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增进和保护所有人权——公民权利、政治权利、

经济、社会和文化权利,包括发展权

移民人权问题特别报告员弗朗索瓦•克雷波的报告

依靠今后一代人的迁移: 欧洲联盟外部边界管理及其对移民人权的影响区域研究后续报告*

概要

地中海中部的移民死亡事件生动而真实地展示出欧洲联盟边界管理对于移民人 权仍然具有的重要影响。本报告承接 2013 年向人权理事会提交的对于欧洲联盟边 界管理的分析。报告讨论一直存在的人权关切,审查欧洲联盟总体移民政策的长期 可行性以及在融合和多样性方面适用欧盟根本价值观和区域人权标准的问题。

GE.15-09247 (C) 030615 040615





^{*} 本报告以所有正式语文分发。报告附件仅以提交语文分发。

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一. 导言

1. 本报告根据人权理事会第 17/12 号决议提交。报告概述移民人权问题特别报告员从 2013 年 4 月 1 日到 2014 年 3 月 31 日期间开展的活动。专题部分讨论欧洲联盟边界管理及移民人权问题。

二. 特别报告员开展的活动

A. 参加磋商和会议

- 2. 2014 年 11 月,特别报告员组织了一场关于招聘做法及移民工人问题的国际 磋商会议,会上就重要问题、障碍和政策选择进行了全面和活跃的对话。磋商结 论已写进特别报告员 2015 年提交大会的报告。
- 3. 此外,特别报告员参与了若干国际和区域性的对话和会议,包括欧洲联盟基本权利署移民权利问题年度会议、联合国难民事务高级专员办事处(难民署)以"海上保护"为主题的保护问题第七次对话。

B. 国别访问

- 4. 特别报告员注意到有 180 万斯里兰卡人在海外工作,面临许多人权受侵犯问题,因此于 2014 年 5 月 19 日至 26 日访问了斯里兰卡。他建议该国政府采取一系列措施,包括与移民目的地国签署双边协议,废除移民招聘费,充分落实私营机构道德行为守则。
- 5. 特别报告员于 2014 年 12 月 2 日至 6 日访问了意大利。他发现,尽管意大利面临困难的经济和政治形势,但仍采取了大胆的举措,解决人数达到空前规模的移民和寻求庇护者乘船前来的问题。他强调指出,欧洲联盟成员国必须集体支援一线国家,提供充分尊重移民人权的可持续应对办法。
- 6. 特别报告员于 2014 年 12 月 6 日至 10 日访问了马耳他。他在访问之后表示,马耳他必须预见到乘船前来的移民和寻求庇护者人数达到空前水平并会持续增长,并制订相关应对方案。

C. 欧洲联盟后续情况

7. 除了访问意大利和马耳他之外,特别报告员还访问了位于布鲁塞尔的欧洲联盟,作为 2012 年对于欧盟外部边界管理长达一年的研究工作的后续行动。2013 年,特别报告员仍然相信,必须解决非正规越境问题,这似乎也是最恶劣的侵犯人权行为发生的领域。越来越多的移民经由地中海并在海上死亡,而欧洲联盟成员国应对薄弱,这就促使特别报告员重新提起这些问题。此外,人权理事会主席在理事会第二十七届会议上要求报告员监测海路移民的状况。

8. 本报告应结合关于意大利和马耳他的访问报告及向人权理事会提交的关于欧洲联盟边界管理情况报告(A/HRC/23/46)一起阅读。

三. 2013 年欧洲联盟外部边界管理及其对移民人权的影响区域研究后续报告

A. 导言

- 9. 尽管存在一些积极的进展,但特别报告员在 2013 年报告中提出的人权问题 始终没有解决。欧洲联盟边界管理政策仍然无效且自相矛盾,在移民问题上缺乏 一个统一的基于人权的方针,这些问题都在地中海上移民死亡事件中生动而现实 地展示出来。这些悲剧性事件使利用海上移民路线的移民人权问题成为令人瞩目 的焦点。但是在移民各个阶段包括已经在欧洲联盟的那些移民都会遭受种种痛 苦,只是较少被提及而已。
- 10. 鉴于欧洲联盟在全球资源中所占份额以及欧盟内部大量的实质规范标准,只能将近期海上的死亡事件以及其他人权问题视为集体性政治意愿和政策选择的结果。这么多的人遭受痛苦,移民活动倾向于偷偷进行,这就表明欧洲联盟边界管理体系存在系统性失灵问题,并清楚说明欧盟正在丧失对移民的控制,尽管它持续对边界安保进行投入。这些失灵还影响到更深的层次,表明欧洲联盟是如何应对不同和多样性的。
- 11. 试图维持现状的费用高昂。随着移民在海上死亡,在边界遭受大量痛苦,欧洲联盟内部及相邻国家的人力成本不断上升。此外,对一个无效的系统进行投资,而不是最大限度地利用机会通过有组织的移民活动受益,这也意味着大量资源被丧失。
- 12. 为弥补这个问题,欧洲联盟需要在移民问题上采取全局性观点,审查如何转变相关政策和基本概念,制订一种基于人权的方针。采取一种长期性观点,利用依靠未来 25 年中的人员流动将使欧盟能够更好地应对今后经济、社会和人口变化的重大挑战。

B. 2013 年以来移民情况综述

1. 非欧盟移民并未持续增长,但非正规移民和庇护申请在增加

13. 五年来,来自第三国的移民总体数量并未持续增长。经济合作与发展组织(经合组织)预测,2012年,欧洲联盟中涉及非欧盟国民的移民人数下降了12%。¹流入欧盟的人数总体下降反映了一个现实,即来自第三国的移民普遍认为欧盟不是理想地区,而且正规移民机会大幅度减少。

¹ 经合组织, "移民确实在增加吗?",移民政策讨论(2014年5月)。

- 14. 这种做法的直接副作用体现在非正规移民趋势上。对欧洲联盟的正规移民数字在下降,但自 2013 年报告以来的一个明确趋势是,非正规移民和庇护要求的数字在上升。欧洲联盟成员国外部边境行动合作管理局(欧盟边境合作管理局)报告说,2014 年第四季度,非正规移民处于 2007 年以来的最高水平(100,000 名非正规渠道入境者),2007 年是在 FRONTEX 风险分析网络下实现数据共享的起始年份。
- 15. 庇护要求也大量增加。欧洲联盟内部的庇护申请数在 1992 年达到最高水平 (670,000 起), 2001 年再次达到高峰水平(424,200 起), 而到 2006 年降到不足 200,000 起。在这个相对低点之后,申请数不断增加,直到 2012 年,之后变化大大加快,寻求庇护人数在 2013 年升至接近 450,000 人。
- 16. 在全球范围内,因人道主义危机流离失所而到欧洲寻求避难的人数比例仍然很小。根据难民署的报告,就流离失所问题而言,全世界目前正处在第二次世界大战结束以来最严重的时期,2015年初,在黎巴嫩登记的难民有 130万人,土耳其登记的难民有 190万人。与此形成对照的是,欧洲联盟在 2014年评估的庇护申请约为 620,000 起。

2. 移民趋势在分化

- 17. 流入欧洲联盟的正规移民趋势在欧盟全体成员国之间并不均衡。德国、芬兰和法国等国自 2012 年以来的移民流入人数在增加,而流入意大利、西班牙和大不列颠及北爱尔兰联合王国的永久移民数字在下降。²
- 18. 庇护申请方面的趋势也在分化,欧洲统计局 2014 年的统计数字显示,德国有 126,705 起,而列支敦士登为 55 起。根据欧洲统计局的数字,德国、瑞典和意大利处理的申请比例从 2010 年的 37%增加到 2014 年的 60%。

3. 海路移民和海上死亡事件

- 19. 虽然通往欧洲联盟有若干条危险的海上通道,但自 2013 年以来,最常使用的是地中海中路。这条通道的使用率大幅度上升,造成大规模人员死亡的悲剧结果。难民署估计,2014 年有 3,000 人在海上死亡或失踪。2015 年前四个月的事件表明,这条道路仍在使用,而与之相联的本可避免的移民死亡事件仍在以惊人的速度发生着。
- 20. 虽然大多数海路移民是经由地中海中路一线,但欧洲联盟意识到,由于做出努力来保护与土耳其的边界,更多的难民和移民开始采取经爱琴海至希腊群岛这条线路。欧盟边境合作管理局报告说,从7月到9月,采用这些线路的移民人数创下历史记录。2014年10月,联合国难民事务高级专员警告说,形势已经达到危机临界点。

2 同上。

4. 针对移民的仇外情绪上升

21. 经济状况不佳,欧洲联盟内部的民族民粹政党抬头,2015 年初巴黎又发生恐怖主义袭击惨剧,在此背景下,仇外心理和仇恨言论有所上升。自特别报告员2013 年报告以来针对移民仇外情绪的上升是一个重大趋势,涉及移民在欧洲的形象,也成为制订更进步政策的一个绊脚石。

