

Mandates of the Working Group on Arbitrary Detention; the Working Group on Enforced or Involuntary Disappearances; the Special Rapporteur on the situation of human rights defenders; the Independent Expert on human rights and international solidarity; the Special Rapporteur on the human rights of migrants; the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and the Special Rapporteur on trafficking in persons, especially women and children

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Excellency,

We have the honour to address you in our capacities as Working Group on Arbitrary Detention; Working Group on Enforced or Involuntary Disappearances; Special Rapporteur on the situation of human rights defenders; Independent Expert on human rights and international solidarity; Special Rapporteur on the human rights of migrants; Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance; Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment; and Special Rapporteur on trafficking in persons, especially women and children, pursuant to Human Rights Council resolutions 33/30, 36/6, 34/5, 35/3, 34/21, 34/35, 34/19 and 35/5.

We are closely following the current discussions on the reform of the European migration and asylum system. In this context, in view of the upcoming informal summit of EU heads of state or government in Salzburg on 19-20 September 2018, we wish to express our concerns regarding a series of initiatives that are being considered, which, if implemented, will have serious negative consequences on the human rights of migrants.

At the outset, we would like to recall the powerful affirmation of the adopted draft text of the Global Compact for Safe, Orderly and Regular Migration, that all migrants are entitled to the protection of their human rights, without discrimination and regardless of their status.

We fully support all efforts of the European Council and the European Commission to work towards a comprehensive migration agenda, and we stand ready to engage in any sort of support you may need to ensure such an agenda is human rights centered and meets international human rights obligations and standards. In this respect, we would like to highlight the President of the European Commission's message in his State of the Union address on 12 September 2018, in which he acknowledged that the EU "cannot continue to squabble to find ad-hoc solutions each time a new ship arrives". Migration must be effectively managed and long-term solutions need to be found. We welcome the intention to streamline asylum processes in the EU, provided they are in compliance with international norms and standards, and to reform the Dublin system. This system has to be strong enough to ensure that all member States adhere to the same processes, and the responsibility must be shared amongst all member States.

Permanent EU Delegation to UNOG

We would like to comment on three particular proposals elaborated by the European Commission based on the European Council's conclusions, which are of utmost concern from a human rights perspective, namely: the creation of regional disembarkation platforms, the establishment of controlled centres, and the strengthening of the border police and coast guard.

It has become evident that arrangements need to be found in order to prevent deaths at sea and ensure that migrant persons are disembarked in places of safety, through a predictable process. Any such mechanism should be premised on solidarity and shared responsibility by EU member States, including reception and resettlement efforts. Outsourcing responsibility of disembarkation to third countries, in particular those with weak protection systems, only increases the risk of *refoulement* and other human rights violations. As similar models have shown elsewhere, external disembarkation and processing centres do not provide durable solutions and result in numerous grave human rights violations, including breaches of the *non-refoulement* obligation, torture and ill-treatment, confinement amounting to arbitrary or indefinite detention, and violations of the right to life. Furthermore, processes should be established to ensure that relevant actors be held to account if they fail to meet international standards.

Another proposal under consideration, in connection with the disembarkation platforms, are so-called ad hoc or temporary "controlled centres" in EU member States. Migrant persons who disembark in an EU member State would be transferred to these centres for an assessment of their international protection needs. In this regard, utmost care has to be given to ensure due process guarantees and legal safeguards are met, including proper individual assessments and safeguards against arbitrary detention. In this regard, it is important to adopt appropriate systems to identify protection needs of migrant persons in vulnerable situations, including victims of torture and victims or potential victims of trafficking, in compliance with international human rights law.

These temporary centres should ensure protection of the economic, social and cultural rights of migrants such as access to an adequate standard of living, food, water, health and education, as well as protection of their civil and political rights, including the rights to life, physical and mental integrity and access to justice. Further, these centres should not deprive all migrants of their liberty, as any form of administrative detention or custody for migrants must be used as an exceptional measure of last resort, for the shortest period of time, and only if justified by a legitimate purpose, as stated among others in the revised Deliberation No.5 of the Working Group on Arbitrary Detention. In addition, children should never be detained for reasons related to their own or their parents' migration status, as detention of children in the context of migration cannot ever be in their best interests and therefore constitutes a human rights violation.

These ad hoc centres would be part of a network of national centres where the status of migrants would be processed. In this respect, it is important that the reform efforts also encompass the national centres in member States, in order to allow for the protection of the human rights of migrants throughout the EU asylum system. The EU and its member States

should also adopt legal mechanisms to extend protection and grant status based on international human rights law to persons who do not qualify for protection under international refugee law, but whose return would be contrary to obligations under international human rights law, including the principle of *non-refoulement*.

The return of migrants who do not meet the requirements of international refugee and human rights protection to remain in the host country should be conducted in safety, with due regard for dignity, humanity and respect for human rights, and in compliance with international law. Forced returns should always be a measure of last resort, and follow a fair and efficient process guaranteeing that all legal safeguards have been provided, most notably the requirements for individual assessments to respect the principle of *non-refoulement*.

