

EU Contribution to the OHCHR Comprehensive report on "Human Rights of migrants"

The 70/147 GA Resolution of 17 December 2015, on the protection of migrants, requests the Secretary-General to submit to the General Assembly and the Human Rights Council at their seventy-first and thirty-third sessions, respectively, a comprehensive report entitled "Human rights of migrants", covering all aspects of the implementation of the present resolution (par. 17);

The EU is firmly committed to the promotion and protection of the human rights of migrants. Our policies are founded on the principles of non-discrimination, proportionality, non-refoulement, access to justice and the best interests of the child. The Charter of Fundamental Rights applies to the European Union in all its actions and to Member States when they implement EU law. All legal instruments adopted by the EU in the area of migration, asylum and border management must therefore ensure a high level of protection of the human rights of all individuals, including third-country nationals. The EU's external action is guided by the principles of human rights and respect for international law, in accordance with Article 21 of the Treaty on European Union.

The importance of ensuring that human rights are effectively mainstreamed in all Union actions is taken into account in the EU's legislative work and policy, as well as in the European Commission's advocacy towards Member States, in capacity-building in Member States and third countries, and in its priorities for infringement actions against Member States.

This is particular the case of the EU response to the unprecedented migrants and refugees flows received during 2015 and 2016. Since the beginning of the crisis, the EU has mobilised all efforts at its disposal to prevent further loss of life at sea and to tackle the root causes of the human emergency, in cooperation with the countries of origin and transit. They decided to strengthen the EU's presence at sea, to fight smugglers and traffickers in accordance with international law, to prevent irregular migration flows and to reinforce internal solidarity and responsibility.

This aim is reflected in the European Agenda on Migration¹, adopted by the European Commission on 13 May 2015, outlining concrete and immediate measures to respond to the crisis situation in the Mediterranean. The Agenda also foresees a number of initiatives to be taken in the medium/short term to better manage migration in all its aspects.

This is also the approach followed in the EU cooperation with third countries. The promotion and protection of the human rights of the migrants are systematically addressed in all cooperation frameworks and partnerships with third countries. Building on the European Agenda on Migration, this approach was reinforced by the 7 June 2016 Joint Communication on establishing a New Migration Partnership Framework with third countries². The new Joint Communication embeds migration in the wider political relationship between the EU and third countries.

Combatting discrimination and protection of persons in vulnerable situations

The respect for the rights of persons belonging to minorities is one of the values on which the EU is founded, and is explicitly mentioned in Articles 2 and 3 of the Treaty on European Union (TEU). Article 10 of the Functioning of the European Union (TFEU) provides that "the Union, in defining and implementing its policies and activities, shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

¹ COM(2015)240

² COM (2016) 385 FINAL

Equal treatment, respect of fundamental human rights and rights of the child, fight against discrimination, racism and xenophobia and finally migrants' democratic participation are therefore an essential part of the EU's migration policy and legislation. This is of course the case of the newly adopted Action Plan on Integration (7 June 2016). Whilst the competence for integration policy lies primarily with the Member States, the EU plays an important role in supporting, developing and coordinating Member States' actions and policies on integration. The Action Plan includes actions supporting pre-departure and pre-arrival measures, education, employment and vocational training, access to basic services, active participation and social inclusion.

The Resolution encourages States to put in place, if they have not yet done so, appropriate systems and procedures in order to ensure that the best interests of the child are a primary consideration in all actions or decisions concerning migrant children, regardless of their migration status, and to use, when applicable, alternatives to the detention of migrant children;

Promoting the protection of the rights of the child is a core commitment of the European Union as laid down in Article 3 of the Treaty on European Union. The EU uses all the instruments at its disposal to promote respect for the rights of the child, and to ensure that the child's best interests are at the centre of all relevant EU actions and policies. The framework for this action was adopted in 2011 with the EU Agenda on the rights of the child. The EU Agenda on the rights of the child reaffirms the strong commitment of all EU institutions and of all Member States to promoting, protecting and fulfilling the rights of the child in all relevant EU policies, in particular when they are most vulnerable. This is the case of unaccompanied children. See point a)

Furthermore, on 10 February 2016, the Commission adopted a Communication on the state of play of the implementation of the European Agenda on Migration³, referring to a comprehensive approach to the protection of children. Annex 6⁴ of the Communication describes ongoing actions in this regard. The implementation of these actions is underway. EU funding is supporting the delivery of appropriate reception facilities in Greece for unaccompanied children, to help lessen and avoid the recourse to detention. In reviewing CEAS legislation, consideration will be given to the strengthening of procedural safeguards for children, to ensure that their best interests are a primary consideration.

