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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

区域研究：欧洲联盟外部边界管理及其对移民人权的影响*

内容提要

特别报告员在其执行任务第一年的全年都致力于对欧洲联盟外部边界管理及其对移民人权的影响的研究。他在布鲁塞尔与欧洲联盟进行了协商，对欧洲联盟外部边界两侧的国家希腊、意大利、突尼斯和土耳其进行了访问。特别报告员对将移民权利纳入政策框架感到满意，但仍关切的是，对移民，特别是非正常移民人权的保护实际上往往没有。报告还探讨了与移民安全化和边界控制有关的挑战，在边界控制方面拘留的采用，边界控制的外部化，与边界外部国家分担责任的不足。

* 本报告的附件只以收到时的原文分发。

目录

一. 导言

1. 本报告系根据人权理事会第 17/12 号决议提交。它简要叙述了移民人权问题特别报告员自 2012 年 6 月 1 日至 2013 年 4 月 30 日的活动。

二. 特别报告员进行的活动

A. 参加会议和协商

2. 2012 年 9 月 28 日，特别报告员参加了儿童权利委员会移民中儿童的权利问题一般性讨论日活动。2012 年 11 月 21 和 22 日，他出席了在毛里求斯举办的移民与发展问题全球论坛及其会外边际活动。2013 年 2 月 21 和 22 日，他出席了在纽约举行的国际移民与发展问题协调会议。4 月 18 和 19 日，他参加了人权事务高级专员办事处(人权高专办)在布鲁塞尔召开的关于欧洲联盟成员国落实人权机制有关移民问题的建议的研讨会。

B. 国家访问

3. 2012 年，特别报告员应欧洲联盟邀请访问了布鲁塞尔；随后，分别应突尼斯、土耳其和意大利三国政府邀请访问了这三个国家。对这些国家的访问为本报告的主题部分提供了资料。

C. 为高级别对话做准备

4. 特别报告员期待着订于 2013 年 10 月 3-4 日举行的移民与发展问题高级别对话，这将是评估关于世界移民政策的全球讨论进展情况的一个难得机会。

三. 区域研究：欧洲联盟外部边界管理及其对移民人权的影响

A. 导言

5. 特别报告员知道，与边界管理和非正常移民有关的挑战对欧洲联盟而言，既不是新问题，也不是独特现象。在全世界，为逃避迫害，寻求安全，或为自己的未来寻求更好机会，跨越边界的移民者从未绝迹。然而，特别报告员注意到，近些年来，特别是“阿拉伯之春”以后，非正常移民流虽然也时有高峰，但这种现象最明显的是在地中海，这是因为所采取的路线更危险，海路上和沙漠中死亡人数和侵犯人权事件更多。

6. 因此，特别报告员决定将其任务的头一年全部用于研究欧洲联盟的外部边界管理及其对移民人权的影响。与欧洲联盟和有关成员国协商进行的研究，其目的是对在保护和增进移民人权方面取得的进展以及依然存在的障碍和挑战进行评估，在此过程中对处于非常情况下的移民者的人权给予特别注意。

7. 2012 年 5 月，特别报告员到了布鲁塞尔，在那里，他与欧洲联盟的有关机构进行了初步协商，包括：民政事务专员、司法总局、扩大事务总局、发展与合作(欧洲援助)总局、欧洲对外行动事务处、欧洲议会成员(包括议会人权小组委员会、人权工作组、欧洲联盟理事会主席/移民和庇护问题高级工作组、欧盟反恐协调员和外部边界)。他还在维也纳与欧洲联盟基本权利机构进行了会晤。

8. 在整个一年中，他都和一些政府间组织保持了联系，包括：联合国难民事务高级专员办事处(难民署)、国际移民组织(移民组织)和移民政策发展国际中心(移民政策中心)。他还和学术界、民间社会组织和移民本身保持了接触和讨论。

9. 然后，特别报告员对欧洲联盟外部边界两侧的国家进行了四次访问以了解实际边界管理政策的实例。由于欧洲联盟的外部边界非常广阔，特别报告员选择了靠近地中海南部边界的几个国家，这是因为南部边界不仅仍然是移民到欧洲联盟的重要入境点之一，而且需要经过一个横跨地中海的艰险海路和危险陆路的旅程才能到达。特别报告员访问了移民到欧洲联盟的两个主要入境点的两侧：土耳其和希腊以及突尼斯和意大利。他于 2012 年 6 月访问了突尼斯和土耳其，2012 年 10 月访问了意大利，2012 年 11 至 12 月访问了希腊。2013 年 2 月，特别报告员回到布鲁塞尔，与欧洲联盟的有关机构就其初步结论进行了协商，也是为了进一步澄清情况。

10. 在每一个国家，特别报告员都访问了拘留中心、庇护所和其他移民接待设施以及过境处。他还会晤了负责边界控制和移民事务的有关国家当局以及专注于这些问题的民间社会人士。

11. 通过这些访问得出的调查结果和提出的建议可见于本报告的四个附录。本专题报告以国家访问为实际案例，旨在突出说明在制定和执行政策方面存在的一些挑战，同时提出建议以帮助欧洲联盟及其成员国以单独、双边和区域形式克服这些挑战。

12. 特别报告员要感谢抽出时间会见他的每一个人，感谢他们与他分享他们的观点和经验。特别报告员特别要感谢欧洲联盟和他所访问的成员国为帮助他进行研究提供的支持与合作。他还要衷心感谢人权高专办欧洲区域办事处提供的不可或缺的支持和援助。

B. 欧洲联盟内移民概况

13. 移民一直是欧洲历史的一个基本组成部分。移民无疑是欧洲联盟文化、经济和社会结构的一个基本要素，它以无数方式对欧洲社会作出贡献。然而，近几十年来，欧洲范围内的移民逐渐成为一个日益敏感的话题，往往演变为相互对立

的激烈公开辩论，成为国家选举中的一个决定性选举议题。而且，虽然移民政策传统上是单个成员国的领域，但在过去二十年中，欧洲联盟却承担了接收和边界管理规则，包括关于第三国国民居住的共同规则的协调工作。申根自由通行区，外部海洋边界 42,673 公里，陆地边界 7,721 公里，包含 26 个国家(其中有 4 个非欧盟国家)，只是在 2011 年就有 7 亿人次经外部边界过境，这是区域边界管理的一个独特试验。[1]

14. 欧洲联盟首先在与安全有密切关系的地区开始合作，首要重点是防止跨界犯罪。合作逐渐扩大到协调边界管理和往返方面的某些规则，庇护和正常移民领域继续发展。但应当说明的是，移民政策的关键决定因素，包括从来都是最重要的接受人数(包括正常移民和重新安置的难民)，仍然属于单个欧洲联盟成员国(欧盟成员国)决策权力的范围。