5. 积极进展

- 22. 欧洲联盟在移民人权方面也有若干积极进展,包括:
- (a) 欧洲人权法院和欧洲法院作出判决,挑战外部化做法、"都柏林逻辑"、移民拘押以及获得社会保障等问题;
- (b) 欧盟边境合作管理局基本权利官员 Inmaculada Arnaez Fernandez 及手下工作人员开展的工作,包括制订"联合遣返行动守则"、"Vega 儿童手册"和建立基本权利监督机制;
- (c) 意大利政府和欧盟边境合作管理局通过"我们的海洋"和"Triton"(泛 欧边界控制)行动开展的搜救业务。但是特别报告员指出, Triton 行动有限, 下文 将进行讨论;
- (d) 正规移民举措,包括"蓝卡"制度、季节性工人指令及学生和研究人员指令草案;
 - (e) 欧洲议会和欧盟委员会为应对地中海当前危机做出的努力;
 - (f) 欧洲联盟基本权利署对移民人权的关注,包括该机构 2014 年的年会。
- 23. 尽管存在这些积极的因素,但欧洲联盟处理边界管理的方式仍然以坚持安保为主。并没有将移民人权整体和统一地纳入各项政策之中。这一体系的标志仍然是复杂、相关政策与区域和国际性人权标准缺乏统一、责任分担有限以及缺少启动所需改革的政治意愿。

C. 从移民人权角度分析欧洲联盟的移民管理和外部边界控制

1. 现状难以维系

- 24. 当前,欧洲联盟边界管理体系在非正规移民不断增加的压力下已经难以维系,虽然危机造成的流离失所人员在欧盟寻求避难的比例相对并不高。
- 25. 随着移民不断地在海上死亡,移民在各个阶段都遭受大量痛苦,显然欧洲 联盟并未控制住移民现象。这种失控表现在各个方面,引起多方面的人权关切, 其中许多从 2013 年以来就一直存在,这两年变得益发严重和紧迫。

进入欧洲联盟的危险通道与人权问题

- 26. 利用危险通道,特别是地中海中路进入欧洲联盟的现象自 2013 年以来大幅度增加,导致生命权受到大规模侵犯,移民进程各个阶段都存在重大侵犯人权现象。这种移民形式主要是由冲突和贫穷(推的因素)以及欧洲劳动力市场需求得不到满足(拉的因素)而造成的。这些移民中许多人是由于完全绝望而又缺乏正规移民机会才铤而走险的。
- 27. 有组织的偷渡集团利用缺乏正规移民渠道的现象而从中牟利,他们超越边界控制举措,为通过危险通道进入欧洲提供便利,以此换取大量钱财。组织偷渡者明显无视移民的尊严、生命和权利,系统地剥削利用那些不顾一切想要前往安全之地的人。
- 28. 通常,装载移民前往欧洲联盟船只的路径是这样的: 走地中海中路和东路的一般从埃及和利比亚出发; 走地中海西路的一般从摩洛哥和突尼斯出发; 走爱琴海线路的一般从土耳其出发。其中许多移民在这之前已经走过漫漫长途,包括来自撒哈拉以南国家和中东国家的移民。穿越撒哈拉沙漠的移民有过可怕的经历,包括遭受强奸和其它形式的暴力。
- 29. 移民到达准备出发地之后,常常遭受更多侵权行为。欧洲联盟基本权利署曾发布报告,介绍在摩洛哥为移民开办的条件极其恶劣的临时营地,以及被土耳其组织偷渡者锁在小屋子里的移民情况。组织偷渡者通常对乘船前往欧盟的人每人收取几千美元的费用。有好几名成员偷渡的家庭为此可能支付超过1万美元的费用。
- 30. 乘船的过程也是很危险的,船只都是最基本的,导航系统有限,并不适于航海,而且船上的食物、水、燃料、急救包和救生衣的数量往往不足。船只通常人满为患,有时甚至比建议载客数多出一倍还多。移民只要交了钱,就常常被迫按计划走下去,即使他们有时在看到船只之后想改变主意也不行。移民曾报告说,有些船只连船长都没有,却让没有任何经验的移民开船,因为组织偷渡者不想冒被当局抓住的风险。
- 31. 组织偷渡者也在船上时曾有过对妇女进行性侵犯和奴役的报告。从北非渡海的航程平均需要两到三天,但在很大程度上取决于船只和海上的情况。许多船只遭遇翻船或其它事故。
- 32. 由意大利和欧盟边境合作管理局单方面提供的搜救服务是针对这种危险趋势的一个应对措施(见附录)。欧盟委员会在对特别报告员的一份报告中指出,2014年,"我们的海洋"行动在海上救援人次超过160,000,而"Triton"行动估计从2014年11月到2015年初救援约22,300人。此外,有些私人和军用船只也救过移民性命。但是,正如国际海事组织强调指出的那样,商用船只为搜救行动提供支持的情况仍然极少,各国应承担此类行动的主要责任。

- 33. 虽然为保护移民的生命权作出了积极的努力,但这些努力仍然是不够的。 主要挑战包括:与"我们的海洋"行动授权相比,"Triton"行动只有有限的授 权开展有效的搜救行动,搜救区管理不统一,单边与区域性的干预行动之间有矛 盾,私营和军用船只缺乏为移民提供援助的动力,成员国承诺的资源有限,难以 制定登陆办法等。
- 34. 搜救服务是解决试图通过危险通道进入欧盟的移民所面临的人权挑战的关键性组成部分,但也必须审查造成利用这些通道的根源所在。一项关键趋动因素是缺乏正规的移民渠道,这些渠道应反映欧盟真正的劳动力需求和逃离人道主义危机者的人道主义和保护需要。欧盟对叙利亚危机的集体应对措施将其坚决拒绝为叙利亚人提供大量移民机会的事实暴露无遗。大多数欧盟成员国更愿意寻找其它的办法,因此毫不意外会将移民推到组织偷渡者那里。
- 35. 越来越多的人采用地中海中路这一渠道无庸置疑地表明,不管欧洲联盟采取什么措施,移民还会继续来到这个地区,将欧洲边界"封死"是不可能的。移民为到达安全之地而准备承担的风险表明,当绝望的人们面临战争、不安全、暴力和极端贫穷的处境时,边界控制措施并不能有效发挥阻止的作用。

外部化

- 36. 自 2013 年报告以来一直存在使用外部化技术的趋势。欧洲联盟通过了"移民和迁徙问题全球举措"这一政策框架,其中大量涉及今后的移民治理和边界控制。"举措"包含一系列复杂、庞大而松散的政策和法律机制,还包括在过境国和来源国的若干项目。
- 37. 迁徙伙伴关系是该"举措"的一项重要工具,在欧洲联盟近期关于移民和边界管理的对话中非常引人注目。伙伴关系针对从发展援助到签证便利、循环移民方案以及打击未经批准移民问题等一系列广泛的问题,包括关于接受遣返方面的合作。2013 年以来,欧洲联盟与阿塞拜疆、约旦、摩洛哥和突尼斯签署了迁徙伙伴关系。欧盟还与尼日利亚签署了关于移民与迁徙的共同议程。
- 38. 总体而言,"移民和迁徙问题全球举措"有着多重复杂的组成部分,而其其实质内容上缺乏透明度和明确性。此外,在"举措"框架下达成的许多协议在国际法中并没有有力的依据,普遍缺乏监督和问责措施,从而使得国家之间的权力不平衡,实施情况由短期政治考量决定。尽管如此,欧洲联盟仍继续利用"举措"来追求更大的"安全"。几乎没有什么迹象表明迁徙伙伴关系更多地让人权或发展受益,因为这些项目都没有明确的规定和成果。整个"举措"本身从总体上只侧重安全,缺乏政策统一性,这就产生一个风险,即人权和发展项目带来的任何益处会掩埋在更加侧重安全政策的副作用之下。
- 39. 遣返协议是尤其令人关注的一个领域。尽管欧洲联盟立法中针对这种做法规定了保护措施,但是在双边协议的广泛保护下,一直存在向法治薄弱和庇护系统不力的原籍国和第三国推回和驱回的做法。欧洲人权法院曾挑战这种做法。2012 年,法院就"Hirsi Jamaa 等人诉意大利"一案作出裁决,认定意大利将通过海路入境的索马里和厄立特里亚移民送回利比亚违反了《保护人权和基本自由

公约》第 3、第 4 和第 14 条。意大利政府在抗辩中援引了意大利和利比亚两国 签署的双边遣返协议。但是法庭支持原告并判决作出赔偿,这就说明,双边协议 不能用来作为违反人权实践的依据。2014 年,在"Sharifi 等人诉意大利和希腊"案中,对于自希腊进入意大利然后被遣返回希腊并担心随后还将被遣返回各自原籍国的那些非正规移民受到的待遇,欧洲人权法院作出了裁决。法院认为,意大利和希腊两国均违反了《保护人权和基本自由公约》第 3 和第 13 条,意大利还违反了该公约第 4 号议定书第 4 条。

40. 2014 年,欧盟委员会启动一个试点项目,在巴基斯坦和乌克兰引入一个机制,监督回返者的人权是否受到尊重。该项目由国际移民组织与难民署和地方伙伴共同实施。特别报告员敦促欧洲联盟确保该项目得到有效落实,并分析和公布项目实施成果。此外,从现在开始,任何人都不应根据"移民和迁徙问题全球举措"而被送回任何国家而不受有效的遣返后人权监督机制的监督。