EU policy has led to strengthened legal provisions for the protection of children in recent EU legislative instruments in the fields of asylum, migration and trafficking in human beings and specific attention has also been paid to unaccompanied children. The guiding principle of the EU approach has been Article 24 of the EU Charter of Fundamental Rights on the rights of the child, namely that each decision affecting a child's future must be taken on a case by case basis with the best interests of the child at heart. There has been a huge increase in the number of children in migration in 2015 and 2016. There were 90.000 unaccompanied child asylum applicants in 2015, compared to 11.700 in 2010. Up to 40% of sea arrivals in Greece in the first quarter of 2016 were children. Commission actions are therefore underway to ensure a comprehensive approach to the protection of all children in migration. In the CEAS reform, the Commission aims to strengthen procedural safeguards for unaccompanied children, in particular respect for the best interests of the child, and effective guardianship systems as a means to achieve that. More emphasis is being placed on the quality of reception with a focus on care and protection. 2016

³ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_en.pdf

⁴ http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/managing_the_refugee_crisis_state_of_play_20160210_annex_06_en.pdf

funding targets, for example, the improvement of capacity in the provision of family-based reception for unaccompanied children.

Compilation of data on children in migration: http://ec.europa.eu/justice/fundamental-rights/files/rights_child/data_children_in_migration.pdf

The Resolution encourages States to establish or, when appropriate, strengthen mechanisms which allow migrants to report alleged cases of abuse by relevant authorities and employers without fear of reprisal, and which allow for such complaints to be addressed fairly;

The Employers' Sanctions Directive (2009/52) includes a mechanism aiming at protecting the rights of irregular migrants. As announced in the EU Action Plan against migrant smuggling (2015-2020), in order to step up the enforcement of the rules against the employers of irregular migrants, the European Commission – in cooperation with the Member States – will identify targets for yearly inspections to be conducted in the economic sectors most exposed to illegal employment (e.g. construction, agriculture and horticulture, housework/cleaning and catering and hospitality services).

The Directive 2009/52 prohibits the employment of irregularly staying third-country workers and provides for sanctions for those who employ them. The employment of victims of trafficking - knowing that they are victims of trafficking - falls within the scope of the Directive. To supplement the complaint mechanisms of the Directive, MS should be free to grant residence permits of limited duration, to third-country nationals who have been subjected to particularly exploitative working conditions, or who were illegally employed minors, and who cooperate in criminal proceedings against the employer (this condition is not applied to child victims).

The Directive on Seasonal Workers (2014) gives third country migrants a pathway to enter the EU in order to take up legal employment in sectors which tend to be prone to irregularity and abuse, but also grants the migrants an extensive catalogue of rights and a number of important protective measures.

Moreover it is worth remembering that inhuman or degrading treatment, including exploitation of migrants, are aggravating circumstances included in the EU rules aimed to fight against the smuggling of migrants, since the real targets of this legislation are the smugglers and facilitators.

Human rights and border management

The Resolution also expresses concern about legislation adopted by some States that results in measures and practices that may restrict the human rights and fundamental freedoms of migrants, and reaffirms that, when exercising their sovereign right to enact and implement migratory and border security measures, States have the duty to comply with their obligations under international law, including international human rights law, in order to ensure full respect for the human rights of migrants;

The EU border management instruments are intended to ensure an effective border management and migration policy while taking fully account of the need to protect fundamental rights.