Thirdly, the proposal to further strengthen the European Border and Coast Guard Agency (FRONTEX) “to better protect [EU] external borders,” as per President Juncker’s aforementioned State of the Union message, causes concern due to the focus on security and returns. Prioritizing the return of migrants from Europe, in particular accelerating the return of migrants in irregular situation, without ensuring that key international human rights obligations are upheld such as the fundamental principle of *non-refoulement*, cannot be considered a protection response. Moreover, increasing the number of border and coast guards may lead to more deaths en route, as it pushes migration further underground, forcing migrants to seek other irregular and more dangerous channels for migration, and to higher risks to fall prey to traffickers. The focus should be on saving lives and disembark at the closest port of safety.

In a 2017 report the Working Group on Enforced Disappearances highlighted how the increasingly precarious movements of migrants undertaking long and perilous journeys, together with the increasingly rigid migratory policies of States, focused on deterrence, have created a situation that exposes migrants to heightened risks of becoming victims of human rights violations, including enforced disappearances. The report refers to worrying cases in which migrants have disappeared as an involuntary but direct consequence of the actions of the State, for instance in the case of pushbacks, both at land or at sea.

We are deeply concerned that in truth, the above-mentioned three proposals which are being discussed in the context of the reform of the common migration and asylum system are aimed at sealing borders, closing the protection space in Europe, and disregarding human rights principles and humanitarian concerns as central aspects at stake. Moreover, we are concerned that these measures are being proposed as a means to leverage political gain in response to the worrying rise of anti-migration and xenophobic hate speeches and stances, as reflected by increased acts and discourses of violence and racism against migrants in various member States. In this respect, we urge the European Commission to lead efforts to counter negative anti-immigration discourses both at the political and social level in order to facilitate and improve the reception and integration of migrants in Europe.

States should not hide behind the lack of solidarity of other member States to relinquish their international obligations vis-à-vis asylum seekers and migrants in vulnerable situations. Human rights obligations do not depend on reciprocity among States, but are of a universal, unconditional nature.

The EU and its member States must ensure that acts of solidarity with migrants by civil society organizations and human rights defenders, including during search and rescue operations and at border crossing, are not criminalized. The continued and tragic loss of lives at sea can be prevented, and the NGO's acts of solidarity are certainly not a pull factor. Therefore, we encourage the EU to establish a dedicated humanitarian search and rescue operation for people crossing the Mediterranean, and to establish clear support procedures for private and commercial vessels which come to the aid of migrants in distress at sea.

The EU and its member States should adopt a more thoughtful approach, and seek constructive, long-term, sustainable solutions, instead of adopting counterproductive and ineffective security policies which result in the criminalization and stigmatization of migrants. In 2016 the European Commission pointed out some of the crucial shortcomings of the common European asylum system, such as the disproportional responsibility placed on some member States. The European Commission also stressed the need for orderly and safe regular pathways to the EU for people in need of international protection as well as for those who can contribute economically. The EU and its member States should acknowledge their real labour market needs, combat irregular labour markets, and develop and incentivize regular, safe, accessible and affordable migration channels, including for migrant workers with varying skill levels, in line with the suggestions of the European Union Agency for Fundamental Rights. The economic argument is clear: migration powerfully contributes to economic growth and social and cultural aspects of development.

It is high time for the EU to accept the impossibility of sealing borders and the perverse incentives and paradoxes created by the current system, as well as the inevitability and added benefits of mobility. The EU must invest in the overall development of a coherent and robust migration policy that fully integrates the human rights of migrants as enshrined in both international and regional law. Measures intended to prevent migration, accelerate returns, and seal borders are not the solution, and only respond to misguided security concerns over the protection of migrants. Persons seeking protection will continue to risk their lives to reach the EU, no matter how dangerous the routes are, unless they are offered credible and feasible alternatives, including in relation to their social and economic empowerment and integration. As reality shows, more restrictive European migration and asylum policies will not stop migration, but will only lead to additional suffering, deaths and human rights violations in the Mediterranean Sea, as long as the EU does not adopt measures that fully recognize the push and pull factors of irregular migration.

We therefore urge the EU and its member States to live up to their commitment of human rights and lasting solidarity, by ensuring the protection of human rights of migrants in the new EU migration system, and as part of their commitment for the effective implementation of the Global Compact for Safe, Orderly and Regular Migration.

Finally, I would like to inform your Excellency that this communication, as a comment on pending legislation, regulations or policies, will be made available to the public and posted on the website page of the Special Rapporteur on the human rights of migrants:

<https://www.ohchr.org/EN/Issues/Migration/SRMigrants/Pages/CommentsLegislationPolicies.aspx>

Your Excellency's response will be made available on the same website page and in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Elina Steinerte
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