15. 一方面，特别报告员对欧洲联盟政策的这一逐步协调感到满意，因为移民必然是可受益于协调区域治理的一个领域。然而，他注意到，区域一级有关移民管理的全欧盟标准的制订，没有与之匹配的移民权利的协调保证。虽然有一些与正常移民权利有关的进步，包括关于长期居住和一次性许可以及与需要国际保护的个人权利有关的法规，但处于非正常情况下的移民权利方面的协调仍显不足。相反，特别报告员注意到，欧洲联盟一级移民法律和政策协调的另一种情况似乎是有关入境条件的越来越复杂和限制性的条例以及严格得多的边界管理政策的增加。

16. 伴随更严格的边界控制办法的是申根地区更严格的入境要求。在签订申根协定之前，相对灵活的入境要求或具体的外来工人方案使非熟练工人能先到欧洲联盟成员国寻求就业机会，然后酌情调整其行政地位。然而，目前，找到这种机会的可能性一直相当有限，因为申根制度要求多数非欧盟不熟练移民，特别是来自世界南方国家的移民，首先要获得进入欧洲联盟寻找工作的签证。[2] 这就造成了一种现实情况，即：非欧盟国家移民，特别是来自没有签证便利方案的发展中国家的移民，越来越难以亲自进入欧洲联盟寻找工作。

17. 特别报告员还注意到，在欧盟成员国内，农业、旅馆业、建筑业和家务工作等部门对临时工和非熟练工的需求仍然很大，虽然一般不被承认。这种工作是地方雇主提供的，属于非正式经济，其工资和条件往往具有剥削性。然而，特别报告员注意到，虽然确实有鼓励熟练工人移民欧洲联盟的方案，[3] 欧洲联盟移民法律框架的出现并未伴随着相应的非熟练移民通过正常渠道进入欧盟成员国获

[1] 另见，欧洲联盟委员会，《移民和庇护情况第三次年度报告》(2011 年)，2012 年 5 月 30 日，布鲁塞尔，COM (2012) 250 定稿。

[2] 例如，欧洲联盟要求所有马格里布国家和多数非洲国家的公民拥有签证。一般情况见：http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2001R0539:20110111:EN:PDF。

[3] 例如，关于寻求高质量就业的第三国国民的入境和居住条件的 2009 年 5 月 25 日第 2009/50/EC 号理事会法令。另见下面第 72-73 段。

得临时非熟练工作机会的可能性的增加。这种不被承认的劳工需求是非熟练工移民的一个重要促进因素。在公开辩论中，非正常移民时常被指控“偷取工作”或促进了正式工人工资的降低，但国家似乎很少为缩小非正式经济部门和制裁“非正式雇主”投入资源，“非正式雇主”利用剥削性工作条件来提高竞争力。特别报告员希望，《雇主惩戒法》[4] 能在这方面发挥积极作用。同样，他也注意到，正在谈判《季节工人使用法》[5] 。

18. 因此，越来越多的移民踏上危险的旅途，为的是非正常进入欧洲联盟做这种工作。为寻找这种机会，他们不仅要乘坐经不起风浪的船舶渡过地中海和大西洋，而且要冒着生命危险通过无定向的陆路。的确，据估计，2011 年有 1,500 多人[6] 因为试图非正常通过地中海边界丧失了生命。据记录，在 1998 年至 2012 年期间，有 16,000 多人因为试图向欧洲联盟移民而死亡。[7] 应当指出，这一统计不仅包括海上的死亡，而且包括其他各种情况造成的死亡，如卡车中的窒息、车祸、冻死、警察暴力、绝食、地雷，还有拘留中自杀，这些都突显了非正常移民途中所包含的很多危险。

19. 然而，特别报告员也承认，通过海路和陆路非正常入境的人在非正常居住在欧洲联盟内的人中只占相当小的比例。实际上，统计表明，欧洲联盟境内的多数处于不正常地位的移民是原有入境许可、因而正常入境、但却逾期滞留的人。在这方面，可以认为，不论是欧洲联盟还是其他评论者，都将关注点过多地放在了陆上和海上非正常入境问题上，特别是在政策方面。

20. 但是，特别报告员注意到，将关注点放在非正常入境的移民上也是很有道理的，因为似乎正是在他们身上发生了很多最严重侵犯人权的问题。最令人关切的是试图进入欧洲联盟的非正常移民的死亡问题。关切的另外一些问题是在边界对移民的虐待，包括侵犯其自由与安全的各种做法，边界两侧的拘留制度，这种制度未能充分遵守起码的人权标准。而且，即便是在跨过边界进入欧洲联盟之前，不论是通过海路还是陆路，移民在路上都时常面临被虐待和剥削的风险，包括被走私者利用。对在过境国等待的妇女和女孩而言尤其如此，她们可能会遭受性暴力。

21. 特别报告员还注意到，“阿拉伯之春”以后，非正常移民有了一个特殊含义。特别是在 2011 年夏季，跨越地中海向意大利运动的移民有些显著增加。然

[4] 欧洲议会和理事会 2009 年 6 月 18 日第 2009/52/EC 号法令规定了对非法留用第三国国民的雇主的最低制裁和措施标准。

[5] 关于第三国国民为寻求季节工作入境和居住的条件的欧洲议会和理事会 2010 年 7 月 13 日法令的提案，COM(2010) 379 定稿。

[6] 如欧洲理事会移民、难民和流离失所问题委员会在其题为“地中海中丧失的生命：谁的责任？”的文件(April 2012 年 4 月)中所估计。

[7] 一般情况见：http://www.unitedagainstracism.org/pdfs/listofdeaths.pdf。

而，这些船民的到来似乎只是一个孤立事件，“阿拉伯之春”在较长期内并未引起向欧洲的新的显著移民流。尽管如此，这些事件仍在欧洲引起了关于非正常移民运动管理的热烈辩论。

22. 在这一背景下，特别报告员注意到欧洲联盟在管理共同移民系统这一复杂现象方面的地位。欧洲联盟是一个由 27 个成员国组成的统一经济、社会和政治伙伴组织，其中许多成员国都有自己的可有力保护人权的国内法律传统。另外，在区域一级，欧洲联盟发展了一个全面的法律系统，可有力保护人权并辅助国内基本权利法和国际人权法。由于这一法律系统，长期合法居住在欧盟的第三国国民在自由通行、居住和工作条件方面可与欧盟公民享有同样的权利。因此，特别报告员指出，欧洲联盟处于独特地位，有助于解决边界管理方面的移民人权问题。

23. 区域系统的长处也给其本身带来挑战。特别报告员还注意到，成员国在很大程度上仍然受国内民意的强大影响，而民意则很容易变为反对移民。对移民政策的这种态度往往缺少人权观点，然后，则在区域一级反映出来，鉴于欧洲委员会的重要作用，则又在制定欧洲移民政策和法律时反映在成员国中。另外，特别报告员还注意到，欧洲联盟和各国在移民领域的管辖权的复杂相互作用时常被利用，其结果往往是人权在空当中被漏掉：成员国在区域一级提倡模糊政策，然后，利用其中的标准推行限制性更强的国内移民政策，最后将其归因于区域法律系统。下面的情况可能可以说明这一点：欧盟委员会关于《欧洲联盟遣返法》的原提案规定最长拘留期为 6 个月，但在欧洲委员会的坚持下，它被延长到在特殊情况下 18 个月；随后，意大利和希腊根据《遣返法》允许的最高标准延长了它们的最长拘留期限。人们希望，与移民有关的新的普通立法程序可有助于避免在立法方面将移民问题政治化。

