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Seminar On The Human Rights Dimensions Of Migration In Europe

Istanbul, 17-18 February 2011

Organised by the Office of the Commissioner for Human Rights and the Turkish Chairmanship of the Council of Europe Committee of Ministers

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Introduction

The protection of migrants (immigrants, asylum seekers and refugees) is one of the greatest challenges currently facing Council of Europe member states. Over-restrictive migration laws and policies applied in many countries not only foster xenophobic and discriminatory reactions among the populations of the member states, but also raise serious concerns regarding their compatibility with Council of Europe and international human rights standards.

The Council of Europe Commissioner for Human Rights and the Turkish Chairmanship of the Committee of Ministers organised a Seminar on the "Human Rights dimensions of migration in Europe" in Istanbul on 17-18 February 2011.

The Seminar provided a forum for an exchange of views between European migration experts from governments, intergovernmental and non-governmental organisations, and academics. It was an opportunity for a substantive, in-depth discussion on the most important discrepancies between European migration laws and practices and Council of Europe and international human rights standards, as well as on optimal ways in which more assistance may be provided to member states in reflecting on and revisiting their migration policies.

The Seminar began with a general session on the major human rights challenges raised by migration in Europe today, and on possible strategies by which migration discourse may be guided, based on European and international human rights principles.

The treatment afforded by countries to unaccompanied migrant children and the human rights issues arising in this context was the focus of the second session of the Seminar. It included an analysis of current state policies and a discussion on the best human rights compliant practices.

The third and final session of the Seminar focused on the humanitarian and human rights implications of migrant smuggling in Europe, affecting especially the Euro-Mediterranean member states which frequently serve as transit points for further migration to other European countries. Analysis and discussion of this theme aimed to divest the current discourse on this topic of its security-oriented character and highlight the human dimensions, and often life-threatening effects that smuggling has on migrants and their families.

This report brings together the conclusions of the Seminar, drafted by the General Rapporteur, Professor Theodora Kostakopoulou, the speeches delivered by the speakers, the programme and the list of participants. The background document prepared by the Office of the Commissioner for Human Rights is included as an Appendix.

Conclusions of the General Rapporteur, Professor Theodora Kostakopoulou

The two-day Seminar organised by the Council of Europe Commissioner for Human Rights and the Turkish Chairmanship of the Council of Europe Committee of Members provided a unique opportunity for the participants to reflect on the human rights challenges underpinning the regulation of migration, be it voluntary, forced or mixed, and to discuss options for legal and political reform. The main challenges identified by the participants, which, in many ways, are linked to our vision of migration law and policy and the overall goals of migration regulation, are presented in this report.

Participants identified weaknesses in the present framing of migration and debated the merits of reframing it in ways that respect the dignity of all human beings and their moral autonomy. The ways in which migrants and their families are perceived and treated shape the identities of existing citizens and the character of societies. Similarly, migration policies carry meanings not only for individual life choices, but also for the limits and possibilities of creating inclusive polities as well as political units above the nation-state, such as the European Union. It is true that migration has traditionally been framed as a problem for states, a threat to their sovereign prerogative of controlling their borders and determining the composition of their citizenry, and as a destabilising force for settled national identities and the alleged cohesiveness of societies. Accordingly, it has been depicted as a phenomenon that needs to be controlled, reduced or even suppressed. Such approaches, however, are both ahistorical and reductionist. They are ahistorical because they disregard the fact that lands have always been receptors of people – even before they were transformed into homelands and before the reality of globalisation which has brought people closer together. The world is inhabited by both sedentary and mobile individuals and even sedentary individuals are no longer bounded by the private orbits they inhabit. They are necessarily exposed and connected to cross-border movement and the way they respond to it affects the kinds of individuals they variously become and the moral quality of the political units that regulate their lives. As C. Wright Mills wrote more than half a century ago, the history that affects every man is world history and the changes that affect societies are world changes. Since this is the case, it is important not only to recognise the rightful place of migration in human history and its role in the development and flourishing of societies and political structures, but also to reflect on its place within, and its meaning for, the development of humanity as a whole. The latter reflection opens up the possibility for the reframing of migration, that is, for an approach that views migration as a part of the normal order of things in globalised environments, an intended or unintended consequence of foreign policy choices and wars, and a by-product of global inequalities as well as environmental challenges that affect everybody. Instead of viewing migrants as threats, problems, burdens, numbers, transgressors of migration laws and merely units of production, the former pragmatic approach restores the dignity of human beings by viewing them as persons entitled to be treated with respect, equality, solidarity and as resource bearers, equal participants in society and often citizens-in-waiting. As it was noted in the opening statements, 'migrants are prone to exploitation and it is unthinkable that governments and states should leave them without protection'. It is true that governmental authorities often appeal to the need to procure a balance between security demands and considerations of advancement of the national interest, on the one hand, and migration, on the other, but it is also equally true that balancing acts often involve artificially created dilemmas. Sacrificing human rights in the pursuit of the former goals, however legitimate these might be, more often than not leads to grievances, resentment, ineffective policies, mobilisation and insecurity. That is one reason why the human rights dimensions of migration must feature centrally on policy agendas and in migration laws at all levels of governance. An additional and equally important consideration is that they point to the kind of Europe we wish to have: a Europe of exclusion, restriction, fortresses and walls or a Europe of openness, inclusiveness, equality, solidarity

and active engagement with all the regions of the world. In the narrower context of the European Union, a rights-based agenda has been proclaimed as a necessary ingredient of future EU migration law and policy. As the Commission stated in its Action Plan on the Stockholm Programme, "a robust defence of migrants' fundamental rights out of respect for our values of human dignity and solidarity will enable them to contribute fully to the European economy and society".

There exists another challenge, which perhaps countries such as Turkey, as well as other Southern European countries, are better equipped to meet: namely, the challenge of devising migration policies which are sensitive to how a country's emigrants are (and should) be treated abroad. Mr Şarbak noted that Turkey has 6.000.000 citizens living in other countries, and the problems they face there are of considerable concern. Western European countries often adopt a much narrower perspective in devising migration laws and policies; endogenous factors which more often than not include party political manifestos, electoral expediency, ideology and the domestic needs of business elites, overshadow a consideration of exogenous considerations and reciprocity, such as a reflection on, and careful consideration of, how countries' emigrants are (and should be) treated in other parts of the world. For example, integration tests have been used in Western European countries as filters of selection, and restriction, of the migration population. But how would Western Europe react if China adopted regulations prescribing compulsory tuition and exams in mandarin as a condition of the grant of a temporary or permanent residence permit to EU nationals? In this respect, it is encouraging to witness calls for more symmetry in migration law and policy design and to hear about the progress that has recently been made in upgrading Turkish migration and asylum legislation. This approach can be contrasted with Greece's response to increasing migrant entrants by erecting a wall, which, as participants noted, is likely to be ineffective, unlikely to produce a sustainable solution and appears to be an act of performative politics.

The third challenge identified by the participants is a definitional one. The categories used in day-to-day discourse and policy are not innocent ones. Illegal migration is such a category. Wanted, unwanted and simply tolerated migration, is another flawed categorisation. The term 'unaccompanied migrant children' is also problematic and a convincing case was made during the workshop deliberations for its replacement with that of 'unaccompanied children'. In addition, although the distinction among labour migration, irregular migration, refugees and asylum seekers is well-established and capable of drawing attention to the differentiated claims, and differing needs, of each group, it is also important to bear in mind the 'fuzzy' boundaries among them and that people can easily change status and/or conceal their true status.

The fourth challenge relating to migration in Europe is the articulation of a truly global approach to migration which takes into account the global politics of migration as well as the need for examining closely the migration and development nexus and reflecting critically on existing partnership agreements with countries of origin with a view to addressing local specificities, procuring mutual benefits for all partners and encouraging multilateral dialogues.

Finally, there exists a need for co-ordinated action and regular multilateral dialogues among the Council of Europe, the European Union, the United Nations, governments, civil society representatives and academics with a view to ensuring the rigorous implementation of international standards and human rights treaties and States' compliance with them. To this end, the ratification of the 1990 International Convention on All Migrant Workers and Members of their Families must be firmly on the agenda. In addition, since the right to seek and enjoy asylum from persecution is a fundamental human right, it should be fully respected. State authorities should avoid violating the principle of non-refoulement that underpins the refugee regime, and as Commissioner Hammarberg had noted, asylum claimants in European countries should be able to access asylum procedures irrespective of their point of entry into the country and the manner in which they enter and stay, and should

benefit from a thorough, fair and individual examination of their claim. Their systematic detention in Europe contravenes Article 31 of the 1951 Geneva Convention and Article 5 of the ECHR. Mr Atassi noted that the provision of adequate training for border guards and 'the establishment of border monitoring systems are key components of protection-sensitive entry systems'. To this end, UNHCR's '10-point' plan of how to ensure that refugees receive protection and are not forcibly returned to their countries of origin as part of the blanket removal orders has proved useful in the regulation of the so-called 'mixed flows'. But people do not have to fall within the scope of international refugee law in order to be entitled to international protection. Many individuals who cross borders because they seek to escape socio-economic distress or environmental degradation, are trafficked migrants or have been deeply traumatised during transit have protection needs and must have their human rights respected. States' obligations to protect refugees and other vulnerable individuals are neither territorially limited nor confined to the determination of their claim. IN the might of reported cases of suicide, the return of irregular migrants and failed asylum seekers to their states of origin should also be handled in a responsible and sensitive manner and in partnership with the countries of origin under a global approach to migration. And although readmission agreements may be applied in the return of individuals, they should not be used as a means of responsibility-avoiding or responsibility-shrinking or of delegating responsibility to third countries that are not parties to international conventions.