The application of EU law on border management is subject to the EU Charter of Fundamental Rights and does not affect the rights of refugees or those seeking international protection. Its implementation by Member states ensures a right balance between the rights of migrants and the security concerns. A high level of security at our borders is not necessarily incompatible with the full protection of human rights and compliance with international human rights and refugee law. The EU is fully committed to make all necessary efforts to uphold international human rights law and refugee law at its borders.

When there are indications that a person or a group of persons is likely to be in need of international protection, such as the general situation in their country of origin (e.g. Syrians) it is necessary to inform them of their rights in such a way so as to provide them with the opportunity to request international protection. Third-country nationals who are in need of special treatment and care (vulnerable groups i.e unaccompanied minors) and/or in need of international protection and/or have expressed the wish to apply for asylum must be treated in accordance with the EU asylum *acquis*, in particular, the Reception Conditions Directive and the Asylum Procedures Directive.

Furthermore, a person who has crossed a border illegally and who has no right to stay on the territory of the Member State concerned shall be apprehended and made subject to the procedures respecting the Return Directive. When implementing the Return Directive, Member States must take into account the best interests of the child, family life, the state of health of the third-country national concerned, and respect the principle of *non-refoulement*.

As guardian of the Treaties, the European Commission follows closely the actions of the Member States and it takes appropriate steps where there is evidence that a Member State is in violation of EU law, including with regard to the respect of human rights.

Member States that are at the frontline to responding to the surge of migrants are provided financial support through the Asylum, Migration and Integration Fund and the Internal Security Fund, as well as operational and technical support through the European border management agency, Frontex, and European Asylum Support Office (EASO). Furthermore, in the context of the current crisis, the European Commission has increased support to frontline Member States, including the establishment of the "hotspot" approach, operational in Italy and Greece, and, for the first time ever, providing emergency financial support for humanitarian relief operations to the Member States most affected by the migration and refugee crisis.

(e) Requests States to adopt concrete measures to prevent the violation of the human rights of migrants while in transit, including in ports and airports and at borders and migration checkpoints, and to adequately train public officials who work in those facilities and in border areas to treat migrants respectfully and in accordance with their obligations under international human rights law;

The Frontex Regulation states explicitly its duty to protect human rights in its operations and established a Fundamental Rights Officer post and a forum to consult civil society. All officers deployed to an operation coordinated by Frontex are bound by a code of conduct, which includes specific provisions on the respect of fundamental rights and the right to international protection. The code of conduct lays out also a set of behavioural standards that all staff involved in a Frontex joint operation must follow. Besides, Frontex in cooperation with a number of external partners developed a fundamental rights component in its common core curriculum for the training of border guards as well as specific training materials for border guards on the fight against human trafficking. The EU is not responsible for patrols carried out by Member State or third country vessels and such issues fall under international law.

In addition, the proposal for a Regulation on a European Border and Coast Guard (which will replace Frontex) reinforces the human rights protection in a joint operation coordinated by the Agency by establishing a complaint mechanism. It provides for the possibility that any person who considers himself/herself to have been subject of a breach of fundamental rights during activities carried out by the European Border and Coast Guard Agency, or any third party intervener, to make a complaint to the Agency.

Protection of human rights and counterterrorism, trafficking in human beings and smuggling of migrants

(d) Calls upon States to ensure that their laws and policies, including in the areas of counter-terrorism and combating transnational organized crime, such as trafficking in persons and smuggling of migrants, fully respect the human rights of migrants;

As stated above, all legal instruments adopted by the EU in all fields must ensure a high level of protection of the human rights of all individuals, including third-country nationals. This is also the case of legislation on counter-terrorism and transnational organized crime, including trafficking in persons and smuggling of migrants.

Trafficking in human beings, in all its forms, is prohibited under Article 5 of the Charter of Fundamental Rights. European Union's anti-trafficking policy takes a comprehensive approach, focusing on prevention, protection of victims, prosecution of criminals, and developing partnerships with a wide range of actors involved. This integrated perspective is consistent with a human rights-centred and gender-specific approach, which does not only focus on repression, but also aims at preventing the crime, also ensuring that people who are victims of trafficking are given an opportunity to recover and to be re-integrated into society. This comprehensive approach complements the Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims. This Directive brings robust provisions on victim's protection, including national mechanisms for early identification and assistance of victims, and supports unconditional assistance and the principle of non-punishment.

