Naciones Unidas A/HRC/23/G/2

Asamblea General

Distr. general
24 mayo de 2013
Español
Original: inglés

Consejo de Derechos Humanos
23º período de sesiones
Tema 3 de la agenda
Promoción y protección de todos los derechos humanos, civiles, políticos, económicos, sociales y culturales, incluido el derecho al desarrollo

Nota verbal de fecha 21 de mayo de 2013 dirigida a la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos por la Delegación Permanente de la Unión Europea ante la Oficina de las Naciones Unidas y otras organizaciones internacionales en Ginebra

La Delegación Permanente de la Unión Europea ante la Oficina de las Naciones Unidas y otras organizaciones internacionales en Ginebra saluda atentamente a la Oficina del Alto Comisionado de las Naciones Unidas para los Derechos Humanos y tiene el honor de adjuntar las observaciones de la Unión Europea sobre el informe del Relator Especial sobre los derechos humanos de los migrantes titulado "Estudio regional: administración de las fronteras periféricas de la Unión Europea y sus repercusiones sobre los derechos humanos de los migrantes" (A/HRC/23/46), que presentó al Consejo de Derechos Humanos en su 23º período de sesiones.

La Delegación Permanente de la Unión Europea agradecería que hiciera distribuir la presente nota verbal y su anexo* como documento del 23º período de sesiones en relación con el tema 3 de la agenda

* Se distribuye tal como se recibió, únicamente en el idioma en que fue presentado.

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Anexo

[Inglés únicamente]

Response by the European Union and its Member States to the report of the Special Rapporteur on the human rights of migrants entitled "Regional study: management of the external borders of the European Union and its impact on the human rights of migrants"

The EU and its Member States (hereafter EU) welcome many of the findings and recommendations of the UN Special Rapporteur on the human rights of migrants (UNSR) concerning the management of the EU's external borders and its impact on the human rights of migrants. The UNSR's reflections and analysis of this important issue will be a valuable contribution for future discussions within the EU.

The EU welcomes the UNSR's assessment that the EU has developed a comprehensive system of legislation, with strong human rights protection that complements domestic fundamental rights law and international human rights law. The EU considers its legislation and policies to be in line with international human rights conventions and agreements. Effective border management and fast and efficient returns, with respect for migrants' fundamental rights and the principle of non-refoulement, are vital to ensure the integrity of the EU migration systems.

This document details the EU's assessment of the UNSR's main findings and recommendations on a point by point basis.

The EU looks forward to the interactive dialogue at the Human Rights Council on 27 May 2013.

UNSR's opinion that 1) the development of EU-wide standards regarding management of migration has not been matched by a parallel coordinated guarantee of the rights of migrants; and 2) border management policies has become stricter (point 15)

The EU takes note of the UNSR's observation that the harmonisation at EU-level in terms of the rights of migrants in an irregular situation has been insufficient, that rules and conditions for entry has become increasingly complex and restrictive, and that border management policies has become far stricter.

However, it should be emphasised that the legal basis for border control has not changed fundamentally in recent years. The Schengen area, composed of 26 Member States and associated countries, is an area without internal borders. The management of the external borders is a task common to these Member States. The EU is developing an integrated border management policy in an effort to ensure that Member States can effectively meet the challenges of managing a common external border, both as regards regular and irregular crossings of the external border. Border management is, nevertheless, only one response to addressing irregular migration. The EU is also developing a common asylum and a common immigration policy.

The EU's legislative framework on the management of the external borders emphasises the obligation on Member States to respect fundamental rights. The Schengen Borders Code (Regulation (EC) No 562/2006) makes express reference to the EU Charter of Fundamental Rights. The application of the Schengen Borders Code must be in full respect of the Charter

and does not affect the rights of refugees and persons in need of international protection. The Schengen Borders Code provides that border guards must fully respect human dignity in the performance of their duties and that border control measures should be proportionate and non-discriminatory.

Another important instrument is the Frontex Regulation (Regulation (EC) No 2007/2004) and the amendments to this Regulation adopted in 2011. The changes to the governing Regulation as proposed by the Commission strengthened the protection of fundamental rights in the activities of Frontex. This means, for example, that border guards participating in operations coordinated by the Agency must be trained in fundamental rights; the adoption of a code of conduct for joint operations; cooperation with EASO and the Fundamental Rights Agency; reference to fundamental rights in incident reporting and a new reference to cooperation with third countries as a tool to promote European standards on border management including fundamental rights. The amended Frontex Regulation requires Member States hosting a joint operation to provide appropriate disciplinary measures in case of violations of fundamental rights and these operations may be suspended or terminated in case of persistent or serious violations of fundamental rights.

Finally, fundamental rights have been given increased priority in the activities of Frontex. Frontex has adopted a Fundamental Rights Strategy, it has set up an office for a Fundamental Rights Officer and it has also set up a Consultative Forum, which is an advisory body involving international organisations and NGOs, to assist the Executive Director and the Management Board on fundamental rights matters.

UNSR's statement that 1) while 'push-backs' have been condemned by the European Court of Human Rights in the Hirsi case, the EU appears to find more creative ways to ensure that migrants never reach Europe, why UNSR fears that the cooperation with third countries has the practical objective of simply stopping boats from entering European territory altogether (point 56); and 2) the focus on irregular arrivals by sea or land is disproportionate (points 19 and 20)

The EU shares the UNSR's condemnation of past push-back practices. 'Push-backs' in violation of the principle of *non-refoulement* have never been the policy of the EU and the Commission has denounced past push-back practices. On the contrary, EU and the Member States are obliged to respect the fundamental rights of migrants in conformity with EU and international legislation.