In addition to the above recommendations, the participants of the first session of the workshop identified the European Court of Human Rights' judgement in M.S.S. v Belgium and Greece as an opportunity for the upgrading of laws, policies and refugee protection in Europe. In this case, the Court held that Belgium had violated the ECHR by sending the asylum seeker to Greece where the conditions of detention and the living conditions for asylum seekers violated Article 3 of the ECHR and where the likelihood of protection from onward return to Afghanistan without a proper examination of the request for asylum was quite low owing to the deficiencies of the asylum system. Among the important implications of this judgement is the light it sheds on the Dublin II Regulation (Council Regulation No. 343/2003 of 18 February 2003), since the premise upon which it has been based, namely that all member states provide minimum procedural guarantees, thereby implementing the Procedures Directive correctly, has been proven to be incorrect. Ms Wilson observed that all states which are parties to the European Convention on Human Rights have a clear international obligation following the judgement in MSS to ensure that the living conditions, detention conditions and the procedure and remedies in place for asylum seekers conform to international standards set by Articles 3 (the prohibition of inhuman and degrading treatment) and 13 (the right to an effective remedy) of the ECHR.

The evolution of the European Union asylum regime augments the opportunities for enhancing refugee protection in the EU. The possibility of reviewing the Dublin II Regulation, the Stockholm Programme's commitment to developing the common European asylum system, the establishment of the European Asylum Office which will play an important role in capacity building measures, and the Commission's proposal for a new Procedures Directive which provides for additional guarantees and confines the application of accelerated procedures to manifestly unfounded cases, all provide room for optimism.

With respect to the problems facing migrant children and the treatment of those who arrive unaccompanied, the need for a paradigm shift which accords priority to child protection over migration control was defended convincingly. To this end, the fifteen common principles entailed by the draft resolution adopted by the Committee on Migration, Refugees and Population of the Council of Europe's Parliamentary Assembly on 26 January 2011 coupled with the EU's Action Plan on Unaccompanied Minors furnish a suitable framework of protection for unaccompanied children at a Europe-wide level. Participants expressed their support for: the treatment of unaccompanied children first and foremost as children; the need to make the best interests of the child the primary consideration; the provision of a well qualified and independent legal guardian; protecting vulnerable children who have been victims of human trafficking; providing access to education and health care; ensuring

appropriate accommodation and care arrangements, preferably foster care, thereby forbidding detention; providing opportunities for the children to be heard and their views to be taken seriously in all relevant procedures; according the benefit of the doubt if there exists uncertainty about their age. The draft resolution also contains important guidelines for the return of children to their country of origin including protection against refoulement, their reintegration in the extended family in the country of origin and the recognition of the fact that return to institutional care in the country of origin is far from a sustainable solution. Family reunification is of crucial importance to children and efforts should be made to facilitate it, without imposing artificial limitations depending on the age of the child, in line with the principle of the best interests of the child. In brief, an ethic of care and special duties of protection and assistance for all unaccompanied children should be institutionalised, thereby fully respecting the UN Convention on the Rights of the Child which all Council of Europe member states have ratified. At the same time, the identification and dissemination of good practices throughout Europe should be encouraged; Ms O'Donnell commented on the guardianship system existing in the Netherlands and participants noted good practices in Spain.

The third session of the workshop was devoted to the smuggling of migrants – an issue that affects Euro-Mediterranean member states considerably. Mr Fowke noted that the UN framework, that is, the Protocol against the Smuggling of Migrants by Land, Sea and Air, is characterised by a strong rights dimension and entails a holistic and comprehensive approach to smuggling. It is intended to affirm the rights of smuggled persons and not to criminalise them while promoting co-operation among states. However, it is the case that, in contrast to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (2000), the second of the two 'Palermo Protocols', which puts emphasis on exploitation and the non-consensual element owing to the deprivation of liberty associated with trafficking, smuggled persons have not been defined as 'victims' entitled to wide-ranging support and socio-economic assistance in host states. However, this distinction does not accurately reflect contemporary realities, since, due to their irregular status, many smuggled persons are exposed and can often be coerced into exploitative situations, thereby not only switching legal status and but also suffering human rights violations. Restrictive and law-enforcement oriented migration policies contribute to the dilution of the distinction between trafficking and smuggling, since they increase the possibilities for irregular employment and the susceptibility of migrants to trafficking. They also entail increased risks of endangering the lives of smuggled persons and the misidentification of asylum seekers as irregular migrants. To this end, the concrete steps that FRONTEX has undertaken with respect to providing training to border guards, identifying best practices and issuing guidelines and providing for the independent monitoring of operations with respect to forced returns are encouraging. Mr Ares highlighted the advantages of the envisaged articulation of a code of conduct for all staff participating in FRONTEX while Professor Ekşi reviewed the amendment of Article 79 of the Turkish Criminal code No 5237 in 2010 and reflected on the draft code that is prepared for an effective and human rights-centred migration regulation. All the participants agreed that tackling smuggling and protecting vulnerable human beings are important challenges facing authorities and that developing adequate legal frameworks and ensuring their implementation remain work in progress. However, although eliminating the discrepancy between 'word' and 'deed' is an important duty as well as a legitimate aspiration, so is striving for consistency. Borrowing the title of Commissioner Hammarberg's Viewpoints (2009), it is 'time to honour our pledges' concerning the human rights dimensions of migration in Europe.

Speeches

Thomas Hammarberg, Commissioner for Human Rights

Human rights challenges of migration in Europe

When the UN 'Refugee Convention' was signed in 1951 there seemed to be a common recognition among European nations that people fleeing persecution required international protection and that states had the responsibility of providing them with a safe haven. Now, sixty years later, this understanding appears to have been lost. Even those fleeing from brutal repression are no longer welcome when arriving at European borders.

Migrants trying to access this fortress continent have drowned in the seas or while crossing rivers, have been struck by anti-personnel mines, suffocated or died of hunger during their journey. A number of them have disappeared without a trace, there is no record of their death, and their families have never learned what happened to them. These many individual tragedies have caused only limited concern in the countries which the victims had dreamt of reaching. The absence of empathy has been striking.

Still, there are those who do not give up but continue their attempts to join us here in Europe in spite of restrictive immigration policies and increased border controls. One side effect of the measures taken is that migrants have been directed to the services of smugglers.

During my travels to members states of the Council of Europe I have come across a number of dilemmas concerning migration and the human rights protection of immigrants and refugees, which I feel necessitate reflection and a new policy direction.

Increased border surveillance and forced returns

European states have in recent years adopted a series of measures that make migrants' access to Europe extremely difficult, such as the introduction of strict visa requirements, extensive border patrols and the application of administrative or criminal sanctions to migrants who enter Europe irregularly. One consequence is that asylum seekers may not be able to apply for protection.

European states have signed readmission agreements with countries which do not respect international refugee law and human rights standards. 'Migration management' has been 'outsourced'. European states bound by the European Convention on Human Rights seek in this way to divert migration flows to third states, thereby trying to avoid responsibility for any violations of the human rights of migrants returned to those countries.

The European Union has strongly contributed to the advancement and homogenisation of immigration and asylum law and practice, though serious gaps of course still exist. Of particular importance has been the role of the EU in the efforts of border management and the prevention of irregular migration. EU policies also affect non-EU countries, which are often inspired by EU state practices and take on the task of deterring migration flows into the EU area.

The actions of the EU's border control-related agency, FRONTEX, which assists member states in the management of their external borders, have a direct impact on migrants attempting to enter Europe, including asylum seekers. It is absolutely essential that the agency's border management strategies be sufficiently 'protection-sensitive' and that respect for human rights, including the right to apply for and to enjoy asylum, is fully safeguarded during border control operations.

In this context, the recent deployment of Rapid Border Intervention Teams to the Greek-Turkish land border has raised concerns. It is important that the intervention teams are not only composed of national enforcement authorities specialising in strengthening border controls but also of officials trained to distinguish asylum seekers from irregular immigrants.

Rise of xenophobia in Europe and its effects on migrants

The increasingly restrictive migration policies of European states go hand in hand with a xenophobic, anti-migrant rhetoric which is on the rise. Extreme political parties have gained popular support in several European countries by promoting prejudices and advocating stricter rules on immigration.

The current debate on migration mainly focuses on issues such as border control, the ban on the burqa or the prohibition of the construction of minarets. Migrants are blamed for not 'integrating', while there is little debate on how real integration can be fostered.

The roots of this xenophobia must be discussed with more clarity. The high unemployment rates and other consequences of the economic crisis have certainly contributed – and these problems have been exploited by extreme nationalists in their hate speech.