Likewise, inhuman or degrading treatment, including exploitation of migrants, are aggravating circumstances included in the EU rules aimed to fight against the smuggling of migrants, since the real targets of this legislation are the smugglers and facilitators, not the migrants. This is also the line taken by the EU Action Plan against migrant smuggling adopted in May 2015 and will be reflected in the future EU legislation against smuggling to be presented by the end of 2016.

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

The Resolution calls upon States that have not done so to consider signing and ratifying or acceding to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families as a matter of priority, and requests the Secretary-General to continue his efforts to promote and raise awareness of the Convention;

The EU cannot sign or ratify the convention as it is only open for accession by states only.

The EU and its Member States consider that the convention's insufficient distinction between the economic and social rights of regular and irregular migrant workers is not in line with national and EU policies; and that the already existing EU instruments provide far-reaching protection for both regular and irregular migrants, and safeguards that are often broader than those provided by the Convention (Council conclusions of 23 September 2013 in view of the UN High-level Dialogue on Migration and Development).

There are only 47 state parties in the world. The majority of the rights covered in the Convention are already covered in other Conventions to which the Member States are party e.g. CESCR. Non-ratification of the Convention does not mean that the EU and its Member States are not interested in protecting the rights of migrants, and it is clear that irregular migrants have a number of rights in the EU – in particular the rights that are bestowed on all persons pursuant to instruments such as the European Convention on Human Rights or the EU Charter of fundamental rights.

The EU is fully attached to the objective of the Convention. In fact, they are already part of the EU immigration legislation. The current EU instruments provide far-reaching protection for both regular and irregular immigrants and often go further than the general provisions of the Convention.

Detention of migrants

The Resolution calls upon all States to respect the human rights and inherent dignity of migrants, to put an end to arbitrary arrest and detention and, in order to avoid excessive detention of irregular migrants, to review, where necessary, detention periods and to use alternatives to detention, where appropriate, including measures that have been successfully implemented by some States;

Detention of migrants is a measure of last resort, only applicable within the limits and with the safeguards provided by the Return Directive. The latter provides for a number of guarantees for those who are placed in detention, including the possibility of effective remedy against the return decision, respect for family unity and the best interest of the child. In particular, it limits detention of third country nationals subject to a return decision to six months – which can be prolonged to a maximum of six months if, despite all efforts made, the return procedure is prolonged.

Detention may be used only as a pre-removal measure in case of forced return and only under specific circumstances specified in art.15 of the Return Directive. Legal safeguards are in place to verify the lawfulness of detention. Art. 17 of the Return Directive foresees specific rules for pre-removal detention of minors and families, a measure that should be used only as a last resort. Moreover families should be kept together and provided with separate accommodation, and children should have access to education and leisure activities. Special safeguards are also foreseen for Unaccompanied Minors. The Return Directive does not regulate material detention conditions (e.g. size of rooms, access to sanitary facilities, access to open air, nutrition during detention); however, whenever Member States impose detention for the purpose of removal, this must be done under conditions that comply with Article 4 of the EU Charter of Fundamental Rights, which prohibits inhuman or degrading treatment.

The recast Reception Conditions Directive⁵ allows the detention of minors under very restrictive grounds and strict conditions. Minor asylum seekers can only be deprived of their freedom as a measure of last resort for as short a time as possible, on the basis of an individual assessment of each case and if other less coercive alternative measures cannot be applied effectively. All efforts shall be made to release the detained minors and place them in accommodation suitable for minors. Moreover, the minor's best interests shall be a primary consideration for Member States. Regarding unaccompanied minors, they shall be detained only in exceptional circumstances.

The European Commission actively monitors the implementation of these provisions in member States. One of the main tools to verify the correct implementation of these provisions is the Schengen Evaluation Mechanism in the field of Return that foresees visit in all countries applying the Return Directive over a period of 5 years to check the implementation of the Return acquis. The mechanism became operational in 2015 and the verification of detention conditions and respect of human rights will be one of its main focus.