The Council Decision (2010/252/EU) establishing rules and guidelines for Frontex sea operations explicitly lays down the obligation to respect fundamental rights and the principle of *non-refoulement* when carrying out border surveillance operations, including on the high seas. Last year the decision was annulled by the Court of Justice of the EU after the European Parliament challenged the fact that the Council decision had been adopted as an implementing act rather than a legislative act. The Court found that the adoption of rules conferring enforcement powers on border guards entails political choices falling within the responsibilities of the EU legislature and that these rules were likely to affect personal freedoms and fundamental rights to such an extent that the involvement of the EU legislature is required. The Court indicated that the decision shall remain in force until it is replaced, within reasonable time, by new rules.

On 12 April 2013, the Commission presented a proposal for a regulation establishing rules for the surveillance of the external sea borders in Frontex sea operations (COM(2013) 197 final), intended to replace the above mentioned annulled Council decision. In its proposal for a regulation, the Commission took into account recent developments with regard to the protection of fundamental rights, such as the amendments to the Frontex Regulation and the judgment of the European Court of Human Rights of 23 February 2012 in the case Hirsi Jamaa and Others v. Italy. In order to ensure the protection of fundamental rights in sea

operations coordinated by Frontex, in this new proposal the Commission strengthens the fundamental rights provisions, in particular as regards the application of the principle of *non-refoulement*. It does so by requiring that before deciding on disembarkation in a third country, Member States must take into account the general situation in that third country and then they must identify the persons concerned and assess their personal circumstances before disembarkation. Border guards participating in a sea operation must be trained in fundamental rights and refugee law, as well as the international regime of search and rescue.

This latest Commission proposal also covers search and rescue situations which may arise during a sea operation coordinated by Frontex. The proposal sets out the obligation for Member States participating in a sea operation to assist any ship or person in distress. Based on international maritime law instruments, the proposal includes criteria as to when a ship is considered to be in a situation of uncertainty, alert or distress. An assessment of these criteria should be communicated to the rescue coordination centre where the rescue situation takes place and the rescue operation then continues under the coordination of this rescue coordination centre. As regards disembarkation after a rescue operation, participating Member States are required to identify a place of safety, defined as a location where the survivors' safety of life and fundamental rights are not threatened, and ensure rapid and effective disembarkation.

As regards the role of Frontex in search and rescue operations, with the 2011 amendments to the Frontex Regulation, the Agency became entrusted with assisting Member States in circumstances requiring increased technical and operational assistance at the external borders, taking into account that some situations may involve humanitarian emergencies and rescue at sea. This does not mean that Frontex becomes a search and rescue body nor that it takes up the functions of a rescue coordination centre, but during a sea operation it assists Member States to fulfil their obligations to render assistance to persons in distress. The coordination of the rescue operation is carried out by the rescue coordination centre of the area where the rescue takes place.

Finally, the EU has an eye for the disproportionate focus on irregular arrivals by land and sea. This is exemplified by the new proposal of the Commission to introduce an Entry-Exit System for travellers from third countries (see below for a description of the Entry-Exit System).

UNSR's deliberations on the inclusion of migrants' rights in the Global Approach to Migration and Mobility (point 28, 38 and 41)

The EU welcomes the UNSR's acknowledgement that protection of human rights of migrants is enshrined as a cross-cutting priority in the EU's 'migrant centred' external migration policy – as defined through the Global Approach to Migration and Mobility, cf. Council Conclusions of 29 May 2012. Enhancing the human rights of migrants is indeed a priority across all EU actions on migration and development and constant attention ought to be dedicated to the human rights of migrants, in particular vulnerable groups.

Furthermore, the EU notes the UNSR's concerns about the lack of enforcement mechanism, which would enable an evaluation of practices that might infringe on human rights (point 41). This should be carefully considered. Having said that, it is important to bear in mind that each human rights instrument has its own structures for monitoring and appeal, and that the Commission could initiate an infringement procedure if Member States fail to implement regulations and directives in an accurate way. Also, Member States often have their own human rights institutions. In addition, a larger emphasis could be placed on the role of the European Court of Human Rights to which all EU Member States are subject. The Court gives binding rulings in cases brought by individuals against the states, including cases regarding detention of asylum seekers, Dublin transfers etc.

It could also be mentioned that the Joint Readmission Committees with third countries is an existing tool for monitoring the implementation of the EU readmission agreements; including possible examples of violation of human rights of readmitted persons. Further, in the Communication on an Evaluation of EU Readmission Agreement (COM (2011) 76, 23 February 2011) the Commission recommended to include a suspension clause in every readmission agreement that would provide for temporary suspension of the agreement in the event of persistent and serious risk of violation of human rights.

UNSR's deliberations about the securitisation of migration and border control (points 42-45)

The EU does not share the UNSR's assessment that migration and border control have been increasingly integrated into security frameworks that emphasise policing, defence and criminality over a rights-based approach.

Currently, negotiations are on-going between the Council and the European Parliament as regards the Commission proposal for a Regulation establishing a European external border surveillance system (EUROSUR) (COM (2011) 873 final). The objectives of EUROSUR, as already set out in the 2008 Commission Communication (COM(2008)68 final), are three-fold: prevent irregular border crossing, counter cross-border crime and reduce the loss of lives at sea. EUROSUR aims to provide us with a better picture of what is happening at our coasts and at our land borders, which should make it possible for Member States to manage the borders in a more cooperative and effective manner. It is a system for cooperation and information exchange between Member States and with Frontex. The system is being developed through the use of pilot projects but there is a need for a legal framework to set out the conditions and obligations for this information exchange.