This sad trend must be reversed. What Europe needs is wise leadership, which will not seek to gain ground through populist rhetoric, but rather search for fair, durable solutions, with due respect for the human rights of migrants.

Criminalisation of migration

Migrants arriving in European countries are increasingly perceived as "transgressors" – persons who have violated national legislation on border crossing. Several European countries have introduced criminal sanctions for irregular entry or residence. The sanctions applied include fines, imprisonment and expulsion.

The criminalisation of persons seeking international protection is a matter of substantial concern. Such stigmatisation violates basic principles of human rights. In respect of refugees, the UN 'Refugee Convention' specifically provides that 'states shall not impose penalties, on account of their irregular entry or presence, on refugees who … enter or are present in their territory without authorisation.'

Several European states also impose criminal or administrative sanctions on smuggled migrants on account of their irregular entry. This is wrong; migrants should not be held criminally liable for being the object of smuggling, as laid down in the UN 'Smuggling Protocol', but should rather be treated as victims and provided with special care.

Assisting irregular entry is also treated as a criminal offence in several countries. Although such measures are frequently justified as a means to fight human trafficking and migrant smuggling, there have been incidents where sanctions were imposed on vessels that had rescued persons at sea and brought them to the shore.
In certain states persons who employ or in some form aid foreigners who are already present in the territory and whose status is irregular are punished. In Italy, for instance, the letting of accommodation to irregular migrants is a criminal offence. Such policies frequently target the migrants' family members. They put migrants in a much more vulnerable position and facilitate their exploitation and marginalisation.

Unjustified detention of migrants

Detention of migrants, falling within the current trend to criminalise migration, is now a common practice in almost all Council of Europe member states. Without having committed

any crimes, migrants are locked up in detention, at times in appalling conditions. Children, including unaccompanied migrant minors, are frequently among them. I have stressed on several occasions that migrant children should not automatically be detained.

Particularly troublesome is the detention of asylum seekers, which is increasingly applied by states, in spite of the obligation under international law to guarantee freedom of movement to refugees. The 'Dublin Regulation' has had the effect of further detentions, with some states detaining asylum seekers when their transfers are underway to the state responsible for examining their application.

Irregular migrants are detained on a regular basis, particularly prior to expulsion, often automatically. However, such deprivation of liberty can only be defended if there is an objective risk that the individuals would otherwise abscond, and that alternative measures such as regular reporting do not exist. Such detention, if necessary, should be limited in time, and open to challenge before a judicial authority.

In this context, I find the 18 months time limit for detention prior to return, as permitted under the 'Return Directive', particularly unfortunate. Lengthy detention is not only inhumane but also unnecessary. The return procedure can usually be completed in a much shorter period than 18 months.

Protection needs of asylum seekers

The 'right to seek and to enjoy asylum from persecution', as guaranteed in the Universal Declaration of Human Rights, is not fully protected in Europe today. Asylum seekers have to overcome ever more obstacles to be able to file their asylum claims.

In Turkey, the application of the UN 'Refugee Convention' is limited 'to persons who have become refugees as a result of events occurring in Europe'. Thus, non-European asylum seekers are excluded from protection under the Convention. On this occasion, I would once again like to encourage the Turkish authorities to withdraw the geographic limitation to the 'Refugee Convention'.

Although in some states there has been a downward trend in the number of applications filed annually, in recent years the recognition rates have dropped dramatically throughout Europe, with large discrepancies between countries. The burden of proof has been shifted onto the individual and it is increasingly difficult for many asylum seekers to prove their protection needs.

Many European states have developed lists of countries that are presumed to be safe places of origin. Asylum seekers originating from these states are deported almost automatically, often to some of the most dangerous parts of the world, and against the advice given by UNHCR. Upon return to their home country many of them are targeted, and their lives and health are at risk. We have seen this recently for instance in the case of Iraqi Christians, who are forcibly returned by some states without a thorough examination of the individuals' situation.

The standards of the asylum procedure also differ significantly between states, in spite of EU attempts at harmonising state practice in this respect and setting certain minimum requirements. Legal assistance and interpretation are not always available and asylum officers are in many cases not sufficiently aware of the vulnerable position of asylum seekers, particularly as regards children, victims of trafficking or smuggling, or persons persecuted on grounds of their sexual orientation or gender identity. Moreover, pending the appeal procedure, the guarantees provided are frequently insufficient, including protection against expulsion.

In this context, I am also concerned by the application by some states, such as the Netherlands and France, of accelerated procedures for the consideration of asylum applications. Such procedures are by their very nature bound to be less thorough than regular ones, and may undermine the right to seek asylum.

The recent judgment of the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece* has clearly demonstrated that asylum systems in European states do not always meet the minimum standards. The Strasbourg Court has also markedly exposed the weaknesses of the 'Dublin mechanism' by confirming that the assumption that all EU countries respect fundamental rights and may thus automatically transfer asylum seekers to the member state of first entry cannot be maintained. I would like to reiterate here my position that the 'Dublin mechanism' clearly requires rethinking, and should be replaced by a safer and more humane system.

Migrants' right to family reunification

The restrictive migration policies in European states have also had a negative impact on the principle that separated families should be reunited. Authorities are now reluctant to admit even the closest family members of migrants – even when the so-called 'sponsor' has permanent residence status or has acquired the nationality of the host state.

Applicants for family reunification often have to fulfil unreasonable requirements before being allowed to enter the receiving state. In some states applicants are required to pass language and integration exams before obtaining an entry visa – a requirement that for many may be difficult or even impossible to meet. This is particularly the case for illiterate persons, individuals living in war-torn countries or remote areas where there are no possibilities of learning the language of the state of destination.

In several states the sponsor is required to demonstrate that he or she has a safe income of a certain level, and in the case of reunification of spouses or family formation frequently the sponsor must have attained a certain age to be able to be joined by a loved one. With respect to children and parents, DNA testing may be applied to verify if they are genuinely related to the resident family member.

As a result of such excessively strict requirements families are frequently separated for years, and the only possibility for being reunited may be the migrant's return to the country he or she had fled. Being alone in the host state, without one's next of kin, is burdensome and negatively affects the migrant's ability to integrate into society. Moreover, it is an infringement of a migrant's right to respect for family life.

Human rights of irregular migrants

European countries often seem to forget the fact that even if the right of irregular migrants to remain in the host state is not protected, they do enjoy certain human rights. They should not be refouled, and should have access to basic health and education.

This is not well respected today. The focus is instead on getting these migrants out of the country. Some governments even set annual quotas for the number of people that are to be pursued and returned to their country of origin. Migrants who have lived in the host states for many years and are well integrated into society may be deported, as is the case for example with Roma families that are sent back to Kosovo[*] by a number of European states without due regard being paid to their private and family life. There have been reports of migrants

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[*] All reference to Kosovo, whether to the territory, institutions or population, in this text shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo.

being chased down and arrested by authorities in public spaces – actions that not only harm the individuals themselves but also foster xenophobic attitudes.

Despite such measures there will be irregular migrants present in Europe and many of them will remain there. Indeed many states are dependent on their labour, as these persons work in various sectors, such as agriculture or construction, in which nationals often do not wish to be employed. However, the irregular status of these migrants makes them prone to exploitation by employers. In this context, it is worth noting that regrettably no EU member state is so far a party to the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, while for the other Council of Europe countries this is currently only the case for Albania, Azerbaijan, Bosnia and Herzegovina and Turkey.

The possibility of regularising the stay of migrants should be seriously considered by European states. Some governments are hesitant to apply such measures for fear of attracting further immigration. However, regularisation may be the only means of safeguarding the dignity and human rights of a group of persons that are de facto residents and are particularly vulnerable on account of their irregular status. States should face up to reality.

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Migration laws and policies have long-term effects on democratic societies in Europe and go to the heart of the question of Europe's pluralistic identity and values. Over-restrictive migration law and practice have not and will not manage to deter flows of migrants who seek protection or decent living conditions. They can only put more lives and human rights at risk.

European states need to reflect more upon the challenges of migration and tackle them in accordance with the human rights principles by which they are bound. The Council of Europe can provide leadership in this domain and its human rights standards give valuable guidance.

Marc Pierini, Head of the European Union Delegation to Turkey

The dimension of the issue

- According to recent Eurostat data, 20 million people holding the citizenship of countries outside the EU live on its territory. Another few million are undocumented migrants. Therefore, we are constantly confronted with very practical challenges concerning their rights. As such, the human rights of migrants cannot be treated as optional, vaguely accompanying the policy on immigration and asylum. On the contrary, the effective system of protection of their rights must be an integral part of the migration agenda. The enhancement of migrants' rights is a direction which the EU aims to pursue in future. This is reflected in a number of aspects.

The EU framework is changing

- The new institutional framework, after the entry into force of the Lisbon Treaty, has the potential to bring new progress in this field. The new Treaty foresees the accession of the EU to the ECHR which is a vivid and effective tool aimed at protection of individual rights. The Charter of Fundamental Rights is now explicitly part of the Treaty order. The European Parliament, which has always placed protection of rights as one of its principal axes of action, has also received a stronger position in the European architecture. The new Treaty offers an express legal basis in the area of integration and established an explicit basis with regard to the definition of the rights of third-country nationals residing legally in a Member States. At the same time, the requirement of unanimity for legal migration initiatives has been abandoned.

