in the third countries, including on the monitoring of the treatment of third country nationals.

103. Section 4.3 of the Commission’s Communication deals with possible measures to enhance human rights guarantees in EU Readmission Agreements, including enhancing the access to international protection and legal remedies in practice; providing for suspension clauses for persistent human rights violations in the third country concerned; giving preference to voluntary departure; requiring compliance with human rights for the treatment of third country nationals readmitted to a transit country; and setting up a post-return monitoring mechanism in the countries of return.

104. In June 2011, the Justice and Home Affairs Council adopted conclusions defining the EU strategy on readmission, stating, *inter alia*, that “combating illegal immigration is a major migration policy goal of the European Union”. The Council considered that more attention should be paid to the main countries of origin, but stated that it will continue, as a general rule, incorporating clauses on the readmission of third country nationals. The Council further stated that Joint Readmission Committees were to be considered as the main tools for monitoring the implementation of EU Readmission Agreements.

## **D. Legal, institutional and policy framework with regard to asylum**

### **1. The Common European Asylum System**

105. Article 78(1) of the Treaty on the Functioning of the European Union states that the EU shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement.



106. The Tampere European Council of 1999 agreed on the establishment of a Common European Asylum System. Under the Tampere programme, between 1999 and 2005, negotiations started on the creation of the Common European Asylum System, aiming to harmonise asylum procedures in the EU and develop higher standards of protection for asylum seekers. Several legislative measures harmonising common minimum standards for asylum at the EU level were adopted, the four most important being the Directive laying down minimum standards for the reception of asylum seekers (Reception Conditions Directive, 2003/9/EC); the Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (Qualification Directive, 2004/83/EC); the Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status (Asylum Procedures Directive, 2005/85/EC); and the Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (Dublin Regulation, 343/2003). Additionally, the Council Regulation concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention (EURODAC Regulation, 2725/2000) provides that EU Member States shall take and transmit the fingerprints of every non-EU national above the age of 14 who asks for asylum in their territory, or who is apprehended for crossing their external border unauthorised. Furthermore, the Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive, 2001/55/EC) allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin.

107. The Commission's Policy Plan on Asylum, presented in June 2008, stated that three pillars underpin the development of the Common European Asylum System: First, bringing more harmonization to standards of protection by further aligning the EU States' asylum legislation, which would require amendments to the Reception Conditions Directive, the Asylum Procedures Directive and the Qualification Directive. Secondly, effective and well-supported practical cooperation, including through the Asylum Support Office and thirdly, increased solidarity and sense of responsibility among EU States, and between the EU and non-EU countries. The need to improve the "Dublin" system and establish solidarity mechanisms was noted.

108. The EU Member States committed to establishing the Common European Asylum System by 2012. The Council and the European Parliament already reached agreement on the recasts of the Qualification Directive, the Reception Conditions Directive, and the Dublin Regulation, while negotiations on the recasts of the EURODAC Regulation and the Asylum Procedures Directive have entered their final phase, with agreement expected in spring 2013.

109. The recast of the Reception Conditions Directive provides detailed provisions for the detention of asylum seekers during the examination of their asylum application. Article 8(2) provides that when it proves necessary and on the basis of an individual assessment of each case, Member States may detain an asylum applicant, if other less coercive alternative measures cannot be applied effectively. Six grounds for detention are set out in article 8(3): in order to determine or verify identity or nationality; in order to determine those elements on which the application for international protection is based which could not be obtained in the absence of detention, in particular when there is a risk of absconding of the applicant; in order to decide on the applicant's right to enter the territory; when he or she is detained subject to a return procedure under the Return Directive, and the Member State concerned can substantiate on the basis of objective criteria that there are reasonable grounds to believe that he or she is making the application for international protection merely in order

to delay or frustrate the enforcement of the return decision; when protection of national security or public order so requires; or in accordance with Article 28 of the recast Dublin Regulation. Detention of asylum seekers in prisons is allowed, if no specialized detention facility is available, and the detention of unaccompanied children is allowed “in exceptional circumstances”.

110. The recast of the Dublin Regulation maintains the general rule that asylum applications shall be dealt with by the first country of entry into the EU. It includes some improvements, including the obligation to hold a personal interview and procedural safeguards on appeal. The establishment of an early warning, preparedness and crisis management mechanism envisaged under the recast Dublin Regulation article 33 is aimed at contributing to timely identification of protection gaps in EU Member States.

111. In 2014, the Commission will launch a comprehensive “fitness check” by conducting an evidence-based review covering the legal, economic and social effects of the Dublin system including its effects on fundamental rights (Commission Communication on enhanced intra EU solidarity in the field of asylum, COM(2011) 835 final). The Communication aims to develop solidarity in the field of asylum, based on the principles set out in the Communication.

112. In May 2012, the Commission presented a proposal for a recast of the EURODAC Regulation, which merges into a single regulation the proposed amendments for the better functioning of EURODAC, as well as a proposal for law enforcement access to EURODAC. The proposal provides that law enforcement authorities will be given access to EURODAC data, when national fingerprint databases return negative results and where the comparison is necessary for the purpose of the prevention, detection or investigation of terrorist offences or other serious criminal offences; the comparison is necessary in a specific case; and there are reasonable grounds to consider that such comparison with EURODAC data will contribute to the prevention, detection or investigation of any of the criminal offences in question. Additionally, Europol may make requests for comparison with EURODAC data within the limits of its mandate and where necessary for the performance of its tasks and for the purposes of a specific analysis or an analysis of a general nature and of a strategic type.