EUROSUR is a multi-purpose system which will provide Member States with a better picture of what is happening at sea and therefore it can be used as a tool to detect and help improve the ability of Member States to save lives of migrants at sea. The Commission proposal includes the objective of saving lives of migrants in its recitals, which through negotiations between the Council and the European Parliament, has been further elaborated in the enacting terms. The Commission proposal respects the existing legal regime and mechanisms for search and rescue that are in place in Member States based on international law. It does not lay down the procedures for ensuring rescue at sea to avoid setting up parallel structures at national level, and considering that a comprehensive SAR regime already exists under international law, with the International Convention on Maritime Search and Rescue and International Convention for the Safety of Life at Sea under the auspices of the International Maritime Organisation.

In this context it should be emphasised that during sea border surveillance operations coordinated by Frontex, the Agency also assists Member States in saving many lives at sea, by responding to boats of irregular migrants in distress. Data about the amount of such cases could be found in the Frontex annual report (point 44).

For the time being, it is true that the cooperation between Member States and third countries in the field of border control is not always transparent. For this reason, the draft EUROSUR Regulation foresees that common rules shall be established as laid down in Article 18 of the draft EUROSUR Regulation:

- The information exchange and cooperation must take place on the basis of bilateral or multilateral agreements (Article 18(1));
- The EUROSUR national coordination centres shall be the single point of contact, thereby serving as hub for the information exchange between the EUROSUR communication network managed by Frontex and third countries (Art. 18(1));

- Any exchange of information which could lead to fundamental rights' violations (including *non-refoulment*) is prohibited (Article 18(2));
- Prior approval of any other Member State or Frontex, which provided information, is required before that information can be shared with any third country (Article 18(4));

Two further important instruments of border management are the Commission proposals for Entry-Exit System (EES) and the Registered Travellers' Programme (RTP) adopted on 28 February 2013, and known as the 'Smart Borders Package'. The aim of the EES is to enhance border checks and prevent irregular migration, monitor travel flows, calculate a stay within the Schengen area, identify over-stayers and also assist in the identification of persons (e.g. lost/stolen travel documents). Although it is an important tool for over-stayers to be identified, this is not the only purpose of the EES. As regards the RTP, its aim is to facilitate travel of *bona fide* third-country nationals.

The 'Smart Borders Package' reflects a balanced approach to the fundamental rights of the travellers and security concerns, which are comprehensively analysed in the impact assessments accompanying the proposals. As regards privacy, in order to ensure a high level of protection, the two proposals lay down specific rules on certain aspects of the protection of personal data that complement the EU instruments on data protection.

Personal data will be collected and handled only by the competent visa and border authorities at consular posts (for the RTP) and at border crossing points (for the RTP and EES) as far as is necessary for the performance of their tasks. Access to the data will be strictly defined and will be handled in accordance with current EU and national privacy and data protection legislation. Measures for redress, in case of any human error, will be put in place so that travellers will be able to rectify any data contained in their Registered Traveller application or their entry/exit record. Every effort will be made to ensure that the data is stored securely and is not subject to misuse. The data processing will be supervised by the European Data Protection Supervisor as far as EU institutions and bodies are involved, and by national data protection authorities, as far as Member States' authorities are involved.

None of the systems will have any effect on the rights of refugees or on how persons in need of international protection are able to lodge an asylum application.

As regards the role of Frontex in the coordination of Member States' activities in the field of border management, in particular on the role of guest officers, it is important to note that these interviews are intended to establish their identity, gather information on their route and identify possible involvement of facilitators. However, neither Frontex nor the guest officers are directly involved in national procedures of the host Member State with regard to the eventual return decisions or prosecution of facilitators.

UNSR assessment of the Mobility Partnerships (point 67, 78 and 103)

The EU regrets the UNSR's negative assessment of the Mobility Partnerships (MPs) as a mechanism for ensuring the externalisation of border control in exchange for tightly controlled and limited migration opportunities.

The MPs are offering a political framework for enhanced and tailor-made dialogue and cooperation with non-EU countries in a wide range of fields related to migration and mobility, including on enhancing and promoting mobility of people and better managed legal migration. Promoting mobility is done through, for example:

- Putting in place mechanisms and programmes that facilitate legal mobility, including circular and temporary migration;

- Enhancing migration management capacities of the partner country,
- Informing potential migrants about possibilities for legal migration to EU;
- Undertake labour surveys;
- Investing in pre-departure training;
- Setting up exchange programmes for students or professionals,
- Working towards mutual recognition of diplomas and professional qualifications,
- Strengthening social protection of legal migrants, portability of social rights, etc.

It is also important to notice that legal migration is a policy area of shared competence by the EU and the Member States; the latter having the competence of determining the volumes of non-EU nationals admitted for work or residence in the territory of the EU and having the competence of determining conditions and procedures for admission to their labour markets within the framework of the European directives.

The EU is of the opinion that the recent adjustments to the concept of MPs – amongst others linking the MPs to visa facilitation and readmission agreements –are a significant step forward. Although separate visa facilitation and readmission agreements still remain possible, those agreements will often be accompanied by a MP. Within the MP, the participating Member States and the third country can together work towards a more adequate legal and practical framework for migration and asylum in the third country.

Therefore, the EU remains convinced that the MPs is a valuable instrument to address relevant migration and mobility issues of mutual concern and that the MPs are building trust between the partners, which is of particular importance if we want to increase mobility in a secure environment. Furthermore, as for the non-binding character of the MPs, which the UNSR has described as a weakness, the EU would like to emphasise that the non-binding nature allows to conclude partnerships that are acceptable to all parties involved considering the split competences of the topics involved, but which are not necessarily negotiated in all its details.