- Throughout the previous development of the instruments concerning legal migration (directives on long-term residents, family reunification, students, researchers, Blue Card for highly-skilled workers), ensuring an adequate standard of living as well as a successful integration into the labour market and in the society has always been an essential aspect. Two recent proposals for directives concerning seasonal workers and intra-corporate transferees will further strengthen this framework, improving the position of both low-skilled workers, who may be most susceptible to unfair treatment and those highly-skilled who were also faced with complex procedures and could be uncertain about their rights.

- The framework of rights has also been systematically consolidated with regard to undocumented migrants. The instruments adopted in the last years (return directive, employer sanctions' directive) are not purely repressive measures. They include numerous provisions aiming at the consolidation of the migrants' rights, which should reduce legal ambiguity and prevent the exploitation of illegally staying persons.

- Obviously, the potential of immigration can only be concretised by means of integration of immigrants. The success of this process cannot be taken for granted. It is a two way process implying effort by the immigrant and the receiving state. The Commission has developed and is still working on tools to support the exchange of knowledge and experiences in this field

Asylum

- The protection of fundamental rights has always been at the heart of the Commission's action throughout the establishment of the Common European Asylum System.

- The first stage of the Common European Asylum System led to improvement in most Member States, for example regarding material reception conditions and access to

health care for asylum seekers. The first phase of the Common European Asylum System was a timid, but nevertheless useful first step.

- As you know, we are currently negotiating the laws that should make up the second phase of the system. The Commission's proposals for new laws have been broadly welcomed for their contribution to the protection of fundamental rights. The Commission has tabled proposals to amend the current instruments with a view to striking the right balance between high protection standards and the efficiency of the asylum system.

- We follow closely the developments in the case law of the European Court of Human Rights as all Member States are obliged to implement EU law in line with human rights and fundamental principles enshrined in the relevant EU and international instruments. To this end, the case-law of the European Courts, both in Strasbourg and in Luxembourg and the Charter on Fundamental rights was taken into account, in particular as regards the concepts of effective remedies, non-discrimination and protection against refoulement.

- The European Commission is also very keen to see that the two key institutions, UNHCR and IOM, are fully involved when it comes to determining the treatment to be applied to irregular migrants and the determination of their status. This is in particular the view we take in EU-funded projects such the reception and removal centres.

Readmission and visas

- Being in Turkey, I want to say a few words about the Readmission Agreement and the visa issue. We have made substantial progress towards the conclusion of a readmission agreement and I hope that we will get there very soon.

- Concerning visa facilitation, visa liberalisation and visa free regimes, the EU position is well know: the readmission agreement comes first, then the road map on visas. This will be a difficult discussion and we will start with well identified categories of travellers.

- In this field, we also welcome the prospect of reinforced cooperation with Turkey on border management, for example at the Turkish-Greek border and at Istanbul airports. We are also cooperating in enhancing the integrated border management policy of Turkey.

Conclusions:

- Even though the legislative framework is becoming more and more complete, it is never time to be complacent in this field. One needs to stay close to the realities on-the-ground and be prepared to provide relevant answers.

- We are firmly committed to continue working towards a fair, efficient and protection-oriented Common European Asylum System, which is the best way to jointly uphold this human right as one of the important pillars of the area of freedom, security and justice.

- A crucial challenge is to find the right way to continue to develop protection of migrants' rights in times of economic crisis and xenophobic tendencies, where societies tend to turn inwards and their attitude to immigrants evolve in unhelpful directions. Our ability to act in the coming future will be tested in search of solutions which are at the same time responsible, realistic and meet up our principles.

Karim Atassi, UNHCR Deputy Representative to Turkey

Mr. Professor Turgut Tarhanli, Mr. Commissioner for Human Rights Thomas Hammarberg, dear members of the panel, distinguished guests, ladies and gentleman. I would like to start by expressing UNHCR's gratitude for having been invited by the Council of Europe and by its Turkish Chairmanship to participate in this Seminar in Istanbul and for having been given the opportunity to share with you some thoughts on the human rights challenges of migration in Europe.

Since I am representing the UN Refugee Agency, I shall mainly approach the subject from the angle of asylum seekers and refugees. In that respect, I shall focus on the linkage between migration and asylum, access to asylum procedures, readmission agreements, and detention of asylum seekers, before concluding with some remarks regarding Turkey.

From UNHCR's perspective, the phenomenon of mixed migration flows highlights some of the most significant human rights challenges around migration to and in Europe. In speaking of 'mixed' migration, we refer to the fact that while refugees and asylum seekers account for a relatively small portion of the global movement of people, they increasingly move alongside other people whose reasons for moving are different and not protection-related. This interrelation between refugees and economic migrants present a challenge for the States, as well as UNHCR, which is struggling to ensure that measures to curb irregular migration don't prevent refugees from having access to international protection.

In this context, UNHCR emphasizes that concrete steps are needed on the part of destination countries to establish entry systems that are able to identify new arrivals with international protection needs. Such systems must be able to offer durable solutions for those people, as well as such other solutions as are needed and appropriate for other groups involved in mixed movements.

In particular, efforts need to be made to enhance access to procedures, i.e. the possibility for asylum seekers to introduce their claims for international protection and to have them adjudicated – on their merits -- in a fair procedure.

Access to procedures in some European countries remains problematic. A recent and clear example is Greece where, as recognized by the European Court of Human Rights in the recent judgment in the case of *MSS v Belgium and Greece* (Grand Chamber judgment, 21 January 2011), the asylum system fails to function effectively. In Greece, in the recent past, a significant proportion of asylum seekers have been unable to access the means to register a claim; and among the few who managed to do so, less than 1% was recognized as refugees or as beneficiaries of subsidiary protection. Based on this information, Greece is a clear example; but there are other countries in Europe where access to protection may be difficult. In Ireland, for instance, reports in Eurostat, the European Statistics website, indicate that at one point in 2010, the recognition rate was 1.33%. I won't elaborate more on this judgment since Ms. Helena Wilson will focus on it during her presentation.

Another good example of how difficult – if not impossible - it may be to access asylum procedure in the context of mixed migration flows became apparent in 2009, with the 'push backs' to Libya implemented by the Italian Government with respect to people intercepted on the high seas. Among those people, a number indicated their desire to seek protection when they were able to meet with UNHCR upon disembarkation in Tripoli.

In this context, it is a concrete possibility that asylum seekers with genuine international protection needs are returned to countries where they may be at risk of persecution or serious harm, or onward expulsion to such countries.

In the EU and certain other countries, many asylum claims are dealt with through an arrangement for allocating responsibility for claims to certain countries, under the EU's Dublin II Regulation. The Dublin system is predicated on the assumption that asylum seekers will enjoy broadly the same level of rights across European Union. However, this is not the case, as recently remarked by European Commissioner for Home Affairs Malmström who said "it is 'indecent' that wide differences persist in a Europe 'with the same values'. Many other asylum seekers subject to this system may be returned to countries where they may be at risk of persecution or serious harm without having their claims analyzed in a fair procedure. It could be the case, for instance, that an asylum seeker who arrives in Ireland, proceeds to the UK, and is subsequently returned under Dublin Regulation, to Ireland where his/her chances of being granted international protection may be significantly lower than in the UK.

Protection-sensitive entry systems thus should be established to grant asylum seekers access to asylum procedures and to avoid situations where the *non-refoulement* principle may be violated through the use of migration related tools and legislation. This is also a risk, for instance, through the application of readmission agreements.

UNHCR observes with concern that EU readmission agreements – even if their wording requires the parties to respect their international obligations including the 1951 Convention – may be applied to return, in practice, persons in need of international protection to countries where they may be at risk of persecution or serious harm, or onward expulsion to such countries. This is particularly the case under some accelerated procedures, which are used to expel people seeking to enter or apprehended without entry permission at or close to some national borders. Alleged cases of asylum seekers returned from Slovakia and Hungary to Ukraine through the use of accelerated procedures has been recently documented -- inter *alia* – by Human Rights Watch. Such accelerated procedures must, in UNHCR's view, be applied in a way which provides genuine opportunities for asylum seekers to request protection and have their claims fairly considered.

Training of border guards and the establishment of border monitoring systems are also key components of protective-sensitive entry systems. Other measures to incorporate refugee protection considerations into broader migration policies are provided in the '10-Point Action Plan', a tool UNHCR has developed to assist all stakeholders interested in migration management today.

From UNHCR's perspective, another human rights challenge around migration in Europe concerns the detention of asylum seekers. Article 31 of the 1951 Convention requires contracting states not to impose penalties on refugees for their illegal entry or presence, and not to apply restrictions to them other than those which are necessary. Despite this provision of the 1951 Convention, UNHCR observes with concern that some countries in Europe systematically detain asylum seekers. Detention of asylum seekers may result in a violation of Article 5, the right to liberty and security, of the European Convention for the Protection of Human Rights and Fundamental Freedoms

Moving to Turkey, I am pleased to say that the quality of the asylum space in Turkey continues to improve. Turkey has been very active over the last several years developing policies and preparing legislation and regulations in order to adequately manage the flows of 'mixed migration'.