24. 特别报告员还注意到，欧洲联盟边界管理共同制度的另一个结果是：地处欧洲联盟自由通行(申根)区外部边界的成员国发现，它们不仅要负责管理本国的边界，还要负责监管整个欧洲联盟的外部边界，而这种边界则往往包括大片的陆地或海洋边界。特别报告员注意到，欧洲联盟已经认识到这项任务对单个边界国家的艰巨性，因此成立了欧盟边界管理局以协助成员国执行挑战性的边界管理任务。尽管如此，很明显，对处于外部边界的成员国的影响仍然过大，这可能会影响到进入这些国家的移民的人权。

C. 欧洲联盟外部边界管理办法分析

25. 1990 年代以来，欧洲联盟在边界控制方面逐渐建立了一个重要而复杂的立法、体制和政策系统。由于欧洲联盟内移民政策的广阔性，全面概述所有政策、方案和所涉部门已超出了本报告的范围。但本报告的附件概述了在这方面对欧洲联盟的决策有影响的某些关键法律、体制和政策安排。[8]

[8] 见附件，其中概述了与移民管理有关的欧洲联盟的各种方案、政策、法规和其他项目。

1. 将移民的人权纳入政策框架值得肯定

26. 将移民方案和政策纳入欧洲联盟的体制和政策框架这一行动表明清楚地认识到，在本区域内，移民问题不仅目前起着作用，将来一也会继续起作用。这肯定应当作为一种积极措施给予欢迎。特别是，最近的一些进展表明，欧洲联盟移民政策更广泛地采取了从人权角度看问题的办法，主要是在正常移民方面。

27. 欧洲委员会《斯德哥尔摩方案》在将人权纳入移民政策方面迈出了几个重要步骤。在《斯德哥尔摩方案》范围内，强调了移民作为确保欧洲联盟竞争力和经济活力和解决人口问题的一种办法的重要性。《斯德哥尔摩方案》明确规定，它的优先政治事项之一就是“一方面，执法措施，另一方面，保证个人权利的措施、法治和国际保护条例，是朝着同一方向相伴而行、相辅相成的。”

28. 特别报告员还赞成《全面看待移民和流动性问题》，这是一个重要的总政策文件，其目的是塑造和影响欧洲联盟所有实体与影响移民问题外部的政策和方案有关的所有其他管理决定。特别报告员注意到，《全面看待移民和流动性问题》反映了一个更注重权利的议程，2011 年修订的《全面看待移民和流动性问题》的关键变化之一就是采取更全面看问题的办法，这种办法考虑到通过边界时受到威胁的人权，因而强调要建立移民的法律渠道和保护人权，包括国际保护。重要的是，《全面看待移民和流动性问题》明确表示以移民问题为中心，将移民自己关注的问题放在核心地位。文件将移民的人权明确作为涉及各方面的问题，关系到《全面看待移民和流动性问题》的所有四个支柱，被给予特别注意的是，保护和扶持弱势移民，如无人陪伴儿童、寻求庇护者、无国籍人员和贩卖人口的受害者。[9] 《全面看待移民和流动性问题》还将移民对发展的积极影响最大化和移民的权利作为明确目标。

29. 另外，也绝不能忽视在欧洲联盟外部边界管理方面的重要人权进展情况。例如，欧洲联盟为确保欧洲边界管理局改善遵守国际人权法的情况采取了相当多措施。在欧洲联盟法院(欧盟法院)作出废除欧盟委员会第 2010/252/EU 号决定 [10] 的判决以后，欧洲联盟将制定新的海上边界工作条例和指导原则；特别报告员得到保证说，欧盟委员会的提案将按照国际难民法和国际人权法，全面采纳在边界工作中尊重基本权利和不驱逐的规定及明确的入境规则。2011 年，修订了《欧盟边界管理条例》，其中规定，边界管理局要任命一名基本权利干事负责监察边界管理工作对移民和难民基本权利的影响，另设立一个起咨询作用的基本权利咨询会负责提供政策咨询。

[9] 《全面看待移民和流动性问题》，第 6 页。

[10] 欧洲联盟法院，第 C-355/10 号案件，2012 年 9 月 5 日。

30. 根据同一精神，欧洲联盟基本权利局(FRA 基本权利局)最近也为解决欧洲联盟内移民权利问题完成了一些重要工作。[11] 特别报告员还注意到，《欧洲联盟基本权利宪章》现在是欧洲联盟法律的一个重要依据，由于其作为一个具有约束力的条约的地位，遵守《宪章》必然是欧洲联盟移民政策的一个重要组成部分。

2. 有效保护移民权利方面的主要缺陷

(a) 移民和人权的关系中排除了非正常移民

31. 特别报告员感到遗憾的是，尽管有上面提到的进步，但在欧洲联盟政策范围内，非正常移民在很大程度上仍被看作一个必须解决的安全问题。这与从人权角度看问题大相径庭，因为从概念上来说，移民也是人，是人权的平等拥有者。

32. 关于《全面看待移民和流动性问题》，特别报告员感到遗憾的是，非正常移民被和贩卖人口联系在一起，这可能会给人一种错误印象，即：非正常移民和贩卖人口一样，是一种犯罪。虽然偷运移民可构成犯罪，但非正常移民却不构成犯罪，因此，不应将其与安全问题和犯罪联系在一起。

33. 同样，司法与民政事务委员会 2012 年 4 月通过的题为“欧盟针对移民压力的行动——一个战略反应”的行动文件的重点也是减轻“移民压力”，而不是研究非正常移民的原因。但特别报告员也注意到，在这些文件中对推动或拉动因素未给予足够注意，包括来源国和过境国的欠发达和脆弱法治。

34. 特别报告员对欧盟委员会保证使用“非正常”移民一词表示满意，但也注意到欧洲联盟的很多移民政策文件，特别是欧洲委员会的结论和法案仍然使用“非法移徙”和“非法移民”二词。即便是《斯德哥尔摩方案》也强调，欧洲联盟“必须继续为合法进入其成员国领土提供便利，同时采取措施打击非法移民和跨界犯罪，保持高水平安全。”

35. 特别报告员对这样用词感到遗憾，对将非正常移民与犯罪和安全问题联系起来感到失望。使用错误词汇将人消极描述为“非法”会助长对移民问题的消极讨论，因而进一步加强非正常移民即罪犯的消极成见。另外，这种语言使移徙罪行化的讨论合理化，从而进一步助长了对非正常移民的排斥、歧视和边缘化，甚至会鼓励对他们的语言和身体暴力行为。这种情况由于欧洲联盟的法规变得更加严重，如《便利法》，[12] 该法虽然没有将非正常移徙定为犯罪，但却由于可能给予的刑事惩罚而阻碍了向非正常移民提供援助。