Finally, it should be emphasised that the implementation of the working arrangements of Frontex with third countries are meant to promote best practices and principles of border management of the EU, based on full respect of fundamental rights.

UNSR's conclusion on the externalisation of border controls (point 57 and 75)

The EU emphasises that while turning to those countries for cooperation on return (and border management) the EU always offers tools (including financial means) facilitating this task to those countries. This is not externalisation but a sharing of responsibility, and also assists third countries in building the capacity necessary to manage immigration of their own, considering that many countries of origin and transit of migration are becoming also countries of destination.

Furthermore, the establishment of a network of EU Member States' Immigration Liaison Officers (ILOs) is mentioned by the UNSR as an example of an externalisation trend. However, the fact that this network is established is not in itself evidence that Member States have adopted a policy on the externalisation of borders. The ILOs, posted abroad by their respective home Member States, establish direct contact with authorities and organisations in host countries to facilitate and expedite the collection and exchange of information related to irregular immigration. The aim of this network is to formalise and facilitate more effective cooperation among ILOs posted in the same third country or region, thus enabling them to share relevant information among them and adopt a common approach or position in accordance with the applicable law or policies of the EU. Regular

reporting on the cooperation among the ILO's in a given third country or region assesses also the situation in that country or region in matters relating to irregular immigration, taking into account all relevant aspects, including human rights. Consequently, the relevant EU institutions are informed of the activities of the ILO network, as well as of the situation where it has been operating, so as to allow them to take or propose such measures as may be necessary to improve further the overall management of the controls on persons at the external borders of the Member States with due respect of fundamental rights.

UNSR's conclusion and recommendations regarding safeguards and rights of persons under readmission agreements (points 77, 82, 91)

The EU takes note of the concerns expressed by the UNSR about the negotiation and conclusion of the readmission agreements, in particular how human rights guarantees are incorporated therein. However, regrettably the UNSR does not substantiate these concerns in the report.

There should be no doubt that the Commission treats any evidence of potential violation of human rights caused in practice by readmission agreements, or foreseeable risks in this regard, with the utmost seriousness.

The EU considers that the UNSR's report, its conclusions and underlying research, appear to remain largely academic, which is regrettable given that there is a clear lack of data on readmission practice, cf. the Commission Communication on readmission on 2011. The Commission welcomes evidence in this area, and calls upon the UNSR to share any relevant information that may have been collected but not included in the report.

The EU would emphasise that EU readmission agreements by no means waive the obligations of the Member States to respect the rights guaranteed by other instruments, both internal and international, e.g. non-refoulement principle, Geneva Convention, European Court of Human Rights etc. It should be duly noted that all readmission agreements contain a special clause emphasising and confirming this guarantee. Furthermore, the more recent EU readmission agreements (and in line with the Commission's evaluation and its recommendation) further strengthened this commitment, e.g. the agreement between EU and Armenia of 19 April 2013. Other clauses were also introduced, such as the priority given to voluntary return, a suspension clause, and a guarantee of respect for the human rights of returnees after their readmission. All this will reinforce the position of persons subject to readmissions under the EU readmission agreements.

The EU would use this opportunity to inform the UNSR that the Commission is in the final stages of developing a pilot project, together with relevant international organisations, introducing a post-return monitoring mechanism in selected third countries. This project is expected to render important information regarding the well-being of returnees after their readmission, the practical feasibility of such monitoring, as well as any evidence that might indicate a need for further or stronger human rights safeguards in the readmission process.

Finally, while underlining the importance of these measures, it should be recalled that, given the nature of EU readmission agreements (administration-to-administration agreements) and the point in which they are used during the return procedure, i.e. at the very end of the procedure once the previous return/asylum procedures have been fully considered, EU readmission agreements are not the primary or most suited instruments for listing rights of returnees. First and foremost, those rights should be (and are) fully guaranteed in the return directive and asylum acquis.

Recommendation 82 on the need to ensure that the rights of migrants, including irregular migrants, are always the first consideration

The EU pursues the enhancement of migrants' rights in a number of ways. The Lisbon Treaty foresees the accession of the EU to the European Convention on Human Rights, which is an effective tool for the protection of individual rights. Moreover, the Charter of Fundamental Rights, which applies to all individuals, thereby including third-country nationals, is now part of the Treaty and must be respected by Member States when implementing EU law.

The Lisbon Treaty also introduced an explicit and new legal basis in the area of migrant integration (Article 79(4) TFEU). Article 79(2)(b) TFEU gives competence to the EU to define and harmonise the rights of third-country nationals legally residing in the Member States. All EU legal instruments on legal migration contain a chapter on the rights of migrants, granting them comparable rights – and in some cases equal - to those granted to EU nationals. The Return Directive (2008/115/EC) ensures that certain basic rights are granted also to immigrants in an irregular situation, pending their removal. The very purpose of the Employers' Sanctions Directive (2009/52/EC) is to prevent and punish exploitation by employers of irregularly staying migrants, and protect this vulnerable category of migrants. [see below for more details on both Directives].

UNSR's conclusion (point 77) and recommendations (point 85, 92, 93, 95 and 98) regarding creating a harmonised set of minimum standards of rights of migrants in an irregular situation, improve return procedures and detention conditions, promote viable alternatives to detention, avoid detention of children, establish durable solutions for migrants who cannot be returned, ensure the full implementation of the Return Directive in Member States, ensure effective access to justice for all migrants in detention

The Return Directive clearly describes how to deal with third-country nationals who are not lawfully present in a Member State. If a Member State gets knowledge of the presence of a third-country national illegally staying on its territory, the Member State has to either issue a return decision or to grant legal stay e.g. by issuing a residence permit. This straightforward approach should help to reduce grey areas.