⁵ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (OJ L 180, p. 96)

Cooperation with third countries

The Resolution encourages States to cooperate and to take appropriate measures, in full conformity with their obligations under international human rights law, to prevent, combat and address the smuggling of migrants, including strengthening laws, policies, information-sharing and joint operational functions, enhancing capacities and support opportunities for migration in a well-managed, safe and dignified manner and strengthening legislative methods for criminalizing acts of smuggling migrants, particularly women and children;

As stated in the EU Agenda for Migration, the EU is increasing cooperation on migration with third countries. The respect of the human rights of migrants continues to be a cross-cutting priority in the EU's cooperation with third countries and regions. This is reflected in the numerous dialogues and processes that are implemented in third countries under the EU's overarching external migration policy – the Global Approach Migration and Mobility, the High Level Dialogues on Migration which are being established with priority third countries and it is also the philosophy followed by the recently adopted Joint Communication on establishing a new partnership Framework with third countries under the European Agenda on Migration.

To provide just a few examples, the EU supports projects in partner countries to improve detention conditions, activities to improve the treatment of unaccompanied minor migrants, capacity building projects to support the development of better refugee protection systems, and projects to improve access to justice for migrants. The EU also funds numerous activities in addressing trafficking in human beings and tackling smuggling of migrants while enhancing cooperation on legal migration and addressing the root causes of migration. Constant attention is given to the human rights of migrants, in particular children and other vulnerable groups, and the EU encourages partner countries to adopt and implement reforms ensuring a set of human rights standards for migrants.

In this context, the Valetta Action Plan, the regional processes such as Khartoum and Rabat, and the Mobility Partnerships and Common Agendas on Migration and Mobility with a number of priority countries can be emphasised as good examples of how human rights issues can be addressed in a systematic manner in policy dialogues with third countries and regions.

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

In addition, issues related to the human rights of migrants are regularly addressed in the EU's Human Rights Dialogues with third countries. Migration, refugee and asylum issues feature in the EU Action Plan on Human Rights and Democracy (2015-2019) (dealing with external relations).

The respect of human rights is also a core element of the EU return policy and it is at the basis of the readmission agreements the EU has signed with a number of third countries. It is important to recall that readmission agreements are simply technical instruments bringing procedural improvements to cooperation between authorities. They do not regulate the situation of the persons subject to readmission which is left to relevant international, EU and national applicable law. Thus, a readmission procedure can only be applied to a person as a result of a return decision.

In this context it should be emphasised that EU readmission agreements by no means waive the obligations of the Member States to respect the rights guaranteed by other instruments, both internal and international, e.g. non-refoulement principle, 1951 Refugee Convention, UN Convention

Against Torture, European Convention on Human Rights etc. It should be duly noted that all readmission agreements contain a special clause emphasising and confirming this guarantee – and that this commitment has been strengthened in recent agreements.

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

The EU-Turkey Statement on Migration of 18 March 2016 reserves a special mention. The EU and Turkey agreed that all irregular migrants who have arrived in Greece from Turkey since 20 March 2016 will be returned to Turkey. This is taking place in accordance with EU and international law after individual assessment of cases, thus excluding any possibility of collective expulsion. It was also agreed that for every Syrian returned to Turkey from the Greek islands, another Syrian will be resettled from Turkey to the EU. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly. In addition, the EU will provide Turkey with humanitarian and development assistance. €3 billion are being committed under the Facility for Refugees in Turkey, with a view to disburse an additional €3 billion to the end of 2018 once the first €3 billion have been implemented.

In addition, for a long time the EU has been engaged with humanitarian assistance and development cooperation to ensure stability and socioeconomic development in partner countries. The EU has spearheaded the international response to the Syria crisis, with humanitarian, stabilisation and development assistance. While the bulk of the funds are committed to humanitarian interventions inside Syria, an increasing amount goes towards alleviating the pressures in neighbouring countries, most notably Lebanon, Jordan, Turkey and Iraq.

The EU has also committed 1.8 billion euro to the Trust Fund for Africa, launched to help the implementation of the Valetta Action Plan.