Turkey's candidacy for European Union membership is having a major impact on the asylum system and the management of migration. This was reflected in the 'National Action Plan for Asylum and Migration', approved by the Prime Minister in 2005, which highlighted the need for a law on asylum and the creation of a national institution in charge of managing asylum and migration. The progress in the legislative area has been rapid since 2008 following the establishment of the Asylum and Migration Unit under the Ministry of Interior. The Unit has

initiated the drafting process of several legislative documents (varying from circulars to laws) to fill the gaps in the system.

The Unit completed the drafting of the asylum law, which was then combined with the new law on foreigners and the law on the future national institution. Now known as the "Law on Foreigners and International Protection", it is expected to be submitted to Parliament soon for its adoption. The 'Law on Foreigners and International Protection' will be instrumental for developing adequate responses combining a coherent approach to the management of migration with an effective protection for asylum seekers and refugees.

Throughout 2009 and 2010, there have been other important developments in the field of asylum and migration in Turkey that are worthwhile mentioning. These developments relate to new administrative regulations adopted by the Government of Turkey to address issues such as access to asylum procedures, and improvement of the reception conditions for asylum-seekers and irregular migrants. In this respect, the Ministry of Interior issued two Circulars in March 2010 on "Refugees and Asylum Seekers" and "Illegal Migrants".

These Circulars have had a significant impact in ensuring access to asylum procedures by persons claiming protection regardless of the irregularity of their arrival in the country. They gave the opportunity for asylum seekers to contact UNHCR as well as to have access to a lawyer without delay. They also lay down the 'principles concerning the physical conditions in removal centers and the practices adopted in these centers' with the objective of implementation of recent ECtHR judgments ruled by the Court within the Turkish context.

As a step to enhance the impact of these two administrative regulations, the General Directorate for Security issued another Circular in September 2010 providing accommodation for apprehended irregular migrants in removal centres after having obtained the written permission of the Governor. This last Circular introduced also a standard notification informing irregular migrants staying at removal centers about their rights and obligations. Among these rights, the right to legal counseling and the right to appeal were explicitly declared.

As the 50-year partner of the Turkish State, UNHCR has had the opportunity to observe the progress achieved by Turkey, a country that continues to expand its asylum space, offering protection to those in need.

Thank you for your attention.

Helena Wilson, AIRE Centre

I would like to thank the Government of Turkey and the Commissioner for Human Rights for organising this very important event and for inviting me to be present at it.

I would also like to thank the organisers for giving me the opportunity to say a few words about the recent case of *MSS v Belgium and Greece* concerning asylum seekers whose claims were not processed in Belgium but who were returned to Greece under the EU's Dublin II Regulation. In the *MSS* case both the Commissioner and UNHCR made constructive and helpful interventions - written and oral - in the proceedings. Amnesty International, jointly with the AIRE centre - also intervened. The Governments of the Netherlands and the UK also intervened to put forward their views.

This litigation has now resulted in a landmark judgment of the Grand Chamber of the European Court of Human Rights. The judgment has important implications far beyond the facts of the case itself. Parallel litigation continues before the Court of Justice of the European Union (the CJEU) in Luxembourg concerning the return of asylum seekers to Greece from the UK (in the case of NS v SSHD) and Ireland (in the case of ME v ORAC). *NS v Secretary of State of the Home Department* and *ME & oths v Refugee Applications Commissioner,* (case numbers C-411/10 and C-493/10).]

These cases are likely to be heard and decided by the CJEU later this year. Both the AIRE Centre and Amnesty International are intervenors on those cases as is UNHCR.
[Secretary of State of the Home Department and *ME & oths v Refugee Applications Commissioner.* (case numbers C-411/10 and C-493/10).]

Dublin II Regulation

Most people in this room will be familiar with the EU's Dublin II Regulation so I shall describe it only very briefly. The Dublin II Regulation (Council Regulation 343/2003) was adopted in February 2003. It sets out criteria for determining which Member State of the EU should examine an asylum claim and provides for the return of asylum seekers to that State.

States retain the option to examine the asylum claim themselves.

The Dublin Regulation forms one constituent part of the Common European Asylum System, which includes; measures setting minimum standards for the provision of material support (the Reception Conditions Directive); minimum procedural guarantees (the Procedures Directive); and common definitions relating who is entitled to refugee status or subsidiary protection (the Qualification Directive.) The Common European Asylum System – taken as a whole - provides the guarantee that all those seeking and in need of international protection have will have their claims **properly** determined in one member state of the European Union, **in accordance with those minimum standards.**

Under the Regulation the first Member State entered by an asylum seeker is in principle responsible for examining the claim and other states are - normally - entitled to return asylum seekers to that state for processing.

The Regulation is based on the presumption that all the Member States participating in the Common European Asylum System respect the principle of non-refoulement enshrined in the Geneva Convention, the European Convention on Human Rights and the EU Charter on Fundamental Rights.

It is also based on the presumption that all the Member States of the EU properly implement the provisions of the Directives mentioned above to everyone seeking asylum on their territory.

However problems arise when this presumption is not supported by the factual situation.

Unfortunately, it proved to be impossible for asylum seekers in Greece to enjoy in practice the rights which they in theory had under European law - as the institutions, reception conditions, procedural guarantees and substantive grant of protection in Greece fell far short of the prescribed EU standards.

The situation was – and is – so far below those EU standards that challenges to returns to Greece were made under the European Convention on Human Rights in many cases.

MSS was selected by the European Court of Human Rights as the leading case.

Article 3 ECHR

Article 3 of the ECHR contains a prohibition on inhuman and degrading treatment and a corresponding prohibition against return to face a real risk of such treatment.

The prohibition is absolute. The case law of the European Court has been consistent on this point for more than 20 years. (*Soering, Mamatkulov, Ahmed v Austria, Salah Sheehk v Netherlands)*

It was argued many years ago in the case of *T.I. v UK* – a case taken by the AIRE Centre - that this prohibition did not apply when asylum seekers were not being returned to the state from which they had fled and where they claimed to be at risk – but were being returned to another European state which was a party to the ECHR.

The Court in *T.I.* found that such returns would engage the responsibility of the sending state if there was a real risk that asylum seekers would not find – in the state to which they were being sent - protection from onward return to the state where they claimed to be at a real risk of absolutely prohibited ill treatment.

The case of *MSS* concerned an asylum seeker who was returned by Belgium to Greece. The case was brought against both states – Belgium and Greece.

In relation to Greece the Grand Chamber found:

- **that the conditions of detention in Greece violated Article 3 of the Convention;**

- **that the living conditions for asylum seekers who were not detained violated Article 3 of the Convention; and**

- **that the deficiencies of the asylum system meant that there was no effective remedy in Greece to protect an asylum seeker from being expelled to Afghanistan without a proper examination of the request for asylum having been made.**

In relation to Belgium the Court reaffirmed the position it had adopted in *T.I v United Kingdom*, but in MSS the Court went further than simply considering the risk of onward expulsion from Greece.

The Court held that **Belgium** had violated the Convention by sending the asylum seeker to Greece where both the conditions of detention and the living conditions were degrading.

The Court also found that systematically applying the Dublin Regulation to transfer people to Greece - operating a conclusive presumption that their asylum claims would be duly examined there – was in violation of Article 3 and Article 13 (the right to an effective remedy).

It particularly noted that there were provisions in the Dublin Regulation (Art 3(2)) which could have been used by Belgium to assume responsibility for examining the asylum claims.

The Grand Chamber judgment in MSS makes it clear that other EU states will violate the ECHR if they try to return asylum seekers to Greece before Greece has introduced – not just new legislation – but **practical** reforms to ensure that the violations found by the Court will no longer occur. This may be a long process.

What are the implications of the judgment in MSS for states, like Turkey, which are - at present- outside the EU and whose actions are not governed by the Common European Asylum System?

First, it is clear that the principles set out in MSS apply to **all** states which are parties to the European Convention on Human Rights.

Turkey - and other non EU states which are parties to the ECHR and are located at the geographical edges of the Council of Europe's territory - are under a clear international obligation to ensure that

- **the living conditions provided for asylum seekers whilst their claims are being processed,**

- **the detention conditions of those it is considered necessary to detain**

- **and the procedures and remedies in place**

do not fall so far short of international standards that they violate Article 3 ECHR taken together with Article 13.

One measure that Greece is proposing to adopt to solve the systemic situation which the Court found violated the ECHR is to try to prevent significant numbers of asylum seekers from reaching the border between Greece and Turkey. In this regard, it must be remembered that the guarantees of the Charter of Fundamental Rights (including the protection of the Geneva Convention) bind all European Union Agencies operating under EU law. Furthermore, in light of the forthcoming accession of the EU to the ECHR, as required by the Lisbon Treaty, all European Union law and acts of Union actors must ensure the guarantees of the European Convention on Human Rights, including the prohibition on refoulement, are respected.

It remains to be seen if the measures adopted will correspond with the obligations of Greece towards asylum seekers under EU law, the ECHR and the Geneva Convention.

What is clear is that if such measures are effective in preventing access to Greece, the result will inevitably be that many of those who now pass into and through Greece from Turkey may have to have their asylum claims determined in Turkey.