[11] 基本权利局，《欧洲联盟内非常情况下移民的基本权利》，2011 年 11 月；基本权利局，《欧洲南部海洋边界的基本权利情况》，2013 年。

[12] 理事会第 2002/90/EC 法律。

(b) 政策与实践之间的差距：实际中缺少权利观念

36. 然而，对特别报告员来说，可能最突出的问题就是政策与实践之间的差距。因为，尽管有上面提到的缺点，欧洲联盟在移民政策方面确实逐步形成了一种更重视权利的观念，特别是是在正常移民方面。但特别报告员没有看到这必然地反映在实际采取的措施上。相反，根据其任务，特别报告员注意到，在很大程度上仍然没有奉行权利观念。

37. 重点仍然是监控欧洲联盟的外部边界。如他所注意到，有关移民管理的活动主要集中在措施的确认、制定和筹资上，而这种措施的重点则是在非正常移民的安全方面，包括正式签订关于下列事项的协定：“非法”移民，通过后勤和技术手段加强边界控制，为制止非正常移民在第三国进行能力建设(如《欧盟边界管理局与土耳其的谅解备忘录》)，通过立法和实际方案使非正常移民罪行化，包括促进在欧洲联盟境内外拘留非正常移民，为欧洲联盟国家和过境国家的拘留中心提供资金。

38. 特别报告员关注的另一个问题是，没有为保证移民方面的所有方案和机构充分遵守国际人权法律可便于实行的独立监督办法。例如，虽然《全面看待移民和流动性问题》将人权问题看作一个涉及各方面的问题，却未规定设立可对可能侵犯人权的做法进行评估的任何执行机制。当然，基本权利局可收集资料，开展研究，从人权角度提出意见，向欧洲联盟提供专家咨询。虽然欧洲法院现在可宣布不符合起码人权标准的政策无效，但这是一个缓慢和漫长的过程。而且，对于负责执行欧洲联盟法律的欧盟各实体或国家当局如何执行政策也缺少监督或系统分析。

39. 另外，与国家人权理论发展的主要趋势相反，移民，特别是非正常移民本身，很少被切实赋予争取尊重和保护人权的能力：在获得补救和诉诸决策机构方面很少有便利条件。多数情况下，他们很难获得信息，很难求助于法院、法庭或人权机构，很难获得口译和笔译服务，很难获得法律或司法援助方案，难以联系非政府组织或其他社会组织。多数方案都是有利于“高效”管理“非法”移民的，都是以通过自愿离开、重新接纳或驱逐实现遣返为目的迅速处理案件为前提的。

40. 总的来说，特别报告员注意到，欧洲联盟处理非正常移民问题的办法未能充分注意保护处于非正常情况下的移民的权利。因此，欧洲联盟面临的挑战是，在与安全有关的议程之外，按照法治和基本人权标准，更好地做出共同的政策反应。

41. 特别报告员还注意到，虽然严格的人权标准被纳入了欧洲联盟的政策和法规，但在法律条文和成员国的执行存在着很大差距。因此欧盟委员会仍然需要认真监督成员国充分和适当执行这些标准。

3. 移民安全化和边界控制

> “不是警察部队的存在使法律……制度强大和得到遵守，而是法律的严格遵守使警察部队能有效地执行任务”。[13]

42. 特别报告员注意到，在欧洲联盟的体制和政策范围内，移民和边界控制越来越多地被纳入安全框架，而这种框架更多强调的是警察工作、防卫和犯罪行为，而不是从权利角度看问题的办法。

43. 以警察和安全为重点的最实在表现是对欧盟边界管理局和欧盟边界监控系统等其他新监控技术的投资。尽管发生了金融危机，但欧盟边界管理局的预算仍从 2006 年的 1,920 万欧元稳步增加到 2007 年的将近 4,200 万欧元，2010 年更达到最高峰 8,700 万欧元。欧盟边界监控系统不仅将改善各边界控制当局之间的信息交流与合作，而且将加强欧洲联盟对海上和陆地边界的监控，因为将采用大量价格高昂的新技术、离岸探测器和卫星跟踪系统。另外，通过其“智能边界包”，欧洲联盟将建立世界最大的生物统计资料库之一，其主要目的之一就是，发现超过签证期限逗留的人，同时防止非正常移民。边界控制安全化的另一个证据是，最近决定将外部边界基金作为新的内部安全基金的一部分。

44. 特别报告员注意到，关于建立欧盟边界监控系统的法规要求成员国和欧盟边界管理局“优先考虑”海上遇险人员以及儿童、寻求庇护者、贩卖人口受害者和需要医疗者的特殊需要，欧盟委员会也多次强调欧盟边界监控系统未来“保护和挽救移民生命”的作用。然而，特别报告员感到遗憾的是，提案并没有规定任何程序、指导原则或制度以确保将在海上挽救生命作为第一要务。另外，拟议的法规没有说明要怎样在海上挽救生命，也没有说明怎样处置“被救者”。在这方面，特别报告员担心的是，欧盟边界监控系统只是会变成成员国保护边界、防止入境的另外一种工具，而不是挽救生命的真正手段。

45. 而且，即便原则上在边界有某些人权保障，也仍然有一个落实的问题，特别是在脆弱移民和寻求庇护者的特殊需要方面。例如，虽然《斯德哥尔摩方案》规定，欧盟边界管理局和欧洲庇护支援处(EASO)的活动在欧盟外部边界接待移民的问题上应当协调一致，但特别报告员注意到，目前情况却不是这样。在希腊，当欧洲边界管理局在为确定移民的国籍以便于驱逐对他们进行筛查时，欧洲支援处并不在场，欧洲联盟也并不帮助成员国在边界筛查移民以确定其保护需要。同样，在意大利，欧盟边界管理局特邀官员被允许在没有任何监督的情况下在拘留中心与被拘留的移民谈话。欧盟边界管理局与欧洲庇护支援处最近的工作协定允许成立由边界管理人员和庇护专家组成的共同或混合工作组。这可以进一步考虑作为有效和及时确认有国际保护需要的人员的一种方法，条件是这种混合工作组要有有效的人权监督和难民署的参与。

[13] 引自《万国公法》第七辑(牛津大学出版社)，第 81 段。

46. 另外，地中海是一片忙碌的海洋，来往的私人船舶有可能向海上遇险的移民提供宝贵援助。边防战士曾对特别报告员提到，遇险的船舶时常在陷入危险之前被私人船舶看到。然而，移民的罪行化使私人船舶不愿意对遇险难民施救。特别是已知的移民登陆困难、与这种施救相关的高额费用、以及有关国家与从事这种人道主义援助的私人实体之间缺乏合作等因素都使私人船舶不愿意承担援救遇险船舶的责任，因而增加了海上死亡的危险。