继续使用拘押作为控制边界工具

- 41. 在经过一个往往是极其漫长、危险而艰苦的旅程到达欧洲联盟之后,许多 非正规移民和寻求庇护者受到移民拘押措施。拘押也是许多国家针对等待被遣返 移民的常用措施,这些移民有些是保护申请被拒,有时是经欧洲难民数据库确认 从另一国家进入欧洲联盟的。
- 42. 欧洲联盟成员国中一些拘押难民的案例违反了国际人权法,因为此类拘押在国内法律中被界定为不合理、不必要或不适度的措施,而且此类拘押决定不是依个案情况决定的。拘押效果方面还存在若干人权关切。许多移民认为自己受到的待遇是严厉和处罚性的,尽管非正规移民决不是犯罪行为。事实表明,没有明确依据的长期拘押对移民和寻求庇护者的精神健康具有摧毁性的效果,如加重了创伤后应激障碍、焦虑和抑郁。而令人无法接受的拘押条件更恶化了这种情况,如不够卫生的厕所和淋浴设施及不清洁的厨房。此外,他们也无法获得医疗服务,无法开展体育娱乐活动。
- 43. 长时间的移民拘押还会对移民主张经济和社会权利带来持久的障碍,甚至 在他们被释放之后也是如此。难民署的研究表明,拘押使常常是迫切希望工作的 移民丧失了能力。长期脱离劳动市场,加上拘押带来的情绪和心理损伤,会导致 移民没有必要地依靠国家提供援助。
- 44. 尤其令人关注的是被拘押者中的儿童。儿童一般得到成员国给予的额外保护,而且根据许多国家的政策,儿童不应受到拘押。但是,如果不知道儿童的年龄,而这在没有证件或来自没有严格的出生登记制度的国家儿童中间是很普遍的现象,那么这些儿童就可能被拘押或关在接收中心,直到能确认其年龄为止。这就可能长达数周或数月的时间。在有些情况下,儿童被拘押期间与成人生活和睡在一起,没有适合其幼小年龄的特殊住宿条件,也不能接受教育。有些情况下,一家人会根据年龄和性别而被分别安置到拘押场所不同的地方。即使是短时期的拘押儿童也会产生严重的负面心理结果。儿童权利委员会明确指出,移民拘押在任何情况下都不符合儿童的最大利益,移民家庭不应分离。因此,对无人陪伴的未成年人和携带儿童的家庭应当始终采取拘押之外的替代措施。

45. 拘押之外的替代措施也在探索之中。例如,意大利的法律改革将移民拘押期限从 18 个月减至 3 个月,希腊政府宣布改变政策,缩短拘押期限,释放大量被拘押者。有些国家逐步实行更加开放的接收设施,特别是针对儿童和家庭等弱势移民。尽管存在这些令人欢迎的变化,但在许多成员国中仍然存在移民拘押时间过长及由此产生的对移民人权不利影响的问题。

诉诸司法

- 46. 特别报告员注意到在诉诸司法方面一个令人鼓舞的趋势,即国家和区域性 机构似乎愿意支持移民争取自身的权利。
- 47. 但是,在许多欧洲联盟成员国中存在诉诸司法的系统性障碍。资源方面的重大限制使许多成员国不愿意对便利移民诉诸司法的服务进行投入,如法律援助以及翻译和口译服务。移民担心如果行使诉诸司法权利的话会被发现和/或遣返也是一项重大障碍。此外,在诉诸司法方面始终存在不统一的问题,取决于所涉及的权利、移民的类型和国籍以及司法辖区。最后,关于法庭对违反移民人权案件适用处罚和/或赔偿的问题缺乏专门的规则也是一项重大障碍。
- 48. 欧洲各法院在若干起判决中对诉诸司法问题表达了关切。欧洲人权法院在 "Louled Massoud 诉马耳他"案(2010 年)和"Suso Musa 诉马耳他"案(2013 年) 的裁决中认为,两案中原告受到的待遇违反了第 5 条第(1)和第(4)款,理由是这些拘押行为并不总是合法的,确定其合法性的程序也没有得到适当的执行。2014 年 6 月,欧洲法院在"Bashir Mohamed Ali Mahdi"案中作出重大裁决,强调根据欧洲联盟的法律,缺少身份文件不应用作延长拘押移民的理由,移民应当能够诉诸司法来挑战此类拘押做法。

都柏林体系下的指纹识别和迁徙自由

- 49. 在都柏林体系下,对于寻求庇护者的行动有严格的限制,这与行动自由框架下为欧洲联盟公民提供的人员流动形成鲜明的对照。根据都柏林体系,寻求庇护者必须由对其入境欧盟负责的国家评估其庇护申请,通常是第一个入境国。一经收集指纹之后,就进入成员国之间共享的欧洲难民数据库。如果在该数据库中有详细记录的移民在另外的成员国申请保护,他们通常会被送回其入境欧洲的那个国家。
- 50. 都柏林条例并没有为庇护程序和指标实现重大的标准化,因此导致希望留在欧盟的那些移民更愿意跑到其它国家,而不是第一入境国。此外,在都柏林体系下,移民往往滞留在经济机会非常有限的前线国家。例如,意大利就面临大量寻求庇护者涌入和经济长期下行的问题。这就使得移民被困在那里,没有工作可做,从而对移民和接收国社会产生灾难性的结果。
- 51, 这个体系还有可能在边境上造成紧张关系,因为许多移民不愿留指纹。最近有些令人不安的报告,即边境管理人员强制收集指纹。这个系统还扩大了组织偷渡者的市场,鼓励人们使用危险线路进入欧洲,因为寻求保护的移民被迫采取

非正规途径,以免被发现和被强迫留指纹。令人不安的是,欧洲联盟的规则和做 法导致欧盟内重新出现偷渡路线,而本来随着人员的自由流动这些线路已经基本 上消失了。

- 52, 欧盟委员会 2014 年注意到强迫留指纹的问题。它请欧盟成员国提供关于这方面通用做法的资料。对于移民抗拒留指纹的情况,象希腊、马耳他和意大利等一些国家从法律上规定允许使用武力,而奥地利和爱尔兰等国则禁止这种做法。所有国家政府的回复似乎都表明,移民和寻求庇护者很少出现不愿留指纹的现象,有些国家则表示,对于根本不愿合作的人来说,很难采取强迫措施。甚至象马耳他这样的国家虽然报告说在登陆点移民不愿合作,但同时也表示,一般来说,可在以后叫回相关人员留下指纹。尽管成员国的这些报告令人鼓舞,但移民和一线工作人员之间令人不安的偶发事件仍然说明,在首次入境欧盟国家存在使用武力的现象。
- 53. 欧洲人权法院最近就"都柏林逻辑"作出了两起重大的判决。如上文所述,2014年,欧洲人权法院在"Sharifi等人诉意大利和希腊"案中裁定意希两国均违反了《保护人权与基本自由公约》第3和第13条。2014年11月,法院就"Tarakhel 诉瑞士"案作出裁决,认定瑞士拒绝审查一个阿富汗家庭的庇护申请,并决定在没有得到其权利会受到保护的保障下就将他们送回意大利。法院认为,这就违反了《公约》第3条,并讨论了意大利体系中"系统性的缺陷"。2011年,法院在"M.S.S 诉比利时和希腊"案中认定,虽然希腊的庇护和社会保护条款中存在系统性失灵问题,但比利时仍决定将一名阿富汗移民遣返至希腊,从而违反了《公约》第3条。
- 54. 除了这些判例之外,还有其它迹象表明"都柏林逻辑"正在失灵,对迁徙自由的限制是不可持续的。例如,欧盟边境合作管理局报告说,欧盟边境国家正在对拘押政策进行重大改革,有可能实现更大的迁徙自由,并减少成功的遣返。

移民工人

- 55. 上文所述前往欧洲的危险通道是混杂的移民通道,其中也有经济移民,他们为寻求机会而甘冒生命危险,因为移民工人前往欧洲联盟的正规渠道是不存在的。通过制订"蓝卡"制度和季节性工人指令,在打开经济移民通道方面取得了一些进展。但是,欧盟成员国中使用"蓝卡"的情况很少,低技能移民的长期机会非常稀缺。在监管不足的部门,如家政工人、照料、建筑、农业和旅游业,需要工作但又无法取得签证的移民就采取非正规途径前来,因此容易受到虐待、暴力和经济剥削,行动自由也受到限制。
- 56. 虽然非正规移民身份与劳动市场侵权之间的关系是复杂的,但前者容易加重遭受劳动市场侵权行为的脆弱性。无证工人因条件所限,会从事有巨大经济、身体和心理成本的工作。欧洲联盟劳动力市场的发展对于非正规移民的"拉动因素"以及无证移民工人在欧盟遭受的痛苦很少受到关注。虽然使用危险海上通道对人权的影响令人瞩目,但无证移民工人在欧盟内遭受的痛苦基本上不为人知。