## **2. The Refugee Fund**

113. The European Refugee Fund was established by Decision No 573/2007/EC of the European Parliament and of the Council, as part of the General programme “Solidarity and Management of Migration Flows”. It has provided EUR 630 million over the period 2008-13. It aims to ensure solidarity and responsibility sharing within the EU, and supports actions relating to reception conditions and asylum procedures; integration measures; enhancement of Member States’ capacity to develop, monitor and evaluate their asylum policies; and resettlement. The Refugee Fund will be absorbed by the future Asylum and Migration Fund.

## **3. The European Asylum Support Office (EASO)**

114. The Hague Programme proposed the establishment of a European Asylum Support Office. EASO was created by Regulation (EU) 439/2010 of the European Parliament and of the Council, and inaugurated in 2011. It plays a key role in the development of the Common European Asylum System. It was established with the aim of enhancing cooperation on asylum matters and helping Member States fulfil their European and international obligations to protect people in need. EASO acts as a centre of expertise on asylum, and provides support to Member States whose asylum and reception systems are under particular pressure.

## **E. Legal, institutional and policy framework related to human rights**

### **1. The Treaty on European Union**

115. Art 2 of the Treaty on European Union (TEU) provides that the EU is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.

116. Art 6.1 TEU states that the EU recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, which shall have the same legal value as the Treaties. Art 6.2 provides that the EU shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Art. 6.3 provides that fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

117. Art 21 TEU provides that the EU's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

### **2. The Charter of Fundamental Rights of the European Union**

118. In June 1999, the Cologne European Council concluded that the fundamental rights applicable at EU level should be consolidated in a charter to give them greater visibility. The heads of state/government aspired to include in the charter the general principles set out in the 1950 European Convention on Human Rights and those derived from the constitutional traditions common to EU countries. In addition, the charter was to include the fundamental rights that apply to EU citizens as well as the economic and social rights contained in the Council of Europe Social Charter and the Community Charter of Fundamental Social Rights of Workers. It would also reflect the principles derived from the case law of the Court of Justice and the European Court of Human Rights.

119. The Charter was drawn up by a convention consisting of a representative from each EU Member State and the European Commission, as well as members of the European Parliament and national parliaments. It was formally proclaimed in Nice in December 2000 by the European Parliament, Council and Commission. In December 2009, with the entry into force of the Lisbon Treaty, the Charter was given binding legal effect equal to the Treaties. The Charter applies to the European institutions, as well as to EU Member States when they implement EU law.

120. The Charter reaffirms the rights set out in the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the EU and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights.

121. The rights in the Charter are grouped in seven chapters: Dignity, freedoms (including the right to asylum, and protection in the event of removal, expulsion or extradition), equality, solidarity, citizens' rights, justice, and general provisions.

### **3. The European Union Agency for Fundamental Rights (FRA)**

122. The European Union Agency for Fundamental Rights (FRA) was established in 2007 by Council Regulation (EC) No 168/2007, with the objective to provide the relevant

institutions, bodies, offices and agencies of the EU and its Member States, when implementing EU law, with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights. The FRA is the successor to the former European Monitoring Centre on Racism and Xenophobia (EUMC). It continues the work of the EUMC in the area of racism, xenophobia and related intolerances, but in the context of a much broader mandate.

**4. Working Party on Human Rights (COHOM)**

123. The Working Party on Human Rights (COHOM) was created under the Council of the European Union in 1987 (with the extension of its mandate in 2003) and is responsible for human rights issues in the EU's external relations. COHOM contributes to the shaping of the policy of the EU on human rights in its external relations and monitors developments in the area of human rights worldwide. It is composed of experts of the Member States, the European External Action Service and the European Commission.

**5. EU Strategic Framework and Action Plan on Human Rights and Democracy**

124. The EU's Strategic Framework and Action Plan on Human Rights and Democracy were adopted by the Council on 25 June 2012. The Strategic Framework states that the EU will "fight discrimination in all its forms [...] and advocating for the rights of [...] migrants [...]." The Action Plan provides that the EU shall "In line with the Communication on the Global Approach to Migration and Mobility, develop a joint framework between Commission and EEAS for raising issues of statelessness and arbitrary detention of migrants with third countries."

**6. The EU Special Representative for Human Rights and the European External Action Service (EEAS)**

125. The appointment of a Special Representative for Human Rights followed the adoption of the EU's Strategic Framework and Action Plan on Human Rights and Democracy. The Special Representative's role is to enhance the effectiveness and visibility of EU human rights policy. The Special Representative works closely with the European External Action Service (EEAS). The Special Representative and EEAS are responsible for promoting human rights, guaranteeing full application of the Charter of Fundamental Rights in all aspects of the EU's external actions, and consistency between external action and other policies. The Special Representative and the EEAS also contribute to the programming and management of the geographic and thematic external aid instruments.

## **7. The Victims of Crime Directive**

126. The Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime (Victims of Crime Directive 2012/29/EU), states in its Art 1 that the rights set out in the Directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status. Art 5.2 provides that Member States shall ensure that victims who wish to make a complaint with regard to a criminal offence and who do not understand or speak the language of the competent authority be enabled to make the complaint in a language that they understand or by receiving the necessary linguistic assistance. Article 7 provides for the right to interpretation and translation during criminal proceedings. Shelters or any other appropriate interim accommodation shall be provided for victims in need of a safe place due to an imminent risk of secondary and repeat victimisation, of intimidation and of retaliation (Art 9.3(a)).

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