4. 作为一种边界控制办法的拘留

47. 特别报告员从一开始就提到，他早就怀疑拘留何时曾是一种遏止非正常移民的有效办法；为不违反国际人权法，拘留必须是法律所规定，必须是必要、合理和有助于实现预定目标的。[14] 然而，特别报告员在对各国进行访问和进行研究时注意到，在关于移民安全化和边界控制的讨论中，对非正常移民的大规模拘留逐渐被看作欧洲联盟移民管理的一种合法工具，尽管没有任何证据表明拘留是一种遏止办法。的确，在过去十年中，移民拘留作为欧洲联盟边界控制一种工具的使用的增加与欧洲联盟这方面移民法的制订是相对应的。在某种意义上，欧洲联盟法律的协调，特别是《遣返法》的通过，可以说拘留作为在欧洲联盟内移民管理的一种工具被制度化了。

48. 当然，应当指出，《遣返法》规定，拘留应当是一种最后手段。然而，在实际中，不论是欧洲联盟整体还是成员国单独都极少探索拘留的可行替代办法。特别报告员在所访问的国家中看到，几乎完全没有可大规模实行的替代办法，即便是对儿童也是如此。

49. 相反，特别报告员所看到的是，在欧洲联盟对边界国家支持下的拘留制度的泛滥。例如，西西里最近就在欧洲联盟资助和支持下建立了一座崭新的米罗拘留中心。遗憾的是，其建筑方式高度安全化且几乎军事化，被拘留者几乎没有可能享有甚至是起码的人权，生活条件非常差，而且经常实行最长拘留期限。[15] 希腊通过了一项拘留其境内所有非正常移民的政策，并且正在建设一系列新的拘留中心，目的是将收容能力扩大到 10,000 个床位。这其中一部分是由欧洲联盟遣返基金出资的。[16] 虽然扩大拘留可减轻希腊拘留中心的拥挤程度，但如果不大规模拘留非正常移民，这本来是没有必要的。

50. 更令人关切的是，不仅在欧洲联盟成员国内，而且在与外部边界接壤的邻国，往往是按照欧洲联盟的要求或在其鼓励下，对非正常移民的拘留似乎都在增加。的确，特别报告员注意到，欧洲联盟似乎在越来越多地鼓励、资助和促进非欧洲联盟边界国家实行拘留，目的是确保在非正常移民进入欧洲联盟之前将他们

[14] 移民人权问题特别报告员的报告，A/HRC/20/24。

[15] 见特别报告员的意大利访问报告(A/HRC/23/46/Add.3)。

[16] 见特别报告员的希腊访问报告(A/HRC/23/46/Add.4)。

拦截在第三国。例如，在土耳其，特别报告员听说，计划以特别报告员在埃迪尔内访问的欧洲联盟设计的所谓“示范”拘留中心为样板建立更多拘留中心。特别报告员还听说，在土耳其将由欧洲联盟出资建立两个新的拘留中心。[17] 另外，特别报告员还听说，意大利在其与利比亚的协定中建议在库夫拉为非正常移民建立一个紧急援助中心，这特别是与那里的法治状况不定有关，多次有报告说非正常移民在那里受到虐待。[18] 在 2011 年 11 月访问阿尔巴尼亚时，特别报告员看到一个崭新拘留中心，门口飘扬着一面巨大欧洲联盟旗帜，以示由欧洲联盟出资建设，但没有可过的通道和院落，其实是作为一个中间安全监狱建造的。[19]

51. 特别报告员最关切的问题是，欧洲联盟内外越来越多地采取拘留移民的做法并未自动伴随有对被拘留者的法律和基本人权保障。欧洲联盟的《遣返法》规定了对未被遣返者的基本权利保障(第 14-18 条)，但特别报告员注意到，实际上，在他访问的所有国家都没有遵守这些原则。

52. 例如，特别报告员曾多次发现，拘留没有适当程序，包括不保证有适当的法律代表，被拘留者无法利用领事服务、口译或笔译服务，没有对脆弱人员的适当发觉程序，无法获得有效补救办法。拘留条件也无保障，没有适当的医疗保健或社会心理支援，条件类似监狱。在突尼斯、土耳其和希腊，特别报告员也发现，有儿童和家庭被拘留，没有对儿童的适当监护制度。他在访问的所有国家都发现，没有转移希望的人被拘留，几乎完全没有对拘留办法的有意义替代办法。

53. 另外，他还注意到，非正常移民在被拘留期间利用庇护程序的能力不同。特别报告员感到满意的是，经修订的《接待条件法》包括了一个受限制的寻求庇护者拘留理由非详尽清单。然而，他注意到，措辞笼统的条款实际上可能会允许增加对寻求庇护者的拘留，这应当避免。

54. 另一个常见的问题是由于不可转移长期拘留。应当指出，欧洲法院已经明确，在欧洲联盟，不得只因为他或她非正常逗留在一个国家即将其拘留，即便他或她按照命令离开该国。[20] 因此，没有驱逐程序的拘留不符合欧洲联盟《遣返法》的目的。尽管欧洲法院的这一重要认定明确说明了如何解释这些规定，特别报告员仍然经常发现有人因为没有转移的真正希望而被长期拘留。希腊和意大利的情况确实如此，突尼斯和土耳其的情况则程度较轻，拘留时间较短。

[17] 见特别报告员的土耳其访问报告(A/HRC/23/46/Add.2)。

[18] 国际人权联合会(人权联合会)，“利比亚：必须停止缉捕移民”，2012 年，见：http://www.fidh.org/IMG/pdf/libyemignantsuk-ld.pdf。

[19] 见特别报告员的阿尔巴尼亚访问报告(A/HRC/20/24/Add.1)。

[20] 第 C-61/11 PPU 号案件，*El Dridi,* 2011 年 4 月 28 日，OJ C 186, 2011 年 6 月 25 日；第 C-357/09 PPU 案件, *Kadzoev,* 2009 年 11 月 30 日法院(大法庭)判决。

5. 外部化趋势

55. 特别报告员还注意到，通一系列复杂的政策和方案，欧洲联盟的政策的执行越来越要确保边界控制不在欧洲联盟的实际边界进行。这种现象是通过各种手段实现的，被称为边界控制“外部化”，它要求将防止非正常移民进入欧洲的责任转移给出发国或过境国。

56. 虽然欧洲人权法院在 Hirsi 一案[21] 中已经谴责了这种“推回”做法，但特别报告员注意到，欧洲联盟似乎找到一些更具创造性的做法来确保移民永远不能到达欧洲边界。虽然加强巡查可能有助于挽救生命，但人们也担心，与第三国的制度化合作，特别是在北非和土耳其沿岸，尤其是协助加强海岸警卫队的拦截能力，其实际目的就是拦截船舶，防止其进入所有欧洲领土。