- 57. 想要在欧洲生存的移民工人常常面临受到种族主义和仇外情绪的情况。劳动市场上的侵权与整体人口中的仇外情绪是相互促进的。有报告称,雇主不会雇用甚至具备极高技能的外籍工人,欧盟内部也未能充分发挥移民工人的潜力,许多移民在劳动市场上从事低于其教育水平的工作,部分原因就在于仇外的心态。
- 58. 欧盟成员国不愿批准《保护所有移徙工人及其家庭成员权利国际公约》就 反映出它们不愿因无证移民工人遭受的侵犯人权行为而被追究责任。

2. 制订一个基于人权的框架,依靠利用未来一代人的迁徙

- 59. 上述所有人权关切都表明欧盟边界管理与移民体系中的压力。它们清楚地说明,当前状况是无法持续的。如果无视这些警告的信号,继续将资源投入到一个无效而矛盾重重的封闭体系中,就会导致进一步的人类苦难,而这本来是可以避免的,同时也会因为没有收获有组织迁徙的成果而浪费资源,丧失机会成本。
- 60. 制订一个基于人权的框架,解决最迫切的关切,保持在一代人的时间里坚持改革道路所需的政治意愿,就使欧洲联盟能够依靠迁徙带来的经济和社会收益。

制订一个基于人权的框架

- 61. 各国在国际法中承担了尊重、保护和实现人权的义务和责任。国际法对国家赋予的这些义务和责任也得到欧洲人权体系中各项标准的广泛响应,这些标准适应于全体人员,不分国籍和行政身份。
- 62. 一个基于人权的移民框架将确保对处于脆弱的移民境地的人员适用这些义务和责任。这个框架基于平等和不歧视、保护的职责和诉诸司法。通过高举平等和不歧视原则,各国就承认人权是适用于全体人类的,对移民应作为平等的权利拥有者,不论其在所处的主权领土上的移民身份如何。如果将移民视为平等的权利所有者,那么很自然地就存在在移民程序各个阶段保护他们的责任。如果在任何时候发生了侵犯这些权利的行为,那么移民作为平等的权利所有者,就必须能够诉诸司法,纠正任何不公现象。
- 63. 建立一个立足于国际和区域法核心原则和条款的基于人权的框架就要求立即采取行动,终止欧盟边界上广泛存在的苦难。
- 64. 关键性的第一步是欧盟要逐步扩大海上搜救行动,至少达到"我们的海洋"行动的水平。尽管做出了一些努力,但关键是欧盟要增加为援助海上受困人员所承诺的资源。特别报告员敦促欧盟加强搜救能力,同时做到以下几点:尊重不驱回原则;允许非正规移民在最近的港口立即上岸;为移民提供信息、照料和支持;公平处理庇护申请;支持商业船只在特殊情况下开展援救行动,而不会因被视为偷渡活动的同谋而受到报复或骚扰。应当明确优先事项:拯救生命要比打击偷渡行动更重要。在人员生命受到威胁的情况下,那种认为不应提高搜救能力以免鼓励偷渡行动的说法在道德、政治和法律上都是无法令人接受的。

- 65. 制订一个基于人权的框架不仅限于海上保护。加紧建立拘押替代措施,特别是对儿童的替代措施是另一项关切,也应作为优先要务。
- 66. 长期而言,欧盟需要总结"都柏林逻辑"一直以来失灵的问题,发展成员国之间团结一致的处理办法,扩大移民在欧洲的行动自由。要扭转目前的逻辑,让寻求庇护者能够在自己选择的国家登记庇护申请,欧盟应当发展现有举措,为接受庇护申请的国家提供适度和充足的资金和技术支持。在整个欧盟内实现接受条件和身份确定程序的标准化应当是头号优先任务,以防止"庇护倾倒",使条件较好的国家面临压力。
- 67. 制订一个基于人权的框架需要坚守承诺,并发展更多的正规移民通道,包括对难民的重新安置机会。其中最有效的办法是开始逐步放开对欧盟的正规移民渠道,探讨多种办法。
- 68. 首先,目前在偷渡者帮助下横跨地中海的许多人显然是需要国际保护的,如叙利亚人和厄立特里亚人。我们不可能指望叙利亚人无限期地居住在约旦、黎巴嫩或土耳其的营地或城市里而看不到美好生活的希望。假如没有其它选择的话,难民就会试着找偷渡者,以便为自己和子女找到出路,许多欧洲人过去在类似情况下也是这么做的。通过对难民的重新安置方案以及其他的人道主义签证和机会,欧盟完全有条件发展出必要的机制,在几年内为因叙利亚和其它大规模冲突而流离失所的 100 万难民提供避难。和北方及其它地方的伙伴国家一道,建立一个可靠的长期方案,就能确保大量难民会排队等待重新安置,而不会花成千上万欧元而甘让自己和孩子冒生命危险进行偷渡。这会大幅度减少偷渡者的市场,也会大大降低欧洲难民身份确定程序的成本。
- 69. 其次,偷渡者和剥削性雇主目前从事的劳动力流动是欧洲许多劳动力市场生存所必需的。通过为各种技能水平的工作提供创新的签证机会,包括对低薪移民的签证机会,欧盟能够减少通过非正规途径前来的移民人数。结合出入境控制和其它支持举措,多年有效的多次入境签证会鼓励移民前往欧盟工作,然后返回原籍国,遵守签证规定。要成功实施这样一个计划,欧盟及其成员国需要在今后十年中大幅度减少地下劳动市场和工作场所的剥削现象,因为这些工作场所正按照剥削型雇主的要求成为吸引非正规移民的磁石:要实现上述结果,需要采取更严格的劳动检查机制并加强工会。
- 70. 因此,要在整个欧盟全面长期实施一个基于人权的正规移民框架就意味着:提高搜救能力;便利移民诉诸司法;发展拘押替代措施;加强劳动检查机制以确保欧盟全体劳动者包括移民工人的权利;创建大规模的难民重新安置方案;创建多种工作移民签证机会,以鼓励移民使用正规移民渠道。
- 71. 这一政策组合的成功落实要求挑战欧盟在辩论、话语、政策和政治中普遍存在的许多对移民和移民行为相互交叉的负面看法。在内部和外部移民之间进行严格的概念区分,表现在申根区内自由流动,而对外部边界严加保护,这种做法与立足于平等和不歧视的基于人权的移民框架是相互矛盾的。这种区分也是基于一种假定,即封死国际边界是可能的,但难以维系的现状却有力地表明并非如此。

72. 许多利益方将移民视为"非法"的看法只能起到反作用,也不是以事实和国际法条款为依据。虽然没有证件而前往欧盟的移民没有正常身份(或称"无证"或"无许可"),但他们并没有犯罪行为。将非正规移民视为"非法"的概念无疑是使用移民拘押做法的一个因素。这种看法也会影响到一般公众对移民的看法,使不符合人权保障的政策合法化,并助长仇外情绪和歧视。

73. 关于移民"窃取"工作的常见观点也是有害的想象。许多经济文献(见 Card 和 Peri³)都强调指出,移民与公民是补充而不是竞争关系,因此总体上提高了经济生产力。关于非欧盟移民对 15 个西欧国家作用的一项长达 14 年的研究报告 (Per 和 D'Amuri⁴)显示,由于移民承担了体力劳动,从而将本国人推向要求更高技能和薪酬更高的工作。这份研究指出,在发生移民之后,本国人从事更复杂技能工作的情况显著增加。劳动力市场的调整并未对本国人的就业率产生重大影响。事实表明,全球衰退导致这种积极现象有所减少,但并没有完全消失,这也驳斥了那种关于经济下行就应当采取压制政策的观点。

74. 同样,将移民视为"包袱"的看法也不是以现实为依据,而且只能起反作用。在欧盟大多数的辩论中,都强调需要在不同成员国之间分担非正规移民这个"包袱"。在许多国家面临财政和人口挑战,政治上充斥紧缩话语的背景下,将外来移民作为"包袱"加以讨论再次成为进一步保护边界的合法理由,并助长公众中的负面看法。社会无疑对移民负有责任,也应鼓励在承担这一责任方面采取团结一致的态度,但移民本身并不是也不应被当作包袱。许多经济文献指出,移民作为劳动者、消费者和纳税人,为社会的经济增长作出了贡献,而其产生的消极因素是有限的。事实上,将移民视为包袱的观点主要是由于需要财政、技术和人力资源来实施欧盟反作用的注重安全的政策,并应对其非理想(但却是可以预见的)副作用。如果承认移民是享有权利的人,欧盟及其成员国要讨论的就是分担责任,而不是分担包袱。

75. 对移民采取更加积极和现实观点的规范基础见于大量的以事实为依据的分析以及欧盟关于尊重人的尊严、自由、民主、平等、法治和人人享有人权的基本价值观,这从其强有力的人权体系以及成员国签署的国际人权文书中就可以体现出来。

David Card, "The impact of the Mariel Boatlift on the Miami labor market" (1990); Giovanni Peri, "Immigrants'effect on native workers: new analysis on longitudinal data" (2015); Andri Chassamboulli and Giovanni Peri, "The labor market effects of reducing the number of illegal immigrants" (2015).

⁴ Francesco D'Amuri and Giovanni Peri, "Immigration, jobs and employment protection: evidence from Europe before and during the Great Recession" (2012).