In those cases where a return decision has been issued but the return or removal cannot be carried out – e.g. for humanitarian or other reasons – in Article 14 the Return Directive foresees a series of principles and safeguards that have to be met in order to guarantee the basic rights and the human dignity of migrants. This includes the right to family unity, to emergency health care and essential treatment of illness, access for minors to the basic education system, special attention to needs of vulnerable persons.

Furthermore, the Return Directive only allows the use of detention as a last resort and contains explicit rules and safeguards for detention of irregular staying third country nationals. The Directive clearly forbids the unlimited detention of irregularly staying third country nationals. For persons falling under the scope of the Return Directive, EU law only allows their detention if other coercive measures cannot be applied effectively and if the detainee is subject of return procedures in order to prepare or carry out the return; in particular when there is a risk of absconding or the person avoids or hampers the relevant procedure. The Directive also states that if there is no reasonable prospect of return, detention is not justified and the person must be released immediately. As far as the duration of detention is concerned, the general rule is 6 months, with the possibility of an extension for another 12 months only in cases where there is a lack of cooperation by the person concerned or delays in obtaining the necessary documents from the third country.

Additionally, the Directive contains provisions ensuring that the third-country national has access to effective remedies to appeal against or seek review of return decisions (Article 13(1)), including the possibility to obtain legal advice and linguistic assistance (Article 13(3) and (4). As regards detention, Member States shall as well provide for a speedy judicial review of the lawfulness of the detention or grant the third-country national concerned the right to take proceedings in that respect (Article 15(2), (a) or (b)).

It also needs to be stressed that a number of important judgements of the Court of Justice of the EU have further clarified the interpretation of certain provisions of the Directive and thereby further constrained the possibility of Member States to use detention and other criminal law measures vis-à-vis returnees.

For example, in some recent judgements (see C-61/11 (El Dridi), C-329/11 (Achughbabian) and C-430/11 (Sagor)), the ECJ clearly stated that the Return Directive precludes Member States from imposing a prison term on an irregularly staying third-country national who does not comply with an order to leave the national territory, since such a penalty is liable to jeopardise the attainment of the objective of introducing an effective policy for removal and repatriation in keeping with fundamental rights, which is clearly and exhaustively set out in that Directive. Such penal measures would undermine the "effet utile" and the protective value of the Directive. The Directive does not, however, preclude criminal penalties from being imposed, in accordance with national rules and in compliance with fundamental rights, on third-country nationals to whom the said procedure has already been applied and who are nonetheless staying irregularly with no justified ground for non-return. The above judgements have already influenced the legislation and practices of some Member States.

The Commission is currently assessing the correct transposition of the Return Directive by Member States, with special focus on the safeguards and rules concerning fundamental rights and the protection of vulnerable persons, as well as on the rules on detention of returnees and criminalisation of irregular stay.

The Commission will not hesitate to use its powers as guardian of the Treaties in order to ensure the correct and effective implementation of the Directive by Member States. In the framework of the current assessment of the correct transposition of the Return Directive the Commission attaches particular attention to this.

Finally, it is also worth mentioning that FRONTEX is working on a Code of conduct for joint return operations, which will also have a special focus on the safeguards of fundamental rights and the dignity of returnees. It foresees, inter alia, the establishment of a binding, comprehensive and effective system of monitoring of the entire return procedure by members of independent bodies.

Recommendation to address pull factors for irregular migrants, and in particular Europe's demand for seasonal, easily exploitable workforce; consider opening up more regular migration channels, including for low skilled workers thus reflecting the real labour needs of the EU (point 84)

The EU aims at developing a common and comprehensive policy on immigration, in line with Article 79 TFEU, encompassing both measures harmonising the conditions of admission and stay of third-country nationals and their rights when legally resident in the EU, and preventing and combating irregular migration, in full respect of fundamental rights.

Six Directives are currently in force regulating the admission, stay and the rights of different categories of third-country nationals seeking to enter the EU on different grounds: for family reunification purposes (Directive 2003/86/EC), as students (2004/114/EC) or researchers (Directive 2005/71/EC), as long-term residents (Directive 2003/109/EC) and as

highly skilled workers (Directive 2009/50/EC). A horizontal Directive (2011/98/EU) provides for a single application procedure and a single permit, as well as a common set of rights, for migrants not covered by more favourable specific rules.

Three other proposals are currently under negotiation, covering intra-corporate transferees (COM(2010)378), seasonal workers (COM(2010)379) and a third one modifying and improving the existing rules concerning students and researchers (COM(2013)151). The proposal for a Directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment is the first proposal focused mainly on low-skilled workers. Its aim is to set harmonised conditions of entry and stay, and define the rights of this particularly vulnerable category of workers in order to protect them from exploitation and to protect their health and safety. In order to protect seasonal workers and to make the enforcement of the Directive more efficient, a complaints mechanism open to third-country seasonal workers as well as designated third parties will be put in place. Clear and simpler rules of admission for seasonal workers should also result in fewer people working illegally in seasonal jobs and/or staying on longer than they are entitled to. The possibility of circular migration may help to prevent overstaying and also allow reliable flows of remittances and transfer of skills and investment in third countries, thus contributing to EU's development policy.

The Commission shares the Special Rapporteurs' view that it is essential to open up suitable channels to legal migration into Europe, linking them to labour market needs, so that migrants can effectively contribute to Europe's economic growth and competiveness and be fully integrated into the European society. In order to inform migrants of their rights and of the immigration procedures in all Member States, in 2011 the Commission launched the EU Immigration Portal (http://ec.europa.eu/immigration).