57. 另外，还建立了一个欧洲联盟成员国移民官员联络网，其目的是使欧洲联盟成员国代表能东道国当局建立和保持联系，以协助防止和打击“非法”移民。

58. 这样看来，欧洲联盟似乎试图确保外国国民永远实际到达欧洲联盟领土，如果他们来到，立即将他们遣返。这是一件特别麻烦的事，因为它意味着将移民控制的责任转移给欧洲联盟以外的国家，因而，那些移民要求助于欧洲联盟内的人权机制就会受到法律限制或变得实际上不可能。而且，外部化的目的似乎是将移民置于非欧盟国家的牢固控制之下，而欧洲联盟无需为这些国家的人权机制提供适当的财政和技术援助，这样，欧洲联盟即可将责任推得一干二净，不必保证试图进入其领土的那些人的人权。

59. 边界控制责任向其他国家的这种令人忧虑的转移并没有伴随着适当的人权保证。越来越强调的似乎是某些国家阻止非正常移民离开本国的能力，而不是确保在合法移民控制过程中充分保护移民的权利。

(a) 外国边界控制能力建设

60. 欧洲联盟推行边界控制外部化的一个重要办法就是协助进行外国负责边界控制人员的能力建设。特别报告员听说了很多欧洲联盟支持的方案，这些方案的目的就是，改进与负责边界控制的过境国和来源国海岸警卫队、边防部队和其他政府官员的合作，对他们进行培训。

61. 这不是说，加强移民管理并非总是优先事项国家的能力肯定是错误办法。相反，强调人权是移民管理的一个核心问题的有效培训可以是保证移民权利的一个重要手段。特别是，更好的海上搜救行动的协调和技能可对挽救海上遇险移民的生命起至关重要的作用。然而，虽然加强地中海上的搜救能力对挽救海上遇险移民的生命无疑十分重要，但加强邻国海岸警卫队的能力可能只是要确保永不允许某些船舶离开该国的领海，同时便于使这种船舶上的移民尽快返回他们所离开

[21] 欧洲人权法院，Hirsi Jamaa 等诉意大利，2012 年 2 月 23 日。

的国家的领土。在移民要返回的国家没有充分尊重移民人权的基础设施的条件下，情况尤其如此。加上这种政策会使去欧盟的企图更加隐秘，这种忧虑就会更加强烈。偷渡集团被加强，移民变得更易受害，腐败变得更猖獗，剥削会更多，侵犯人权会更普遍和严重，最终，生命可能会遇到前所未有的危险。

(b) 再接收协定

62. 在全欧洲联盟与第三国在非正常移民问题上的合作方面，最倾向的办法就是签订再接收协定。这种协定的目的是将非正常移民遣返来源国和过境国。重要的是，欧洲联盟的再接收协定往往包括一项额外义务，即能将第三国国民和无国籍人员送回他们进入欧盟时所来自的国家。至今，已有 13 项欧洲联盟再接收协定生效。[22]

63. 特别报告员仍然特别关切的是这些协定是如何谈判和签订的，具体而言，人权保障如何被纳入其中。看来，尽管没有一个能良好运行的庇护系统，或缺少可以确保有效保护人权的方式管理大量流入移民所需资源或基础设施，仍然与第三国拟定了再接收协定。而且，协定要求签署国不仅要接回本国国民，而且要接回第三国国民，这可能会给这些人造成特殊的人权问题。

64. 此外，特别报告员还注意到，这些协定越来越多地被欧洲联盟和签署国双方用作谈判的工具，这对双方都具有激励作用，包括对签署国而言可享受签证自由化或便利协定，对欧洲联盟而言则可获得对方同意再接收。两种考虑都没有自动包括人权。举例来说，在草签欧洲联盟－土耳其再接收协定之前，土耳其说，它期望给欧盟委员会一个任务，就土耳其公民在申根协定地区免签证的问题开始进行谈判，而欧洲委员会则请欧盟委员会在再接收协定的同时采取步骤，作为一个逐渐实现的长远前景，实现签证自由化。然而协定的重点几乎完全是打击移民，没有充分保证尊重移民的人权。特别报告员听说，欧盟委员会曾建议在每个再接收协定中增加一个中止条款，规定：在人权有持续和严重遭受侵犯危险的情况下，暂时中止再接受协定。[23] 这是一个肯定需要认真实行的重要办法。另外，特别报告员得到保证说，签证自由化一般都会伴有规定了详细标准的行动计划。特别报告员指出，其中还应包括有关移民，包括非正常移民人权的具体规定。

65. 其次，也有不少欧盟成员国与来源国或过境国之间的双边协定，其目的往往相同，主要是确保来到某一欧盟成员国的移民尽快返回他们经其入境的国家。如所提到，在意大利，这种趋势变得越来越明显，意大利与埃及和突尼斯都签订

[22] 而且，欧洲联盟的另外一些协定中也包括再接收条款，如与 79 个非洲、加勒比和太平洋国家签订的《科托努协定》。

[23] COM(2011) 76 终稿，2011 年 2 月 23 日。

了再接收协定，其中都没有保证被遣返者适当人权的规定。[24] 希腊和土耳其的再接收协定也是如此。

(c) 流动性伙伴关系

66. 特别报告员还注意到，在《全面看待移民和流动性问题》的范围内，流动性伙伴关系样板被称赞为一种创新性的先进政治工具，它可加强与非欧盟国家在与移民和流动性有关的广泛领域的适当对话与合作。

67. 然而，特别报告员注意到，欧洲联盟似乎将伙伴关系用作推进其加强边界控制议程的一种手段，它为有限的劳工机会加上前提条件，大部分是给熟练移民的机会；承诺实行签证自由化/便利，采取可切实将移民控制外部化的措施。这些包括边界控制改革，与欧洲联盟签订再接收协定和与欧盟边界管理局签订工作协议。另外，流动性伙伴关系似乎还被加上先决条件，即以这些措施交换某些类工人的临时移民机会。这样看来，流动性合作关系可被称为确保边界控制外部化的一种办法，用来交换严格控制和有限的移民机会。[25]

68. 特别报告员关切的是这种协定的法律性质。这种协定不具有约束力，基本上是一种软性法律文书，具有很高的灵活性。而且，由于不具有约束力，也就不能保证参与的成员国或第三国会遵守或履行其中的倡议或承诺，因为没有强制措施，也没有独立评估。在这种情况下，也就没有将人权自动纳入流动性伙伴关系的明确规定。相反，其作为随机签订的文书的自身性质实际上不会使其成为与第三国共同促进实行统一移民人权政策的有效文书。另外，谈判的不透明性质也意味着人权问题可能不一定被放在重要位置。例如，流动性伙伴关系是与内政部长谈判的，但也会与外部行动处(EEAS)谈判，实际上这可能会导致先后顺序、权限的混乱，最终则会影响将人权问题协调一致地纳入每一个这种方案，这特别是因为财政部负责谈判再接收协定，而外部行动处则有开展一般人权合作的任务。