If Turkey has to deal with increased numbers of asylum seekers as a consequence of measures being adopted by Greece – this will present a challenge, not least in providing minimum acceptable living conditions for asylum seekers whilst their claims are being processed. Many of the asylum seekers who arrive at Turkey's borders come not from Turkey's neighbouring states but from states further away such as Afghanistan.

If their claims for international protection are not properly examined in Turkey and they are returned – not directly to Afghanistan but to the states through which they arrived at Turkey's borders – Turkey will be responsible – as Belgium was in MSS - for ensuring that the claims for international protection are dealt with - in law and in practice - in **those** states in accordance with the standards set out in MSS.

Mr President - By holding this very timely meeting under the auspices of the Turkish Presidency of the Council of Europe, Turkey has demonstrated that its awareness of this challenge and we are confident that Turkey will be ready and willing to devote the energy and resources required to meet it.

Ivi-Triin Odrats, Secretariat of the Parliamentary Assembly

UNACCOMPANIED MIGRANT CHILDREN

Chairman,
Moderator,
Distinguished guests,

Allow me to start by thanking you for inviting the Parliamentary Assembly to speak at your seminar. Unfortunately Mrs Acketoft could not make it to Istanbul because of an acute illness. Please accept her apologies and the fact that I'm going to take her place.

This seminar comes at a very timely moment for the Parliamentary Assembly of the Council of Europe, as we will be adopting a report on this very subject at our next part-session in April. In fact, the Assembly's Migration committee that I represent has already adopted a draft resolution and recommendation, which you find copies of in the room. However, it is still possible to amend these texts at the moment of the adoption by the Assembly's plenary, so I'm very keen to use this forum as a first test and collect your feedback, especially as regards our proposed 15-point common principles on unaccompanied children.

I think we can all agree that we're not where we'd like to be when it comes to the protection of unaccompanied children, and notably when we look at the implementation of all the international children's rights and human rights standards. Our Assembly has been dealing with the issue of unaccompanied children and adopted recommendations for almost ten years, but in reality the situation of these children has – with a few exceptions apart – changed very little since our first recommendation eight years ago. The current tightening of the EU borders and the lingering economic crisis do not help improve the picture either. In these circumstances, it is more than welcome that the EU has put the issue of unaccompanied minors high on the political agenda.

In these circumstances, you may also wonder what **added value** the recommendations from the Council of Europe Parliamentary Assembly may bring.

I believe that the Council of Europe <u>does</u> have a role to play when it comes to rendering child rights and child protection more visible, and that in many aspects:

<u>First</u>, today it may look like the issue of unaccompanied children concerns mainly the EU countries. But I'm convinced that, with the EU borders becoming increasingly impenetrable and with the EU concluding readmission agreements with its Eastern neighbours, it's the <u>current transit countries that should be prepared</u> to deal with the increasing numbers of these children. It is therefore important that the same protection measures be applied all over the 47 member states of the Council of Europe.

<u>Second</u>, the proposed 15 common principles are a <u>comprehensive, plain-language tool for any state authority or practitioner</u> dealing with unaccompanied children. In fact the idea of presenting our recommendations in this format came from a request from the Dutch ministry of the Interior, asking if the Council of Europe had any comprehensive guidelines that they could use for working out their rules. Indeed, the Council of Europe has done a lot on unaccompanied children, especially in terms of setting up the Life Projects for

unaccompanied children, and through the viewpoints of the Commissioner of Human Rights, but there is nothing comprehensive from A to Z to help policy makers.

Third, the recent EU Action Plan is forward-looking in many ways. However, in several aspects - be it on detention, age assessment, guardianship, returns or child-specific experiences of persecution to name but a few -, it either falls short on proposing action or leaves room for interpretations that do not necessarily comply with our human rights standards. It is therefore important for us to present "our rights-based view" on the issue, which we ask the European Commission to take into consideration in the process of implementing their Action Plan as well as while defining their new actions.

Finally, with its expertise in human rights and child protection fields, the Council of Europe can make a major impact in pushing for the paradigm shift as regards unaccompanied children being first treated as children and only secondarily as migrants and asylum seekers.

This **paradigm shift** is in fact the greatest challenge for dealing effectively with unaccompanied children. Central to it is the recognition that children are entitled to special care and protection, that their best interests should be a primary consideration in all decisions affecting the child, and that the child's views should be heard… And that this should apply to all unaccompanied children, not only those who submit a request for asylum or other form of international protection. In reality this is nothing new. It simply requires member states to live up to the UN Convention on the Rights of the Child – which all Council of Europe member states are party to.

The second major challenge is to **improve procedures**: every unaccompanied child should be granted a fair, comprehensive, and individualised assessment that respects age and gender specificities and lead to lasting and beneficial solutions. Instead of focusing on the return of these children to often war-torn and dysfunctional states, which is in most cases anyway impracticable before they age out, European states should engage in finding durable solutions from the first contact with the child. Accepting that a durable solution may be any of these three options: the child's integration into the host country, family reunification in a third country, or return and reintegration in the country of origin. Children should also be given the right to challenge decisions with the help of guardians and lawyers when they face detention, deportation, or go through an asylum procedure.

Thirdly, there is a crying need for **harmonisation of policies and practices across Europe**. Today it's basically a lottery for an unaccompanied child in which European country he or she is intercepted or seeks asylum in, a lottery that has dire consequences for the child's future! Therefore we highlight the best practices that all our member states should aim at in order to provide meaningful protection and ensure that the best interests of the child are really taken as the basis of decisions regarding these children.

But before the best interests of the child can be effectively defined, we'd need common basis on how to define the child's best interests. Surely the General Comment N°6 of the UN Committee on the Rights of the Child and the UNHCR 2008 guidelines are valuable interpretative sources. However, we think that European states need to develop their own common guidelines on the best interests' assessment, which would define clearly the procedures and responsibilities.

Similarly, common standards and procedural safeguards at pan-European level are needed for

- legal guardianship and legal aid for all unaccompanied children to ensure that their interests and protection needs are safeguarded throughout all administrative and judicial procedures;

- for age assessment in order to balance the current divergent approaches and practices,

- as well as for a harmonised system of asylum for unaccompanied minors.

Finally, I'd like to say a few words about our **15-point common principles**. Time does not allow me to elaborate on all the 15 areas of proposed principles. Therefore I'll focus on a few issues where our views differ from those of the EU.

One key issue is detention of unaccompanied minors. The Assembly has repeatedly advocated – and so has Mr Hammarberg – that detention can never be in the best interest of the child and therefore NO detention of children should be allowed on migration grounds.

Another area of concern is the return of unaccompanied children to their country of origin, and mainly to so-called reception centres in war-torn countries in Africa or the Middle East. Several countries – including my own – consider the existence of these reception centres as a justification to refuse residence permits to unaccompanied children as there is a "safe and adequate" place for the child whose families cannot be traced to return to. Our Assembly is adamant that children should never be returned to places where their safety and well-being is at risk. Without proper guarantees for safety and reintegration, the reception centres in countries of origin do not cater for the child's best interest.

But unaccompanied children should not be allowed to "age out" either, only to return them at the age of 18 when they turn adults. This is a "no win" solution for all, which far too many countries practice. Today we often talk about "disappearances" of unaccompanied children from care centres. But isn't that a symptom of a faulty policy of not providing these children more durable and meaningful alternatives? Instead we push them directly into irregular status and straight into the hands of traffickers. The Assembly's position here is clear: finding a durable solution for the child should be the ultimate goal from the first contact with the unaccompanied child. The assessment must be carried out on a case-by-case basis and with the consent of all parties concerned: immigration authorities, social services, the child's legal guardian and the child himself or herself. Pending identification of the durable solution, the child should benefit from legal residence status. This should be valid throughout the duration of the child's personal life project conducted in the host country, even if the project extends to the age of adulthood.

I am fully aware of a common public scepticism towards these, very often fairly teenaged young men and I do appreciate that finding a durable solution undoubtedly bears some cost, but I'm equally convinced that the benefits of helping all children to develop into positive actors in whichever society they ultimately live, will override these costs.

Thank you for your attention.

Emily Logan, Irish Ombudsman for Children

Separated Children in Ireland
(Notes from PowerPoint presentation)

Ombudsman for Children, Ireland

Ombudsman for Children Act, 2002

Presidential appointment

Direct accountability to Parliament

Independent complaints handling

Promotion of children's rights

Ministerial level Policy & legislative advice

About separated children in Ireland

Approximately 200 separated children

Accommodated in 10 unregistered hostels around the greater Dublin area

Many, but not all of these children seek asylum in Ireland

Little known about their lives or experience

Aim and Objectives

Aim

Better understand the life and level of care afforded to S/UAM

Facilitate the identification of key issues by separated children themselves

Make recommendations for policy & legislative change

Undertake work that would interest them

How we did it

26 volunteered

3 meetings with the 26 volunteers on issues of concern

Numbers grew to 35

New people came every day

Building Support

Health & Social Services

Young people meeting with Government working group

Sought cross party political support

Media education

Public awareness raising through radio

Ministry of Justice (Reception Integration Agency)

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Accommodation & safety

Best interests of the child

Non - discrimination

Missing children

Asylum determination process

Education & Health

Independent Guardian

Communication with children

Progress so far

The practice of accommodating children in privately run hostels has ceased

The last hostel was closed in December 2010

Following assessment all children are placed in foster care

Joint protocol between Irish police & social services on missing children

Numbers of missing children has decreased significantly

Missing SCSA

2000 – 2010	550 children missing
2001	81
2009	47
2010	11

Rebecca O'Donnell, Save the Children EU Office

Introduction

Many thanks for inviting me to join the discussions today. I am grateful to Ivi Odrats and Emily Logan for the ground already covered. They have highlighted key principles that apply to the situation of children and many of the characteristics of the situation of unaccompanied children in Europe.