However, as for the Special Rapporteurs' statement that there is a "high, although generally unrecognised demand within EUMS for temporary unskilled labour in several sectors" (point 17) it should be noted that the demand for unskilled labour differs between EU Member States with regard to volumes as well as sectors. It should also be noted that legal migration remains a policy area of shared competence by the EU and the Member States; the latter having the competence of determining volumes of non-EU nationals admitted for work or residence; and the former for setting minimum standards related to equal treatment.

Recommendation to encourage more solidarity and responsibility-sharing among EU Member States (point 86)

As regards the Dublin system, political agreement was reached last year on significant changes to the Dublin system which reinforce its protective aspects, notably as regards the maintenance of family unity (one the critical points raised by the UNSR), and its efficiency. As for the essence of the system, however, it remains intact – it is a method for allocating responsibility and avoiding asylum-shopping which has been in place for nearly 20 years now (starting with Dublin convention), and it is not politically conceivable that it would be repealed. However, other forms of solidarity can be resorted to, such as financial assistance, EASO/peer assistance, relocation, etc. to demonstrate practical solidarity with Member States facing challenges from mixed immigration inflows or receiving high numbers of asylum seekers.

Recommendation to provide viable alternatives to detention (point 92)

The EU Return Directive allows detention of children only as a last resort and for the shortest appropriate period of time. The possibility to use detention is however an important measure in order to uphold a system for regulating immigration. To completely withdraw such a possibility, would not contribute to an orderly and sustainable management of migration.

As regards the detention of asylum-seekers, to be noted that last year political agreement was reached on the revised Reception Conditions Directive, which now includes very restrictive grounds for the detention of asylum seekers, as well as strict requirements re the conditions of detention – this is a major step forward, in our view, and should produce a real impact in terms of Member States' asylum detention policies.

Recommendation to ensure that complaint mechanisms envisaged in the Employers' Sanctions Directive are properly implemented and do not penalise migrants due to their status (point 94)

The Employers' Sanctions Directive (2009/52/EC) prohibits the employment of irregularly staying third-country workers and provides for sanctions for those who employ them. The reduction of a market for those who take advantage of irregularity, such as employers of irregularly-staying migrants, is essential to ensure a coherent and credible EU immigration policy.

The Employers' Sanctions Directive will reduce the pull factor by targeting the employment of migrants who are irregularly staying in the EU. It is important to stress that the Directive does not provide for any sanctions against the irregularly-staying migrant workers but only against the employers.

Specifically, the Directive requires employers, before recruiting a third-country national to check that they have a residence permit or another authorisation for stay, and to notify the competent national authorities (Article 4). Employers of irregularly staying migrants who have not carried out the pre-recruitment check will be liable to sanctions consisting of (Articles 5, 6 and 7):

- fines (including costs of returning)
- back payment of outstanding wages, taxes and social security contributions, and
- if appropriate, other administrative measures, which might include loss of subsidies, e.g. EU funding, for up to five years and exclusion from public contracts for a similar period. Moreover, Member States are required to provide for criminal penalties in serious cases (i.e. repeated infringements of the Directive, simultaneous employment of a significant number of irregular migrants, particularly exploitative working conditions, employment of victims of human trafficking, and of minors).

At the same time, a number of provisions provide for measures in support of migrants such as the requirement for Member States to set up effective complaint mechanisms by which relevant third-country nationals can lodge complaints directly or through designated third parties such as trade unions, or other associations, against their employers (Article 13(1)). Importantly, given the vulnerable situation of this category of migrants, the Directive enables third parties having a legitimate interest in ensuring compliance with the Directive (including NGOs), to engage in support or on behalf of an illegally employed third-country national in any administrative or civil proceedings provided for with the objective of implementing the Directive (Article 13(2)). Article 13(3) clearly states that assisting a third-country national to lodge a complaint in accordance with Article 13(2) shall not, in any case, be considered as facilitation to unauthorised residence and thereby criminalised by Member States.

Enforcement is a key factor. That is why Member States are also required to conduct effective and adequate inspections, as well as to identify risks sectors and communicate annually to the Commission the numbers and results of inspections in those sectors (Article 14).

The Commission is currently assessing the correct transposition of the Employers' Sanctions Directive, and will not hesitate to use its powers as guardian of the Treaties in order to ensure its correct and effective implementation by Member States.

Recommendation to the Council on mandates for readmission agreements negotiations (point 97)

The EU notes the UNSR's recommendation about issuing negotiation directives for readmission agreements only with countries of origin. The Commission would support such an approach. It must however be stressed that, in line with the Commission's evaluation and recommendations of 2011, in some specific situations, due to the geographic position of a third country and a significant risk of irregular migration transiting its territory, it may be necessary to include a third country nationals clause in a readmission agreement.

It should also be noted that the return to the transit country is always only a second option. This was clearly shown by the Commission's evaluation of EU readmission agreements of 2011. Even when a readmission agreement included a third country nationals clause, Member States tend to turn to countries of origin for return procedures. With the exception of a small number of third countries on the EU's external border, the third country nationals clauses included in EU readmission agreements are rarely used. This means that evidence in support of regular assertions of externalisation or a shift in 'migration burden' from the EU onto third countries as a result of these instruments is weak, and the report forwards little in terms of quantitative or qualitative data to strengthen this evidence base. However, in particular with the closest neighbouring countries being the major transit countries it is necessary to address the issue of third country nationals transiting their territory (see further below).

The EU would like to emphasise that it is important to incorporate issues on readmission into a broader and coherent cooperation with third countries.