6. 未与外部边界国家适当分担责任

69. 特别报告员还注意到，在移民问题上，在欧洲联盟内需要更多分担责任。希腊和意大利是担负欧洲联盟外部边界管理任务的两个国家，因而，也是接收大批非正常移民的国家。然而，根据现行制度，在进入欧洲联盟的入境点被发现不正常的移民，其指纹要被留存在生物统计资料库中。这可能会造成一种实际情况，即：非正常移民滞留在边界国家，如意大利和希腊。特别报告员曾遇到许多这类移民，他们在进入欧盟被留存指纹后，即继续前行到其他欧盟成员国寻求生计。然而，一旦被发现不正常，他们就会被遣返到作为其第一入境点的边界国家，在这种国家，他们往往没有任何关系和可行的前景。而且，在这些国家，这

[24] 见 A/HRC/23/46/Add.3。

[25] 欧盟委员会，第三次移民和庇护问题年度报告，(2011 年)，布鲁塞尔，30.5.2012, COM (2012) 250 终稿，第 9 至 10 页，另见附件第 10 段。

种移民时常陷入困境，因为他们既不能去欧盟境内的其他国家，也不能安全返回本国。

70. 其次，《都柏林第二规则》规定，按照惯例，庇护申请人只能在其首次进入欧盟的国家申请庇护。由于可能的寻求庇护者往往知道这一要求，他们可能会避免提出保护要求，因而，他们在首次进入欧盟的国家留下指纹，以便在他们认为在其中有更长期融合前景与机会的国家寻求国际保护。在实际中，这会使有保护问题的人避免提出要求，争取继续其旅程，时常通过危险路线到其他欧盟成员国，因而使自己处于更脆弱的境地。

71. 因此，特别报告员指出，都柏林系统的运作实际上可能会加剧边界国家在管理一个已经超载的庇护系统方面的挑战，在接待条件和庇护程序上都是如此。虽然《欧洲联盟运作条约》第 80 条规定欧洲联盟成员国要分担责任，根据《都柏林规则》设计的系统似乎与这一原则不一致。相反，要求作为第一入境点的国家负责处理多数庇护申请，对处于欧洲联盟边界的国家来说是不可持续的，这可能会增加接触庇护系统的困难，如特别报告员在希腊所看到。特别报告员注意到经修订的《都柏林规则》会带来一些改进，包括建立早期预警机制，但指出，它不能补救都柏林系统内在的结构问题。

72. 另一个大问题是，非正常移民、辅助保护受益者、寻求庇护者，特别是无人陪伴的移民儿童的家庭团聚没有制度化。虽然《都柏林规则》确实规定要将无陪伴未成年人送到有其父母或监护人的成员国，但由于没有能力或缺少协调，实际上这往往不可能实现。无人陪伴儿童，不论其行政地位如何，只要符合他们的最大利益，总是应当将他们送到他们在那里有某种家庭关系的国家。特别报告员希望，新的欧洲共同庇护系统(CEAS)将有助于解决这些问题。

7. 承认和处理“拉动因素”问题

73. 另外，欧洲联盟决不能回避处理非正常移民的拉动因素问题。特别是欧洲对季节工人、低熟练工人和易于利用的劳动力的需求问题必需解决。欧洲联盟必须优先制订特别是季节性农业工作等低熟练部门的有效工作签证方案。[26] 实际上，欧盟委员会自己也承认，开放欧盟入境法律渠道可能比惩罚措施效率更高、成本更低，还会有助于减少非正常移民。在这方面，特别报告员指出，《季节工人招聘法》可使低熟练工人的季节性移徙更容易。但他也注意到，按照这一方案发放签证的数量将仍然由成员国掌握。该法律的另一个缺点是，它没有提供任何长期解决办法，因此，实际上可能会导致移民在超过签证限期的情况下陷入非正常状态。

74. 而且，对利用移民特别是非正常移民的弱势，付给他们低工资或剥削性工资，迫使他们从事肮脏、困难或危险工作的雇主，必须采取有效的惩罚措施。在

[26] 在这方面有许多倡议，如《兰卡法》，见附件，第 38-39 段。

这方面，《雇主惩戒法》和《犯罪受害者援助法》在保护非正常移民不受剥削方面可起重要作用。当然，首先要问题还是在国家法律中充分和适当落实这些法律；欧盟委员会让特别报告员相信，它会坚定地利用它对这些条约的监护权力确保《雇主惩戒法》的正确和有效落实。然而，欧洲联盟也必须作出更多努力，确保移民能利用为保护他们确立的办法，而不用担心被故意驱逐出境。例如，《雇主惩戒法》第 6 条使中有使非正常移民能进行申诉的一系列规定，但在实际中却无人利用。[27]

四. 结论和建议

A. 结论

75. 尽管有一系列重要政策和实际体制上的一些成绩，但欧洲联盟在很大程度上仍将注意力集中在加强外部边界控制、阻止非正常移民问题上。欧盟成员国重申了一段政治论述，这一论述将非正常移民问题置于犯罪与安全问题的范围，从而进一步使通过移民拘留、“推回”和再接收等措施使边界控制外部化的做法合法化。

76. 特别报告员承认，许多这类办法本身并非无道理。然而，他在对四国的访问过程中都注意到，没有适当制定人权和法律保障，因而破坏了这些办法的合理性、合法性和正当性。

77. 例如，特别报告员多次发现欠妥当的拘留程序，包括不履行法律、程序和实质性保障，拘留没有转移希望的人员，拘留儿童，以及缺少拘留的替代办法。同样，遣返程序，特别是在有再接收协定的情况下，也缺少必要的保障。

78. 另外，也不能忽视欧洲联盟作为一个在移民方面拥有权力的区域组织的影响。考虑到保证签证便利或自由化对邻国本身发展的重要意义，欧洲联盟必须在其所有关于移民的谈判中坚持一个人权框架。忽视人权与法律保障充分结合的任何办法都可以说是遏止性的，都会破坏欧洲联盟充当保护人权世界典范的能力。

79. 而且，这样一种办法只能起到助长排外主义、歧视和边缘化移民的作用，而这又会复活对侵犯移民权利行为的有罪不罚文化，固化反移民的态度，推动反移民的语言和身体暴力的兴起，正如目前希腊所发生的情况。

80. 此外，还必须解决非正常移民的拉动因素问题，特别是欧洲对季节工人、易于利用的劳动力的需求问题。如果能切实努力照顾到移民的尊严，为他们提供包括有力法律保障以及经济和社会支援在内的各种办法，防止非正常移民的工作就会目标更准确、更有效。基于遏制的移民政策完全违反人权义务。为确保移民

[27] 基本权利局《2012 年年度报告》，将于 2013 年公布。

的人权和任何其他人一样有保障，权利就必须得到尊重，程序就必须透明，伸张正义的渠道就必须畅通。采取这种办法不仅符合国际人权法规定的法律义务，而且是向承认移民对欧洲的积极贡献迈出的重要一步。

B. 建议

81. 如果说欧洲联盟的共同移民政策可使移民权利具有更大意义，那么，就要特别注意更好地保证其合理性，对制定现行方案的依据的正确性进行评估，其中特别重点应是法治和保护人权，包括非正常移民的人权。