Save the Children works across Europe on issues concerning unaccompanied children, from a policy and programmatic perspective. For example, we have a team working with arrivals from boats to Lampedusa, outreach centres in Rome, support services and programmes involving children in Denmark, Norway, Sweden, Romania and Albania. We are founding members of SCEP, the network of organizations working with separated children in 30 countries around Europe. We work with children in migration outside of Europe as well, in countries from which children come or through which they pass, including Afghanistan, Sri Lanka and Ethiopia. Here I will describe some of what we see of the situation of unaccompanied children and policy responses.

 In our work we have observed great **diversity** in the circumstances of children coming and the reasons for their being in Europe. But we also see their **common needs** for assistance and durable solutions. Given that children are moving across States and indeed children may be transferred by national authorities between States, we see that **common regional standards and better transnational cooperation** would make sense. That being said, it is clear that an unaccompanied or separated child may have a completely different experience depending simply on where he or she is in Europe. Fundamental disparities in treatment exacerbate movements of children from one country to another without protection of any real kind. The general lack of proper representation and guardianship of these children in particular aggravates the situation, although some countries are doing a better job than others.

As we have seen from Ivi's presentation, there is growing recognition around Europe, greatly helped by the EU Action Plan on Unaccompanied Minors adopted last year, and soon to be championed in the adoption of the Council of Europe principles, that child protection must be at the heart of all actions concerning unaccompanied children, regardless of whether they are asylum seekers, trafficked children or children seeking family reunification or other opportunities.

In a nutshell, this means that all unaccompanied children should receive proper care and assistance and that the State's ultimate obligation is to find a durable solution for them, based on their individual circumstances, taking their best interests as a primary consideration. Finding durable solutions means considering a range of possible options, including return to a country of origin, transfer to a third country (for example for family reunification) or integration in the host country.

This is highly significant and very welcome progress**. And the next challenge is to ensure that this policy change can be minted into a reality for children around Europe, be they on boats on the Mediterranean, crossing mountains from East to West or on the streets of our capitals.** And again drawing on our experience of the policy climate in Europe, I would like to suggest that we discuss three key changes that might help.

Let's first consider how exactly States can put child protection to the fore in this migration context. The current situation, to a large extent, is that the procedures which concern these children are associated with their specific migration status, potentially a border entry procedure, an asylum procedure, a procedure arising out of a trafficking situation, or a deportation procedure. Traditionally they are designed to deliver either of two outcomes (right

to stay/deportation) on relatively narrow grounds. So I'd like to consider in what way this should be transformed to deliver durable solutions. The <u>second</u> change to explore is what new processes and tools have to be forged to assess what is the proper durable solution in individual cases. And as a <u>third</u> and last issue, let's consider how child protection implies a new basis, and new ways, of working with third countries, be they countries of origin, transit or destination.

1.   Child Protection vs. Migration Control

Apart from those children who are recognized as having refugee or subsidiary protection status, the current picture around Europe shows us that placing migration control to the fore when dealing with the situation of an unaccompanied child carries several risks. It can lead to:

- - A complete displacement of child protection safeguards (for example, where the State simply refuses entry to the child at the border);
- - A failure to provide the care and assistance which a child requires (for example, through the detention for the child on the ground that they are an irregular migrant);
- - systematic returns of children to a country of origin without fully considering their individual circumstances and needs;
- - arrangements with third countries that fail properly to address care and custodial responsibilities and neglect the child protection system that must underpin them .

Let's take a concrete example from the border from research by Human Rights Watch. A 16-year-old Guinean girl traveled from Conakry to Dubai via a European airport but was refused entry in Dubai and returned to the airport in Europe. The border police tried immediately to send her back to Conakry. The girl refused to board the plane and was placed in detention. The girl traveled with an authentic diplomatic passport, which was not hers. A judge reviewed her detention after four days and the girl gave a range of contradictory statements about her parents' whereabouts, names and the purpose of her travel to Dubai. The judge ultimately released her and she was put into local authority care. In this case, we can see that, despite these possible indications of trafficking, the border police do not appear to have made sufficient efforts to enquire into her situation. There appears to have been a tendency to think about the issue from a border control perspective primarily, to consider the child as essentially in transit through the country and thereby to refuse to take any responsibility towards the child?

Here I think we come to the first essential change. States must truly be prepared to take responsibility to ensure the protection of children falling under their jurisdiction, however they come under their jurisdiction and whatever the circumstances of the child. And this involves accepting that child protection entails a broader range of possible outcomes, based on a broader range of considerations, than traditional migration procedures. States must be prepared to examine the circumstances of an unaccompanied child thoroughly and identify a solution in their best interests.

Some may fear that this approach will completely undermine migration control. Let's keep in mind that there are often perceptions that some unaccompanied children are opportunistic youths who do not need and should not get special protection and assistance. Or children traveling alone may be seen as part of a family strategy for remittances or as "anchor children" for a subsequent abuse of the family reunification system. And there are cases where we can acknowledge that some of those perceptions are, in the end, correct. However, it is clear that there are all kinds of cases and children arriving in Europe may have a range of mixed motivations. So it is essential to make a full consideration of the child's circumstances and assess their best interests. It is also important to emphasise that this does not effectively mean that unaccompanied children have a right to migrate to and stay in a country. There are certainly circumstances when return of children is in their best interests and is exactly the right choice. But it is crucial for a State to accept its responsibility to

contemplate the full range of potential outcomes thoroughly, when child protection is at stake.

2.   What are the new tools that will make it truly possible properly to assess the situation of a child and determine their best interests?

We see that some States may feel that it is too difficult to establish assessment systems that risk being too expensive and too cumbersome. They may want to find simpler solutions, solutions they may believe have the added advantage of stemming the migration flow. They may feel the economic situation in Europe warrants a tougher deterrent approach. For these reasons, when they consider best interests, they may take the view that:

- unless there is a refugee claim, it is almost always in the best interests of a child is to return to family; in other words there is no need for thorough individual assessments;
- In the absence of family or where it is not possible to trace them, it is in the best interests to return children to countries of origin if there are adequate reception facilities there; again without considering the child's individual circumstances;
- In fact, family tracing might be skipped entirely if it is possible to send children back to reception facilities in countries of origin;
- Some countries increasingly seem to be exploring investing in buildings in countries of origin to which children can be sent, even in countries where there is virtually no functioning child protection in place;
- On the other hand, for the sake of simplicity, some States may automatically provide children with temporary protection until they are 18; but on turning 18, they no longer need this protection and can be summarily deported.

The human costs of these assumptions are clear. And this process of successive assumptions is also unlikely to deliver sustainable returns. Their deterrent effect is not proven and it risks storing up problems for the future.

Instead States should consider how to look carefully into the individual circumstances of the child and with what tools they might explore whether family contact can be restored or what can promote opportunities for the child. A good process itself may facilitate a successful outcome. This involves considering:

- what factors contribute to an assessment of best interests? (for example, safety, family ties, integration? It is not the case that it is in a child's best interest simply to be in a more affluent Western society.)
- what child appropriate processes and procedural safeguards are necessary? How do you engage a child in the process?
- what actors should be involved and how? (for example, immigration services, child protection services, judiciary?)
- what tools are necessary to establish this? (for example, reports from schools, country of origin information, how have the child's views been solicited, what role and input for the guardian).

The resources of Europe can be leveraged on this issue, to equip national authorities with skills, expertise and assistance to address these issues properly. There are organizations working to deliver these tools to States. A few examples include:

- UNHCR has already well established guidelines on formal best interests determination; they were primarily conceived for use in refugee camps, rather than in industrialized settings like Europe. so UNHCR is embarking on producing a new version of these guidelines;

- the European Commission has commissioned a study on return practices concerning children around EU Member States and the return to 8 countries outside of Europe, with a view to good practices that might exist to achieve return where it is appropriate; ECRE and Save the Children are strategic partners in this regard;

- Nidos, the independent State guardianship authority in the Netherlands, is working at establishing a functioning network of European guardianship institutions, first by looking across what systems already exist and also looking at what kind of mechanisms can be put in place to provide guardians with an ability to interact across countries; the SCEP network group on guardians has also carried out an important study into children's experiences of guardianship and is working towards a set of standards around the role and qualifications of a guardian;

- The Council of Europe has created and developed ways and means to pursue the "life projects" of these children, putting the development of children to the fore. And States recognise that this kind of investment to respect the rights of children does not neglect the migration dimension of the situation. Indeed, it aims to ensure children can be positive actors in whatever society they ultimately live.