Recommendation to the Commission to actively initiate infringement procedures (point 98)

The Commission continuously monitors the correct application of the EU acquis and takes very seriously any allegations of non-respect of fundamental rights and follows-up any such allegations with Member States. For example, 'push-backs' on the high seas by Italy in 2009 and more recently allegations of similar practices at the Greek-Turkish border. In both cases, the Commission took immediate contact with the national authorities and inquired into their activities to ensure that any possible violations of fundamental rights are discontinued.

Recommendation regarding establishing a human rights focal point within DG Home (point 99)

The Commission takes note of the recommendation of the UNSR, which will be given further considerations.

UNSR's report from the mission to Greece – recommendations to the EU

As underlined by the Rapporteur, the Commission is assisting Greece in the implementation of the Action Plan "Asylum and Migration management", which includes a section on border management. For border management, pending issues derive substantially from the Schengen Evaluation Action plan, following a Schengen evaluation carried out in Greece in 2010. Therefore, the weaknesses in border management identified in the Scheval Action Plan are also followed-up in parallel within the framework of the Scheval mechanism (Scheval Working Party led by the Council).

As regards the Action Plan "Asylum and Migration management", the Commission is actively working together with the Greek authorities to remedy the deficiencies in its system, also involving regular technical missions to this Member State. The Action Plan was recently revised by Greece, and this is the basis for on-going monitoring of Greece's progress with reforms, including channelling of assistance targeted at most pressing needs – a frequent topic for high-level political discussion at ministerial level. Particular attention is paid to Greece meeting the targets on all aspects of the asylum reforming system, especially those aspects with the most serious consequences for human rights (conditions in detention, access to asylum procedures, etc.).
As regards the protection of fundamental rights, the Commission repeatedly emphasises to Greece the need to respect fundamental rights when carrying out border control and to ensure that the rights of migrants are always considered as a priority, in particular when right to life and the principle of non-refoulement are at stake.

Solidarity between Member States has been translated in a very concrete way with the establishment of the Solidarity and Management of Migration Flows Programme. EUR 4bn has been allocated to Member States from 2007 to 2013 through four Funds: the External Borders Fund, the European Refugee Fund, the Return Fund and the Integration Fund for third country nationals. Funds were allocated to Member States through distribution keys taking account different factors measuring the workload Member States had to face in these different areas. For example, the External Borders Fund was allocated in accordance with the level of risks at the external borders and the workload to manage these borders. This resulted in significant allocations throughout the period for Member States having to manage large sections of the external borders and sections under high irregular migration pressure. Spain, Greece and Italy were the main beneficiaries of this Fund. This principle of solidarity has never been challenged by other Member States whereas these countries underwent different migration crisis in particular after the political turmoil in North Africa as from 2010.

Recommendation to the EU to recognise that sealing the external borders of the EU is impossible and that migrants will continue arriving (point 112) and that focus should be on ensuring full protection of the human rights of all migrant (point 113)

The EU legislation on border control, fighting irregular migration and return policy is based on full respect of human rights and dignity.

Recommendation to the EU to encourage more solidarity and responsibility-sharing among EU Member States in relation to borders, asylum and migration (point 118)

The EU is fully committed to give support to Greece, in particular through the SOLID Funds and Frontex activities. The Commission provides constant technical assistance to Greece to improve border management and the conditions of migrants. It must be pointed out that the measures supporting border control at the Greek-Turkish border are not part of

an overall strategy of "sealing" the Greek-Turkish border. For example, the EBF is financing measures aiming to improve the reception conditions for mixed flows arriving at the border. In particular, one of the key priorities for EBF in Greece is the establishment of first reception centres in Evros and other border regions. These facilities are an essential element for the on-going reform of the asylum and migration policy in Greece. The First Reception Service has now been established and the Fylakio reception centre has been launched in mid-March (Evros region), where migrants can be assisted in full respect of fundamental rights. The centre will be fully operational in June. Moreover, the EBF (2011 emergency measures) supports a dedicated project of UNHCR and NGOs providing the appropriate information and interpretation to newly arriving mixed migratory flows in Evros and the islands.

The EU considers that the SOLID funds, mentioned in this report, and proportionality and subsidiarity principles underpinning the EU legal body, give proof of this concern.

UNSR's report from the mission to Italy – recommendations to the EU

As regards border surveillance operations carried out under the coordination of Frontex, these operations are to be carried out in full respect of fundamental rights in accordance with the Schengen Borders Code, the amended Frontex Regulation (Regulation 2007/2004 and Regulation 2011/1168) and Council Decision 2010/252/EU.

On the role of Frontex in search and rescue (SAR) operations, although Frontex should assist Member States in circumstances requiring increased technical and operational assistance at the external borders, taking into account that some situations may involve rescue at sea, Frontex is not a SAR body. Hence, although it may be involved in a rescue operation which arises during a border surveillance operation, Frontex does not coordinate search and rescue operations. This is done by the SAR Rescue Coordination Centre of the region where the rescue incident occurs.

On the role of guest officers deployed in Member States in the framework of joint operations, the purpose of the interviews carried out by these officers with irregular migrants is not to facilitate their expulsion; these interviews are intended to establish their identity, gather information on their route and identify possible involvement of facilitators. However, neither Frontex nor the guest officers are directly involved in national procedures of the host Member State with regard to the claims of asylum, eventual return decisions or prosecution of facilitators.

Recommendation to ensure that EU frameworks do not contribute to the restriction of human rights protections of migrants in Italy (point 126)

EU legislation on management of migratory flows, whether it is border management, legal migration and integration, fighting irregular migration or return policy is based on full respect of human rights and dignity.

Recommendation to avoid externalisation of border controls (point 127 and 128)

The EU is of the opinion that no piece of EU legislation or Communication can lead to the conclusion that European cooperation frameworks with partner countries results in the externalisation of border controls. In contrast, cooperation with FRONTEX is always based on respect to migrants' human rights.