依赖一代人的迁徙

76. 采取立足于事实而不是幻想的政策,适用欧盟的核心价值观,就会产生便利流动和鼓励多样性的移民政策。上述基于人权框架的长期发展对欧盟的内外利益就会变得日益关键。未来 25 年中,欧洲的人口、社会和劳动市场会发生大规模的变化。

77. 到 2025 年,欧盟公民中 20%以上将超过 65 岁,年龄超过 85 岁的人口比例增长更大。老年人口几乎会翻一番,从 2010 年的 8,750 万增加到 2060 年的 1.526 亿。 预计年龄超过 80 岁的人口比例会从 5%增加到 12%。 ⁵ 同时,许多成员国的生育达不到人口替换率。据估计,在发达国家,为使人口保持稳定的规模,平均每名妇女需要生育 2.1 个孩子。联合国人口数据显示,从 2010 年到 2015 年间,所有欧盟国家的平均生育率都低于 2.1 的标准,区域平均生育率为 1.6。

78. 与人口这一变化相伴随的是欧洲劳动力的缩减。2010 年,从欧洲劳动市场上退休的人数首次超过进入劳动市场的人数。欧盟和经合组织预测,如果移民保持零净增长的水平,那么到 2020 年,劳动年龄人口将减少 3.5%。今后 50 年中,劳动年龄人口预计会减少 4,200 万。⁶

79. 这些变化有可能加剧和扩大欧盟内部现有的技能差距。2013 年欧洲公司调查收到的答复中,有40%表示,尽管失业率很高,但很难找到具备适当技能的申请人。上述人口变化会进一步增加压力和动力,即确保劳动力供应和需求方面的平衡。欧盟和经合组织都认为,欧盟要实现 2020 年的就业目标,就需要采取组合政策,重新考虑如何利用非欧盟移民的技能。

80. 在上述变化的背景下,欧洲职业培训发展中心预测,对具备中高技能水平 劳动者的需求会增加,对低技能劳动者的需求会减少。但是,预计到 2025 年对 低技能工人的需求仍然很大,约为 4,300 万左右。考虑这一数字时应联系欧盟 2020 年的目标,即要提高具备高等教育水平的公民比例,并且这一步伐正在加快。中心指出,从 2002 年到 2013 年,30-34 岁年龄段人群中受过高等教育人口的比例增加了 13%,而高等教育毕业生的绝对数字增长了 57%。

81. 采取基于人权办法的另一个原因是欧盟需要保持全球竞争力。世界经济论坛注意到欧洲国家之间的分化趋势,象德国、荷兰、瑞典和联合王国等国位居全世界最具竞争力的前 10 名经济体之列,其它国家则落在后面。排名最靠前的欧盟国家是德国,处于第五位,排名最靠后的国家是希腊,排在第八十一位。⁷ 目前,从非欧盟国家流入大多数欧盟成员国的高技能劳动力移民较少,原因在于法

⁵ 欧盟委员会, 《欧洲人口老龄化:事实、影响和政策》(2014年)。

⁶ 同上。并见经合组织和欧盟, "移民政策简报"(2014年)。

⁷ 世界经济论坛, 《2014-2015 年全球竞争力报告》(2104 年, 日内瓦)。

律上的障碍以及雇主不明说的不愿意从欧盟之外雇人。这也表明强调安全的做法 如何渗透到移民的各个层面。

- 82. 有组织的移民活动将使成员国能够适当了解非欧盟移民的技能水平,支持 采取现实的战略填补劳动力空白和短缺,以维持和提高全球竞争力。不能认定没 有正规身份的移民都只有低技能。而且考虑到培养欧洲人能力的目标以及预计对 低技能工人仍然有需求,即使是那些低技能的移民也会以重要的方式作出贡献。
- 83. 以流动性和人权为基础的有组织的移民政策还有助于欧盟加强人道主义和发展的影响。特别报告员 2013 年报告中特别指出,2013 年移民汇款总计约 4040 亿美元。从人类发展指数偏低国家迁移到人类发展指数偏高国家的移民收入平均增加了 15 倍,入学率翻一番,儿童死亡率降低 16 倍。如果移民的人权在管理得当的移民过程中得到有效的促进、尊重和保护,上述发展成果应更为显著。
- 84. 致力于在移民政策方面实现代际转变,承认外部流动可反映内部流动的益处,将使欧盟及其成员国能够以支撑复苏、鼓励增长和进一步发展全球竞争力的方式更好地应对这些经济、社会和人口的变化,并使欧盟能够按照其创始条约的设想,真正在与世界其它地区的关系中促进其基本价值观。

四. 结论和建议

A. 结论

- 85. 两年来,地中海上的事件以及移民进程中各个阶段所反映出来的悲惨状况清楚地表明,欧洲联盟关于边界控制、庇护和移民的做法现状是难以维系的。尽管为保卫边界进行了巨额投资,但移民仍然能够到达欧洲的土地,这一事实无疑证明封死国际边界是不可能的。移民活动是人类生活的一个长期组成部分,在我们所生活的全球化并充满冲突的世界中,移民是不可避免的现象。
- 86. 否认这一现实就会付出昂贵的代价。最明显的是,人员的代价会持续上升。没有迹象表明,影响移民模式的推动和拉动因素会发生变化,而许多与此相联的严重侵犯人权行为会减少。除了人员成本外,欧盟及其成员国还对无效而自相矛盾的边界控制机制投入巨额资源,而它们本可用于其它方面。
- 87. 尽管成本巨大,但它们绝不是无法避免的。让欧盟大幅度减少大量移民的苦难并没有超出它的道德力量范围。欧盟的区域人权体系及其它规范标准、其创始价值观及其促进和平、安全和人权的强大传统都清楚表明,欧盟有能力在移民问题上发挥全球领导作用。
- 88. 发挥这种领导作用要求制订统一和整体性的基于人权的办法,需要短期、中期和长期的干预。至关重要的是,在短期内,欧盟要加大搜救行动力度,进一步探讨拘押的替代措施,特别是针对儿童的替代措施,开始为来自阿拉伯叙利亚

共和国和其他国家的人们提供更多的重新安置机会, 吸取"都柏林逻辑"的失败之处及其带来的系统性压力。

- 89. 这会对移民人权产生重大影响,同时欧盟还必须采取一种战略性的长期观点。在中期,欧盟应继续提供重新安置机会,开放各级技能的正规移民渠道,对劳动检查进行投入,处理针对移民的仇外、种族主义和歧视问题。这些都是需要长期维持的变化,同时还要对移民概念化进行根本性的反思,在总体多样性政策背景下发展融合方案。
- 90. 为保持成功,欧盟必须考虑其创始原则和规范性标准如何适用于非成员国的公民。欧盟必须利用基于事实的分析和理性的长期思维,挑战欧盟内当前有关移民的社会和政策辩论背后的许多负面概念。其中包括严格区分内部和外部移民、视非正规移民为"非法",在当前持续财政困难的背景下将非正规的非欧盟移民视为"包袱"的偏见,以及认为移民"窃取工作"而剥夺本国人经济机会的看法。
- 91. 欧盟进行反思,发挥领导作用,其益处不仅在于兑现其在文件上的承诺。 基于事实的经济分析认为,移民有助于经济增长和生产力。随着未来一代欧洲的 变化,将人员流动扩大到其边界之外将使欧盟成员国抓住机遇,在欧盟内外实现 和平、安全和可持续发展。

B. 建议

1. 总体建议

对欧洲联盟及其成员国

总体而言

- 92. 接受不可能"封死"边界以及当前系统产生反推动力和相互矛盾的事实以及人员流动的不可避免性和益处。反过来说,强调必须鼓励全体移民自动选择欧盟及其成员国提供的服务,使用出入境控制机制,而不是求助于偷渡集团。
- 93. 为从总体上发展一个统一和有力的移民政策进行投入,使之充分反映国际和区域法律中规定的移民人权。
- 94. 制订一份全面的 25 年战略,为政策发展绘制路线图,列出明确的短期、中期和长期干预措施,并阐述欧洲联盟如何依赖未来一代人流动的共同前景。
- 95. 为填补数据空白进行投入─如有关地下劳动市场、对移民的劳动剥削、海上死亡的数字及推动和拉动因素等──以制订基于证据的政策。此外,加强移民数据来源的统一和协调,形成系统的全面了解。
- 96. 通过基于事实的分析和长期性思维,对移民和移民现象的概念化进行反思,这是只起到反作用且无效的安全政策的依据,并导致移民的罪化和污名化。

- 97. 将这些分析纳入政治层面以及公众宣传和教育内容。
- 98. 充分承认非正规移民包括海路非正规移民的推动和拉动因素以及欧盟对于控制和减少这些现象的责任。
- 99. 利用本区域重大的全球影响力,包括在安全理事会的两个常设席位和一个 非常设席位,推动更加有效地解决阿拉伯叙利亚共和国、乌克兰以及其他国家的 人道主义危机。