一般性建议

82. 进一步从人权角度出发处理移民和边界管理问题，确保将包括非正常移民在内的移民权利问题作为首先考虑的问题。

83. 承认封闭欧洲联盟外部边界是不可能的，无论如何阻止，移民都会不断到来；到了一定程度，遏止非正常移民会适得其反，因为这会使移民进一步走向地下，从而壮大偷渡集团的力量，为排斥和边缘化创造条件，助长侵犯人权行为，如对移民的歧视和暴力侵害。

84. 考虑开放更多正规移民通道，包括低熟练工人通道，从而反映欧洲联盟的真正劳工需求，这将有助于减少非正常越界和移民偷渡。

85. 按照国际人权法律为处于非正常境况的移民制定一套协调的起码权利标准。在这方面，适当考虑到欧洲联盟基本权利局关于“在欧洲联盟牌非正常境况移民的基本权利”的报告，促请欧洲联盟所有成员国批准《保护所有移徙工人及其家庭成员权利国际公约》。

86. 鼓励欧洲联盟成员国按照《欧洲联盟运作条约》第 80 条和《关于促进欧盟在庇护方面的内部团结的公告》，鼓励欧盟成员国在有关边界、庇护和移民的问题上加强团结和责任分担。在这方面，考虑从根本上修改经修订的《都柏林规则》以及其中包含的原则，目前形式的《规则》适得其反地加重了外部边界国家庇护系统的负担。

87. 协调欧洲联盟内部的移民政策，确保在实践中尊重移民的人权，同时实行问责制和透明要求。在这方面，考虑建立一个常设评估和独立监督机制，作为欧洲联盟移民控制政策与实践的一个组成部分。

88. 公布和说明任何关于移民控制的协定，不坚持与不能表明自己能尊重和保护移民人权的国家签订的协定，也不与这样的国家签订这类协定。

89. 在语言、政策和实际上避免将非正常移民视为犯罪者，避免使用不正确措辞，如“非法移民”。

90. 制订程序和原则以确保在海上有效实施救助。在这方面，采用鼓励私人船舶救助遇险船只的规则。

91. 确保在与非欧盟国家进行的任何移民合作协定谈判中将移民的人权问题作为首要考虑，包括再接收协定、与边防部队的技术合作协定或流动性伙伴关系协定。其中应当包括但不只限于：

- 移民求助于司法的渠道；
- 对移民权利民间社会组织的支持；
- 对所有人权法合作伙伴的培训。

92. 促进实行可靠的拘留替代办法，不坚持支持扩大拘留中心网，从而进一步加强作为一种移民控制办法的拘留。拘留应当永远是最后措施，决不应拘留儿童。

93. 确保所有成员国充分执行《遣返法》，以按照国际人权标准改进拘留的程序保障、最低标准和条件。另外，要确保所有被拘留的移民能有效利用民事法，包括：

- 接触合格律师；
- 获得合格的口译和笔译；
- 及时和有效利用司法，即法院、法庭、国家人权机构等；
- 获得法律援助和司法援助方案；
- 接触非政府组织；
- 接触领事机构；
- 利用庇护程序；
- 对所有移民拘留设施实行有效和独立的外部监督。

94. 确保所有移民都能利用司法，特别是要确保《雇主惩戒法》规定的非正常移民申诉办法能适当实行，以使其得到有效应用，不致在实际中因为他们的行政地位对他们给予惩罚。

95. 为由于原籍国的情况或领事机构的不合作不能遣返的移民确立持久解决办法。这应当包括给他们以适当的地位。

对欧洲联盟机构的具体建议：

对部长理事会：

96. 重新考虑所使用的词语，采用“非正常”移民，而不是“非法”移民。

97. 按照欧盟委员会在其《关于评估欧盟再接收协定的公告》中提出的建议，考虑发布关于只与原籍国进行再接收协定谈判的指导原则。

对欧盟委员会：

98. 对未正确执行欧洲联盟有关移民权利的法规的成员国自动启动违约处理程序。

99. 在内政部范围内进一步将人权放在主导地位，在这方面，考虑在部内建立人权联络站。

对欧洲议会：

100. 利用作为有关移民问题的共同立法机关的权力，确保所有影响到移民的法规中的人权保障得到有效落实。

101. 在移民政策方面，继续坚持使用正确词语。

对人权问题特别代表和外部行动处：

102. 采取措施为与非欧盟国家进行的非正常移民问题辩论设定不同的范围，去除关于安全问题的论述，采取从人权角度看问题的办法。

103. 坚持将人权问题纳入移动性伙伴关系谈判。

对欧盟边界管理局：

104. 在其所有行动中都充分考虑到尊重包括处于不正常境况移民的所有移民的人权，包括从人权角度出发开展能力建设、培训、监督、事件报告、外来官员布署等活动。

105. 考虑加强基本权利官员的作用和独立性。

106. 确保有效落实《基本权利战略和行动计划》。

107. 确保在拘留中心由边界管理局外来官员与移民进行的所有谈话都在一个可提供适当人权保障的法律框架内进行。

对基本权利局：

108. 继续进行关于在欧洲联盟内及其外部边界的移民(包括非正常移民)的人权情况差距及其面临的挑战的重要报告工作，同时提出关于如何改善情况的建议。

Annex

[English only]

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

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

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

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

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

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

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

1. The European Council's five-year programmes

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

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

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

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

2. Global Approach to Migration and Mobility

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

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

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

3. The Common European Union Migration Policy

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

4. European Pact on Immigration and Asylum

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

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

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

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

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

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

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

5. EU Action on Migratory Pressures

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

6. The European Neighbourhood Policy (ENP)

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

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

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

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

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

7. High Level Working Group on Asylum and Migration

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

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

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

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

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

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

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

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

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

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

10. The Facilitation Directive

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

11. The Carrier Sanctions Directive

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

12. The Employer Sanctions Directive

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

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

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

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

13. The Seasonal Workers Directive

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

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

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

14. The Blue Card Directive

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

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

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

15. The Single Permit Directive

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

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

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

16. The Long-Term Residence Directive

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

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

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

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

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

17. The Family Reunification Directive

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

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

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

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

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

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

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

1. The Schengen system

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

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

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

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

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

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

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

2. Frontex

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

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

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

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

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

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

3. The External Borders Fund

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

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

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

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

4. EUROSUR

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

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

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

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

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

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

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

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

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

5. The "Smart Borders" Package

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

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

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

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

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

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

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

6. The Common Visa Policy

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

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

7. Immigration Liaison Officers

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

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

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

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

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

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

1. The Return Directive

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

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

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

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

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

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

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

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

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

2. The European Return Fund

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

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

3. Readmission Agreements

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

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

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

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

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

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

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

1. The Common European Asylum System

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

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

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

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

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

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

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

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

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

2. The Refugee Fund

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

3. The European Asylum Support Office (EASO)

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

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

1. The Treaty on European Union

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

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

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

2. The Charter of Fundamental Rights of the European Union

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

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

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

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

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

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

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

4. Working Party on Human Rights (COHOM)

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

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

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

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

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

7. The Victims of Crime Directive

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