Recommendation to support, both technically and financially, civil society organisations which offer services and support to migrants, including those which help migrants defend their rights (point 129)

The EU encourages Member States to involve civil society when implementing the SOLID funds or other EU funding to support a good management of immigration and asylum flows and needs.

Recommendation to promote the family reunification among unaccompanied minors with their relatives regularly resident in other EU Member States (point 130)

The Action Plan on unaccompanied minors puts forwards an EU approach to family tracing and has even set up an expert group who has met twice, the last one in March 2013, at a meeting co-organised with EASO, to discuss this issue, where this family tracing can only be carried out with the minor's consent.

UNSR's report from the mission to Turkey – recommendations to the EU

The UNSR is critical (points 33-39) towards the readmission agreement negotiated by the EU with Turkey, since it does not include sufficient safeguards to protect the rights of migrants in Turkey and to prevent that migrants may deported from Turkey towards third countries where they may be exposed to torture or inhuman treatments.

However, as the report itself recognises, the readmission agreement includes in the preamble and in article 18 provisions stating that the agreement does not prejudge the obligation of both the parties to respect human rights which they are bound to at national or international level. In that respect, it should particularly be borne in mind that not only the EU countries are bound to respect the EU acquis on asylum and on human rights, but that all the countries of the EU as well as Turkey are submitted to the European Convention of Human rights and to the jurisprudence of the European Court for Human Rights. The signature of the readmission agreement will not exempt Turkey or the EU countries from being obliged to respect that convention or jurisprudence, and this remains true, even if it is not explicitly stated by the text of the readmission agreement.

Furthermore, it appears that the EU is criticised for having supported the construction of two detention centres for irregular migrants, pretending that this was an expression of the EU priority being given to security (point 78). The choice for the EU to support the construction and equipping and organisation of two detention centres was triggered by the preoccupation to support Turkey to align not only its legislation, but also its practices, to the EU and European standards as regards detention and return of irregular migrants. Furthermore, the decision to support this project, which was taken by the EU in the course of 2007, was inspired by the vision of the unsatisfactory level of the detention centres existing in Turkey, which had been witnessed on the occasion of a peer-review carried out by EU Member States experts and Commission officials in 2006. In any case, as the report recognises, the decision to support the construction of the two detention centres was taken in parallel and jointly with the decision to finance the construction of seven reception centres for asylum seekers and refugees, as well as with the overall effort to persuade Turkish authorities to revise entirely their legislation on the management of migrants and refugees, effort which has eventually resulted into the adoption in April 2013 of the new law on International protection and foreigners.

Recommendation against sealing the EU external borders, which will constitute a pull factor instead and warn FRONTEX operations from disrespecting human rights (point 116)

Same considerations as above.

Recommendation to develop a more nuanced policy of migration cooperation with Turkey, which moves beyond security, containment and deterrence issues (point 117)

The EU is already following a balanced and comprehensive approach towards Turkey, and not limiting itself only to focussing on irregular migration.

Furthermore, it appears in the report that the UNSR believes the EU is putting too much emphasis, in all its documents related to Turkey, to the need for Turkey to step up its capacity to prevent irregular migration, regretting also that the start of the visa liberalisation process was made conditional to the signature of the readmission agreement.

The documents on Turkey elaborated by the Commission certainly include many references to the need to step up the capacity to prevent irregular migration and to sign the

readmission agreement, but also stress very much the need to improve legislation and practices relating to the respect of migrants and refugees' rights. The visa liberalisation process for Turkey is linked to far more conditions than just the readmission agreement. These conditions are on fields like border management, judicial cooperation, improvement of human and minority rights and document security. These issues are given a high importance, in conformity with the true situation on the ground in Turkey, and in conformity with the Global Approach on Migration and Mobility.

Recommendation to ensure that human rights is a formal criterion for the EU's cooperation with third countries on migration management (point 119)

Reference is made to the reply already provided above in response to points 33/39 of the report.

Recommendation on collaboration with Turkish authorities (point 121)

The EU is stepping up its assistance to Turkey in dealing with refugee flows, but the possibility to enhance the quota of refugees resettled towards the EU countries rests within the competences of the single Member States. The EU currently provides financial incentives under the European Refugee Fund to encourage Member States resettlement efforts. It provides for financial assistance for setting up a resettlement programme as such as well as for the resettlement of individuals belonging to certain categories; that is certain categories of vulnerable persons or persons coming from a region with which the EU has established a Regional Protection Programme. As regards Turkey, the resettlement of persons belonging to one of the categories of vulnerable persons is eligible for financial assistance. As of 2014, the Commission has proposed to increase the overall amount of financial incentives available as well as the amount of the lump sum payments per person resettled. The proposal is currently being discussed by the European Parliament and the Council.

UNSR's report from the mission to Tunisia – recommendation to the EU

Recommendation to encourage the Tunisian authorities to pay attention to the human rights of migrants during the democratic transition (point 91 a)

The EU fully agrees with the UNSR. This is in line with the EU policy and the on-going negotiations. This also applies to the rest of recommendations such as EU Member States having bilateral migration-related agreements with Tunisia to place human rights at the core of these agreements; EU Member States taking all necessary measures to rescue migrants in distress in the Mediterranean Sea in their own territorial waters, including rescuing ships and taking those on board to safe ports of disembarkation in those member States; to intensify efforts to search for the 300 Tunisians who are reported to have disappeared in the Mediterranean Sea in 2011. Finally in the context of any agreement on migration with the Tunisian authorities, also insisting on transparency with regard to migrants rights, including making public all detention centres.