正规移民渠道

- 100. 在叙利亚内战和其他人道主义危机问题上发挥全球领导作用,削弱偷渡集团的市场,与全球的北方发达国家合作,发展再安置机会,以便欧洲联盟在今后若干年中能够接纳全世界 100 万以上的难民(占欧盟总人口的 0.2%)。
- 101. 发展和鼓励其他的正规和安全的移民渠道,包括针对不同技能的工人,其中也包括低薪工人。依照欧洲联盟基本权利署的建议,考虑各种合法移民办法,如人道主义接纳、人道主义签证、临时保护、家庭团聚、从经济上接纳各种技能水平人员以及打工、学生流动和医疗转送等。
- 102. 欧盟成员国应增加在现有正规移民方案下接纳的移民人数,包括蓝卡制度、季节性工人指令和今后的学生及研究人员指令。

搜救

- 103. 为更多人员通过海路前来预作准备,承诺充分履行国际法下的义务,向困 在海上的移民提供搜救服务,以国家作为搜救工作的核心。
- 104. 认真考虑如何消除导致私营船只不愿援助受困移民的那些因素,包括制订为商业损失提供补偿的办法。
- 105. 就因非搜救目的而在地中海部署的军用船只如何辅助国家行动、应对移民受困事件作出规定。
- 106. 进一步发展边境国家与非边境国家在搜救行动和处理保护申请方面的团结和责任共享机制,提供技术、资金和人力资源。

移民外部管理

- 107. 提高"移民和迁徙问题全球举措"的协同一致性,将严格遵守人权、应有注意、监测和管理机制纳入所有对外协定,优先在原籍国和过境国发展改善移民人权的项目。例如,按照欧盟基本人权署的建议,在提高非欧盟国家边境管理能力的工作中优先支持改进搜救行动,并支持国家人权机构。
- 108. 以促进非欧盟移民真正的迁徙作为"移民和迁徙问题全球举措"的基石。

都柏林与拘押问题

- 109. 总结都柏林机制系统性的失败问题。扭转现有逻辑思维,允许寻求庇护者在欧盟内部自行选择国家登记庇护申请,向接收庇护申请的国家提供适当和充足的资金和技术支持。
- 110. 通过几个机制大幅度扩大和统一欧洲庇护支助办公室,包括相互承认难民身份确认决定、难民问题法官在各国之间进行交流、建立共同的欧盟难民确认上诉委员会以及共同或共享的接收机制。
- 111. 协调一致地逐步消除拘押全体移民的做法,转而采取替代办法,防止对通过非正规渠道前来者进行惩罚。考虑采取一种模式,以迅速响应并利用绝大多数移民为社会服务和做贡献的强烈愿望。
- 112. 依照儿童的最大利益原则,扩大为移民儿童提供的保护,特别是无人陪伴的未成年人和有儿童的家庭。争取完全消除拘押儿童做法,在接收和提供社会保护方面充分照顾到儿童的脆弱性。核实年龄不是进行拘押的合理借口,鉴于即使短期拘押也会对儿童造成损害,成员国应采取另外的模式,承认儿童的脆弱性,提供充分保护。

诉诸司法和社会保护

- 113. 消除诉诸司法的障碍,确保移民在权利受到侵犯时能够切实而不仅仅在纸面上获得司法救济。推动移民诉诸司法,不用担心被发现、拘押或遣返,以帮助移民捍卫自身的权利,长期而言,一方面能使新的移民政策合法化,说明领土主权和人权并不是不能兼得的,另一方面,也会改变对于移民的的观念,打击各种不切实际的假想和成见。
- 114. 在移民执法与公共服务部门之间建立"防火墙",以便欧盟的全体移民都 能诉诸司法,获得社会服务,而不用担心会被举报到移民执法当局而受遣返。
- 115. 在便利化指令下确保提供服务者,如援助搜救行动、提供医疗支持、庇护和法律咨询等的人员明确受到保护,不会受到起诉。

移民工人

- 116. 欧盟成员国应断绝对特定经济部门移民工人提供的廉价劳动的依赖,确保捍卫所有人的劳动权利,包括移民,其中也包含非正规移民,充分实施雇主处罚指令和严格的劳动检查制度。为落实全体工作者包括移民工人(不论身份如何)在内的劳动权利和人权而进行长期性的投资将使欧盟以有效和有组织的方式填补劳动市场中必然会不断扩大的缺口。
- 117. 对侵犯移民权利行为的问责,包括继续支持并与欧洲监察员合作,加强国家人权机构之间的协调。
- 118. 重新考虑欧盟成员国一致拒绝批准《移民权利国际公约》的做法。

2. 对单个欧盟机构的建议

欧盟委员会

- 119. 主持制订一个协调一致和基于权利的移民政策,包括关于欧盟各机构和成 员国的 25 年战略。
- 120. 进一步发展现有举措,将人权纳入移民和内务总司工作的主流。
- 121. 调查违反行为,针对违反《欧洲联盟基本权利宪章》中有关移民权利规定的成员国迅速启动违法调查程序。
- 122. 加紧努力,探索为处于人道主义状况的移民提供合法移民途径的新办法的可行性,并迅速实施改革。
- 123. 加强欧盟委员会各司在移民工作上的协调和统一。争取将人道主义援助和平民保护总司的人道主义工作与欧盟有关移民的整体工作特别是移民和内务总司的工作联系起来。
- 124. 支持成员国将欧洲共同庇护体系纳入国内法律并切实加以执行。
- 125. 通过就业、社会事务和融合问题总司的工作,支持成员国不再利用建立在 虐待移民工人基础之上的廉价劳动力,而是走向一个公平、有组织和合法的移民 体系,打击剥削性的雇主。
- 126. 带头打击负面的反歧视言论,以促进和改进移民在欧洲的融合。

欧洲议会

- 127. 对移民政策和做法行使民主监督,鼓励在各项工作中优先考虑人权问题。
- 128. 在"移民和迁徙问题全球举措"下谈判外部移民协定方面注重于改进民主控制和加强人权的应有注意和监督。

欧盟边境合作管理局

- 129. 增加对欧盟边境合作管理局基本权利官员提供的资源和独立性,使之在已完成工作的基础上继续发扬光大。
- 130. 确保 "Triton"行动遵守关于海上保护的国际标准,从 "我们的海洋"行动的全面过渡不会导致移民在地中海上无谓地丧失生命。
- 131. 利用其在协调和信息共享方面的任务授权,支持在搜救区域和登陆做法方面形成共识和协调一致。
- 132. 任何时候在提到移民时避免使用"非法"的说法。
- 133. 确保对欧盟边境合作管理局行动中出现的侵犯人权指控充分地予以跟进。 按照欧洲监察员在关于 OI/5/2012/BEH-MHZ 案调查中提出的建议,为侵犯移民

人权问题建立和充分资助个人投诉机制(即(EU)1168/2011 号指令第 26 条(a)(1)中的规定)。个人及其家人以及民间社会组织应能诉诸该机制,获取充分的赔偿。

134. 按照(EU)1168/2011 号指令第 3 条(1)(a)中的规定,对长期和严重侵权行为要暂停或终止有关行动。

欧洲委员会

135. 支持欧洲联盟将人权关切纳入移民和边境管理政策的主流,执行欧洲人权法院近期相关裁决,从而进一步发展两个组织之间的协调配合。

欧洲联盟基本权利署

- 136. 继续开展在发展重大移民和人权问题相关证据基础方面的重要工作,包括 边境管理、融合和诉讼司法。提高这些问题的影响力,就重大挑战作出报告。
- 137. 将 2014 年基本权利会议的后续活动纳入上述工作。

欧洲监察员

- 138. 继续开展在追究侵犯移民权利行为责任方面的重要工作。
- 139. 就移民问题在国家人权机构与欧洲监察员之间发展进一步合作。

Annex

[English only]

A. Additional sources consulted for the Special Rapporteur's report

- 1. In addition to the three country visits undertaken, as well as insight gained from the Special Rapporteur's on-going contribution to regional dialogues, the following sources were consulted:
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B. Key legal, institutional and policy developments since 2013

2. As discussed in the Special Rapporteur's 2013 report, there are a large number of legal, institutional and policy mechanisms that contribute to migration, border control and

asylum. The focus of the below section will be on the most pertinent developments since 2013.

1. Legal

Dublin III

- 3. The Dublin system was updated in 2013 by two EU directives, which form part of the most recent asylum acquis. The Eurodac regulations (Regulation (EU) No. 603/2013), established a database system whereby migrants are fingerprinted in their country of origin to ensure they can be returned to the country in which their asylum claim should be processed under Dublin. Regulation (EU) No. 603/2013 also updated the overall regulations governing the Dublin Regulations system. Following the passing of Dublin Regulation III and No. 603/2013, the recasted Dublin Regime came into force in January 2014.
- 4. The overall purpose of the updated regime is: to ensure that one Member State is responsible for the examination of an asylum application; to deter multiple asylum claims; to determine as quickly as possible the responsible Member State to ensure effective access to an asylum procedure; and to ensure procedural safeguards such as the right to information, personal interview, and access to remedies as well as a mechanism for early warning, preparedness and crisis management.
- 5. Some new provisions are included which could potentially improve the protection of the rights of migrants, including restrictions on the use of detention when transferring a migrant between countries, respect for the unity of the family and a duty on states to inform migrants of the implications of being transferred between countries. Under the regime one member state is responsible for the examination of an asylum claim and the normal process is that the country the migrant arrives in processes an asylum application. However under the regulations migrants cannot be returned to the countries they originally entered to have their claims processed if there are systemic failings within the asylum system.
- 6. In addition, Dublin III introduces an early warning mechanism and aims to make it easier to detect problems in a member state's asylum system so that the EU Commission and the European Asylum Support Office (EASO) can provide early assistance before the situation degenerates.

EU Regulation 656/2014

- 7. As a response to protection at sea challenges, EU regulation on surveillance of the external sea borders in the context of Frontex co-operation was adopted in May 2014 and entered into force in July. It sets out rules for the interception of vessels during joint operations at sea, including for SAR situations and the disembarkation of intercepted or rescued people. The aim of the new Regulation is to resolve confusion over diverging national interpretations of international provisions on maritime surveillance by setting out clear rules to be laid out in Frontex operational plans and followed during Frontex joint operations. ¹⁰
- 8. According to the regulation, if during a joint operation there is reason to believe that a vessel or persons on board are in an emergency situation, the maritime and aerial assets

⁸ Immigration Law Practitioners' Association, 2014, "Information sheet, Dublin III".

UNHCR, 2014, "The Dublin Regulation".

Amnesty International, 2014, "Lives adrift: Refugees and migrants in peril in the central Mediterranean".

must contact the responsible Rescue Coordination Centre (RCC); they must transmit all available information to the RCC, place themselves at its disposal and follow its instructions to assist with the rescue operation and disembark the rescued persons in a place of safety. This procedure is detailed in the operational plans of each Frontex-coordinated operation.¹¹

Seasonal Workers Directive (2014/36/EU)

- 9. This Directive, passed in February 2014, was the first directive on legal migration to focus on low-skilled economic migration. Member States have until 30 September 2016 to transpose the provisions of the Directive into their national laws, regulations and administrative provisions. Its declared aim is to set out "fair and transparent rules of entry and stay of seasonal workers who are not EU citizens". It is destined for seasonal workers who retain their principal place of residence in a country outside of the EU and stay temporarily in the EU to carry out a "seasonal" activity such as agriculture and tourism. Its seeks to establish "a common set of rights to which seasonal workers are entitled during their stay in the EU in order to avoid their economic and social exploitation". It therefore stipulates that workers are entitled to equal treatment with nationals of the host member state with regard to terms of employment. This includes working conditions, leave and holidays, health and safety requirements at the workplace and social security.
- 10. In contrast to these positive provisions in relation to the human rights of migrants, the Seasonal Workers Directive also aims to provide for incentives and safeguards to prevent temporary stays from becoming permanent. However those who are already in the EU would be allowed to extend their contract or change their employer at least once. Re-entry of those who return every year is to be facilitated in order to promote circular migration. While the Directive provides a framework, again it leaves the Member States to determine how many workers they admit and allows them the latitude to reject applications if EU workers are available. 12

New mobility partnerships and readmissions agreements under the GAMM

- 11. The GAMM framework has four priorities: better organising legal migration and fostering well managed mobility; preventing and combating irregular migration and eradicating trafficking in human beings; maximising the development impact of migration and mobility; and promoting international protection and enhancing the external dimension of asylum.
- 12. The GAMM is constituted by a complex and vast array of loosely associated policy and legal mechanisms, as well as a number of different migration related projects within origin, transit and destination countries, including those related to South-South migratory flows. The GAMM includes 8 regional dialogues, which are designed to foster coordinated action between the EU and other continents at the regional level. Also under the GAMM, sit plurilateral and bilateral agreements between EU and EUMS and specific third countries. In the period 2012-2013, the Commission supported more than 90 migration-related projects with a collective budget of over € 200 million. ¹³
- 13. Mobility Partnerships are a key tool and have been prominent in the EU's recent external dialogue about its migration and border management. They encompass a broad

European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

OHCHR Regional Office for Europe, 2015, "Overview of EU Migration".

European Commission, 2015, "GAMM Implementation Report".

range of issues ranging from development aid to temporary entry visa facilitation, circular migration programmes and the fight against unauthorised migration, including cooperation on readmission. The EU holds these Mobility Partnerships with 8 countries. The EU has signed Mobility Partnerships with Morocco, Tunisia, Azerbaijan and Jordan since the Special Rapporteur's report in 2013. Furthermore, a Common Agenda on Migration and Mobility has been signed with Nigeria. Discussions are ongoing with Belarus on developing a Mobility Partnership.

14. Since 2012, the EU has also signed readmission agreements with four new countries Armenia, Azerbaijan, Turkey and Cape Verde, which all entered into force in 2014. ¹⁴

2. Institutional

Search and rescue

- 15. The further reinforcement of the SAR services provided to migrants in the Mediterranean Sea are an important institutional development since 2013. The Italian rescue operation, Mare Nostrum, was launched in response to the hundreds of migrants who died in shipwrecks near the island of Lampedusa in October 2013. Mare Nostrum is reported to have saved the lives of as many as 160,000 migrants in the Mediterranean Sea in 2014. Despite pressure from civil society organisations, the Italian government ended Mare Nostrum in December 2014 because of high costs, the lack of support from other European countries for the operation and the initiation of Operation Triton.
- 16. Mare Nostrum was a specific mission run by the Italian Navy. It was initiated despite pre-existing regional discussions about a Frontex operation and was described by Italian Coast Guard Admiral Pettorino as "a very important message of humanity and civil responsibility sent out by the Italian Government". It wasn't a totally new operation but was a significantly scaled up version of the Italian naval operation "Constant Vigilance".
- 17. Reported operating budgets for Mare Nostrum differ. Media reports suggested that it cost EUR 9 Million per month to run, whereas funding granted by the European Commission Borders Fund (EBF) suggested that EUR 1.8 Million would cover a month's worth of running costs. More than 900 personnel are estimated to be involved in the implementation of Mare Nostrum, which stretched far beyond the territorial waters of Italy's territorial waters and continuous zone. The operation deployed a large number of navel ships, as well as helicopters, airplanes and drones. ¹⁶
- 18. Debates have been witnessed within Europe about whether Mare Nostrum was a pull factor for irregular migrants. Pettorini asserted that the operation was not a migration pull factor and that those on boats were motivated by the humanitarian situations they were fleeing. However other reports have discussed how smugglers abused the presence of Mare Nostrum by making shorter journeys to where they knew migrant would be rescued allowing them to facilitate more sea-based trips. ¹⁷

European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

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Carrera, S & den Hertog, L, CEPS, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean".

¹⁷ IOM, 2014, "Interview with Admiral Pettorino, Italian Coast Guard: "Saving Lives is Our Only Concern" & Carrera, S & den Hertog, L, CEPs, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean".

- 19. Operation Triton, a Frontex initiative, was launched as a response to the continued loss of life at sea in the Mediterranean in 2014. The Triton joint operation, coordinated by Frontex, started its activities in the Central Mediterranean in support of the Italian efforts on 1 November 2014. ¹⁸
- 20. Whilst Operation Triton has been dubbed as a replacement for Mare Nostrum, the reality is more complex. When Mare Nostrum was launched there were two Frontex joint operations in existence and dialogue was on going about further community support. In 2014, the Italian Government started to lobby other EUMS for financial and technological support for an "exit strategy" from Mare Nostrum. Alongside this lobbying, other EUMS were trying to build support for additional resources for Frontex to support rescue at sea. As the concept of a Frontex joint operation developed there was significant confusion about the relationship between such a mission and the existing efforts of the Italian Government. It became clear that Frontex was not prepared to provide an operation as comprehensive as Mare Nostrum because of the high costs and that Operation Triton whilst providing SAR services would have much more of a focus on border management. 19
- 21. With the support of 18 EUMS, as well as a number of EU agencies and international organisations, and a monthly budget of around EUR 2.9 million, Operation Triton was launched in November 2014. Despite reported disagreement about the continuation of Mare Nostrum within Italy and pressure from human rights organisations, the Italian Government ceased their SAR services but contributes to Operation Triton. ²⁰
- 22. Operation Triton covers a narrower geographic focus but coordinates the deployment of 2 fixed wing surveillance aircrafts, 3 patrol vessels, 2 coastal patrol vessels, 2 coastal patrol boats and 1 helicopter in order to assist Italy in coping with the on-going migratory flows. In addition, Italian assets form part of the operation. Five debriefing teams are deployed to support the Italian authorities in collecting intelligence on the people-smuggling networks operating in origin and transit countries as well as two screening teams.
- 23. The core objective of the Triton operation is to provide assistance to the Italian authorities' efforts to ensure effective surveillance of the maritime borders and in addition provides assistance to any person on board a vessel in distress. Figures published by the European Commission on January 13 2015 indicated that since the launch of the Triton joint operation on 1 November 2014, the participating authorities have dealt with 130 incidents of which 109 were SAR cases. 16,402 people were detected, including 15,325 persons found on boats in distress. In addition to that, 57 facilitators were arrested. The EU has cited the operation as an example of solidarity and best practice sharing between Member States. 22

European Border Surveillance System (EUROSUR)

24. The EUROSUR legislation discussed in became formally operational on 1 December 2013. It is designed to improve the information exchange and cooperation between border control authorities and will involve increased surveillance of the European Union's sea and land borders using a vast array of new technologies, offshore sensors and satellite tracking

Europa, 2015, "Questions and Answers: Smuggling of Migrants in Europe and the EU response".

European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

Carrera, S & den Hertog, L, CEPs, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean".

Carrera, S & den Hertog, L, 2015, "Whose Mare? Rule of law challenges in the field of European border surveillance in the Mediterranean".

Europa, 2015, "Questions and Answers: Smuggling of Migrants in Europe and the EU response.

systems. Its "smart borders package", will create 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. One of the three stated objectives of the EUROSUR system is to reduce deaths at sea contributes to protecting and saving the lives of migrants trying to reach European shores.

25. At European level, Frontex is establishing the European Situational Picture and the Common Pre-frontier Intelligence Picture, which will be continuously upgraded in 2014-2015. Frontex also established, as an initial service, the service for the "common application of surveillance tools", consisting of information derived from satellite imagery and from ship reporting systems together with the EU Satellite Centre and the European Maritime Safety Agency (EMSA).²³

Frontex's Fundamental Rights Officer

26. Since the publication of the Special Rapporteur's 2013 report, the office of Frontex's Fundamental Rights Officer (FRO) has been more fully developed. The work of Ms. Inmaculada Arnaez Fernandez and those supporting her since the inception of the FRO mandate is considered an example of good practice. The Fundamental Rights Officer is involved in many activities of the Agency such as the establishment of a Code of Conduct for Joint Return Operations, the Vega handbook on children (soon to be finalised) and the establishment of a mechanism for monitoring fundamental rights. She is involved in preparing the operational plans for joint operations and she also carries out field visits to these operations. She reports to the Management Board at each of its meetings on joint operations, in particular any incidents reported during these operations, capacity building, as well as on relations with other agencies, such as the European Asylum and Support Office.²⁴

The Fundamental Rights Agency

27. The EU's FRA has been active on the issues related to the human rights of migrants in relation to border management. Their 2014 annual conference focussed the human rights of migrants. The outputs of the conference reflected the key human rights concerns and a significant degree of commonality with the findings of the Special Rapporteur, as discussed in the policies and dialogues section below. In addition the agency have published a number of publications on key issues.²⁵

3. Policies and dialogues

European Agenda on Migration

28. The European Commission launched the work on elaborating a European Agenda on Migration on 4 March 2015, which is expected to be adopted on 13 May. It aims to set out its ideas for a comprehensive, coherent and holistic approach to migration, covering both legal and irregular migration. It four main areas of focus are a common asylum system; a new policy on legal migration; fighting irregular migration and trafficking more robustly; and securing Europe's external borders.

European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

FRA, 2014, "Conference Conclusions".

European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

European Council Strategic Guidelines

- 29. In its Conclusions of 26-27 June 2014, the European Council has adopted the new "Strategic Guidelines for Legislative and Operational Planning for the coming years within the EU's Area of Freedom, Security and Justice (AFSJ)". These Strategic Guidelines identified the need for an organised migration policy on both the basis of international protection and the long-term economic interests of the EU, as shown from the extracts below:
- 30. "Faced with challenges such as instability in many parts of the world as well as global and European demographic trends, the Union needs an efficient and well-managed migration, asylum and borders policy, guided by the Treaty principles of solidarity and fair sharing of responsibility, in accordance with Article 80 TFEU and its effective implementation. A comprehensive approach is required, optimising the benefits of legal migration and offering protection to those in need while tackling irregular migration resolutely and managing the EU's external borders efficiently.
- 31. To remain an attractive destination for talents and skills, Europe must develop strategies to maximise the opportunities of legal migration through coherent and efficient rules, and informed by a dialogue with the business community and social partners. The Union should also support Member States' efforts to pursue active integration policies which foster social cohesion and economic dynamism."²⁶

The proposal for a holistic approach to migration from the European Parliament

32. In December 2014, the Civil Liberties Committee of the European Parliament adopted a resolution calling for a holistic EU approach on migration in the Mediterranean. The resolution includes sanctions for smugglers and human traffickers, and migration management agreements with third countries for cooperation and safe returns. It also calls for the strengthening of the border policy and security as well as enhancing the role of Frontex and European Asylum Support Office (EASO). Whilst the European Parliament has not yet passed the resolution, it suggests potential for the development of further political will in relation to the human rights of migrants.

EU Action Plan to counter migrant smugglers

33. The Action Plan, to be adopted in 2015, will focus on identifying and dismantling the network of criminals who make profit of people seeking protection and better life prospects in Europe, often exposing them to gross human rights violations. In doing so, it will fully take into account the need to respect fundamental rights of migrants and to avoid criminalization of those who assist them for humanitarian reasons.²⁷

European Commission communication on EU Return Policy

34. In its 2014 Communication on EU Return Policy COM (2014) 199, the European Commission the Commission evaluated the Return Directive finding that it had effected legislative and practical changes in all Member States. It found that legislation in all Member States complies with the relevant rules fixed in Articles 16 of the Return Directive, whilst some practical shortcomings remain in a number of Member States. The Commission will follow up on all identified shortcomings.

²⁶ EUCO 79/14.

European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

35. In its upcoming "Return Handbook", due to be adopted in 2015, the Commission will expressly refer to relevant guidance documents from the Fundamental Right agency concerning the treatment of irregular migrants who are subject of return procedures. This handbook will also discuss key access to justice concerns in relation to migrants in situations of return.²⁸

The draft students and researchers Directive

36. This draft legislation, proposed by the European Commission on 25 March 2013, aims to determine the conditions of entry and residence, and the rights, of students and researchers from non-EU countries to benefit from training and academic opportunities in the region. It recasts the existing Directives in this area with the main aim of facilitating admission and stay of these categories of third-country nationals in the EU. It is framed as a response to shifts in demographics and competition dynamics within the EU. Whilst it is currently being negotiated by the European Parliament and the Council and is not adopted yet, the draft Directive recognises the role that non-EU nationals can play in responding to the demographic and societal shifts being seen in the EU.

The FRA annual conference

- 37. On 10-11 November, the European Union Agency for Fundamental Rights (FRA), together with the Italian Presidency of the Council of the EU, held its annual Fundamental Rights Conference, which was this year dedicated to the topic of fundamental rights and migration to the EU.
- 38. The event brought together over 300 EU and national decision makers, members of national parliaments, the judiciary, law enforcement agencies, and experts from international organisations, as well as national human rights bodies, civil society bodies and academics involved with migration issues on a daily basis. Speakers included EU Migration, Home Affairs and Citizenship Commissioner Dimitris Avramopoulos, Speaker of the Italian Chamber of Deputies Laura Boldrini, Italian Undersecretaries of State Senator Benedetto della Vedova and Domenico Manzione, MEP and Vice-Chair of the Committee on Civil Liberties, Justice and Home Affairs, Iliana Iotova, German Minister of State, Commissioner for Immigration, Refugees and Integration, Aydan Özoguz, FRA Director Morten Kjaerum, and Swedish Minister for Public Administration at the Ministry of Finance, Ardalan Shekarabi.
- 39. Participants agreed that the EU and its Member States should develop a more holistic approach to their migration and asylum policy. It was emphasised that fundamental rights are not just one element of such policies, but on the contrary form the normative framework in which they must be situated. It was emphasised at many points throughout the conference that the EU and its Member States need a comprehensive and sustainable migration policy, and that a new and positive narrative is necessary to counter the current negative image of migrants and migration that stresses the benefits of migration both to migrants themselves and to the countries hosting them. This is particularly true at present, as projected demographic trends in the EU mean that many areas of the economy may face an increasing shortage of labour in the coming years. Specific and practical measures are

European Commission, 2015, "Reply by DG Migration and Home Affairs to the questions by the Special Rapporteur on the human rights of migrants".

European Commission, 2013, "DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the conditions of entry and residence of third-country nationals for the purposes of research, studies, pupil exchange, remunerated and unremunerated training voluntary service and au pairing".

needed to promote equal treatment, increase the political participation of migrants, and mainstream fundamental rights into integration policies at national, regional and local level. 30

European Migration Forum

- 40. The first meeting of the European Migration Forum (EMF) took place on the 26/27 January 2015 in Brussels. The EMF addressed issues and challenges in the management of mixed flows of migrants and asylum seekers across the Mediterranean. The discussions were structured around four thematic Workshops: First, access to the asylum procedure at the borders; Second, integration of beneficiaries of international protection; Third, a comprehensive approach to countering migrant smuggling; and Fourth, providing adequate information in countries of origin and transit.
- 41. Conclusions from the Forum included: to take stock of current migration laws and policies; to further develop Member States accountability in the implementation of EU laws, and independent monitoring mechanisms of border controls, surveillance, SAR, visa and asylum policies; to develop legal and regular channels to Europe for protection and employment; and to respect rights of undocumented migrants and de-criminalise migration and humanitarian assistance, including a firewall between immigration control and access to justice and services.³¹

FRA, 2014, "Conference Conclusions".

Carrera, S & Huddleston, 2015, "European Migration Forum, Conclusions and Policy Recommendations".