## 3.	A final word on the waltz between internal and external policies

As I said at the outset, I believe putting child protection to the fore implies a new basis, and new ways, of working with third countries, be they countries of origin, transit or destination. At the moment this kind of transnational work does not seem to be prioritized. The key deliverable on return in international relationships seems to centre on establishing readmission agreements, which do not exclude children and which certainly do not address child protection concerns.

Finding a successful durable solution clearly will depend on transnational cooperation. For example, how do you address family tracing followed by an assessment of the situation of the family (for example, if there was a trafficking situation, how to verify that the family were not involved) unless you properly involve actors and systems in third countries?   European countries must also be cautious about apparently simple "external" solutions to "internal" challenges in Europe, like building reception centres in countries of origin. Clearly establishing reception centres does not create automatic solutions and proper and careful assessment procedures about the child's future in each individual case while the child is within Europe remain crucial. Moreover, there should not be any perception that reception centres simply involve providing buildings, a roof over the child's head in third countries. Instead, there should be a clear agreement between countries on the circumstances and purposes for which centres might be used (for example, are they to be used for a transitional stage of the child's reintegration, as part of a well defined plan)? What responsibilities – and indeed potential liabilities – do European countries have if supporting these centres? But above all, it should be understood that, without a general system in a country of origin providing a protective environment for the child, this seeming solution of centres is just a mirage. So European countries and third countries should work together, through a child protection agenda, to build and foster these systems.

And a host of European policies and relationships with third countries are relevant and can be deployed to provide integrated child protection. As migrant children move from countries of origin, through countries of transit to countries of destination, their circumstances will be affected in turn by both European external policy (including the areas of development cooperation, humanitarian aid, external relations) and internal policy within Europe (including the EU border Code, asylum, trafficking and migration) and then again potentially by external policy (including once more development cooperation). Addressing child protection in an integrated way across these policies will ultimately contribute to better migration outcomes, for example, by helping ensure there are actors and systems helping children in their

countries of origin and fostering opportunities for them. And this is the best form of deterrence of unsafe movement where it is unnecessary.

Conclusion

So, in conclusion, I would like to submit for your discussion that:

- migration control and child protection need not compete;
- but procedures to deliver child protection should not need to be built on uneasy compromises; and
- and legitimate migration concerns should not be pursued at the expense of the safety of individual children, but through a common child protection agenda with third countries.

Many thanks for your attention.

Martin Fowke, United Nations Office on Drugs and Crime

The Human Dimensions of Migration in Europe:
Smuggling of Migrants

Excellencies,
Distinguished Colleagues,
Ladies and Gentlemen,

First of all, on behalf of UNODC, I would like to thank the Government of Turkey for hosting this seminar and the Council of Europe and, most especially, the Commissioner for Human Rights, Mr. Thomas Hammarberg, for asking us to present in this key session on the smuggling of migrants.

Migrant smuggling is a term that evokes strong emotions, clear but divided opinions and, to date, uneven responses that few are satisfied with. Noting this, I beg your patience this morning as with so much that could be said in the small amount of time available, it will be a good few minutes before I will mention human rights and then only all too briefly.

But, if nothing else, I'd like you to note three short points from these opening remarks: one, that we currently have the basic framework for a comprehensive and effective response to migrant smuggling; two, the majority of States have existing, related obligations and a corresponding implementation challenge; and, three, this framework quite clearly has a strong migrant protection component.

Migrant smuggling is defined by the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air. This Protocol is the primary international legal instrument that addresses the smuggling of migrants and its core purpose has four pillars:

•
To prevent and combat the smuggling of migrants;
•
To protect the rights of smuggled migrants;
•
To promote cooperation between states;
•
To prosecute criminals.

This last point is of key importance -the Protocol requires Member States to criminalize migrant smuggling.

IT TARGETS CRIMINAL ACTION AGAINST THE SMUGGLERS, NOT MIGRANTS.

The purpose of the Protocol is not to criminalize migration; it states that migrants themselves must not be held responsible for the crime of smuggling by virtue of having been smuggled. This is a fundamental point to be understood about migrant smuggling responses – detention of smuggled migrants is not an objective or purpose of efforts to curb migrant smuggling as a criminal activity. Further, the purpose of the Protocol is not to criminalize humanitarian assistance to migrants.

November last year marked the 10th anniversary of the adoption of the Protocol by the United Nations General Assembly, hence the timeliness of this seminar in considering the situation of smuggled migrants today and the relevancy of the Protocol to States in addressing the very real consequences caused by migrant smuggling in this region, as in many others.

As of today, there are currently 127 States Parties to the Protocol, including Turkey, as well as all current EU Member States. But while ratifications are high, globally, implementation remains low -most States Parties, for example, do not have dedicated action plans or strategies in response to the issue, report few prosecutions and convictions of migrant smugglers and provide, at best, uneven forms and levels of assistance to smuggled persons. In short, effective implementation of the Protocol has not yet been achieved.

To help address this challenge, we have developed over the last 24 months a number of technical tools and materials to assist States and their practitioners in effective implementation of the Protocol. All of these tools are available on the human trafficking and migrant smuggling part of our website at www.unodc.org, and for easy reference can also be quickly reviewed and accessed through this online catalogue with all of our technical material regarding trafficking in persons also. I'd be happy to provide or answer any related requests or questions if anyone would like to talk or write to me after the session. I will quickly note some of the more important tools -you will find all available language versions as e-publications on our website.

First, the Model Law against Smuggling of Migrants has been developed to assist States and legislators in particular in implementing the articles of the Protocol & aims to facilitate the review and amendment of existing legislation as well as the adoption of new legislation. The suggested model provisions are accompanied by a detailed commentary, providing several options for legislators, as well as citation of existing national examples.

Second, the Toolkit to Combat Smuggling of Migrants provides guidance, showcases promising practices and recommends resources to assist policy makers, law enforcers, judges, prosecutors, and members of civil society in their efforts to prevent migrant smuggling, protect smuggled migrants and their rights, and cooperate to these ends. The Toolkit is comprised of tools and existing examples at the national, regional and international levels, on, for example, understanding migrant smuggling, actors and processes, detailing the international legal framework, problem assessment and strategy development approaches, international criminal justice cooperation practices, law enforcement and prosecution, protection and assistance measures, prevention and capacity building and training initiatives.

Third, we have developed a comprehensive set of training modules on investigating and prosecuting migrant smuggling as a practical guide for criminal justice actors in a form that can be readily adapted to the needs of different countries and regions. As an aside, we have also published a series of research reports and issue papers to assess and extend the current state of knowledge on the subject matter, most notably with regard to North and West Africa, and South Asia, with regard to migrant smuggling by air and, hopefully shortly, migrant smuggling by sea.

Finally, the forthcoming International Framework for Action to Implement the Protocol is a technical assistance tool that aims to support the effective implementation of the Protocol by assisting state and non-state actors in identifying and addressing gaps in their response to migrant smuggling in accordance with international standards. I will say a little more on this shortly.

These materials share a number of qualities. They all aim to ultimately support a full and effective implementation of the Protocol. They have all been developed through extensive research and expert consultation, and they all reflect the experience of the international community over the 10 years since the Protocol was adopted. In identifying the actions that should be taken under the Protocol, there is a host of national experience, international policies and instruments that needs to be taken into account and considered. We have tried to do so in developing these materials. Further, as with each of the four pillars of the Protocol [prevention, protection, cooperation and prosecution], the protection of smuggled migrants and their rights are a core and central component of all of these standard-supporting and implementation assistance tools.

Knowing time is short, I would refer you to the materials themselves for a full and proper review to see if they can be applied or adapted in your own work or related activities, or maybe improved on by your own experience – we're always very keen to receive feedback, inputs and advice – but I'd like to finish by citing a few examples from our technical interpretation of the Protocol as an indication of how integral the human rights of smuggled persons are to a holistic and comprehensive approach to migrant smuggling.

The Model Law against Smuggling of Migrants, for example, clearly states in its commentary (as many of our speakers and experts here noted yesterday) that certain rights are inalienable and apply to everyone, regardless of their migration status. Under the Protocol, States parties have agreed to ensure that inalienable rights arising from human rights, refugee and humanitarian law are not compromised in any way in the implementation of measures to counter the smuggling of migrants.

In addition to these general rights, the Model Law provides suggested wordings for several more specific rights that have been restated in the Protocol, such as the right to protect smuggled migrants from violence. The relevance and reference to other instruments is fully detailed such as the use of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families to draft an article on the right to urgent medical care, or the application of the best interests of the child from the Convention of the Rights of the Child in referring to the protection of smuggled migrants who are children.

As noted yesterday, capacity-building and training of relevant actors is essential. Within our Global Basic Training Manual for investigation and prosecution, while consideration of a migrant themselves is a consistent thread through the manual and the trainings conducted, one of our 9 core modules is solely dedicated to consideration of human rights. Amongst other points, law enforcers and prosecutors are taken through the human rights of smuggled migrants, the principles relating to the protection of refugees and their role in protecting and promoting human rights. Specifically, coverage includes examples of codes of conduct, a detailing of the principle of non-refoulement and examples of non-derogable rights.

The International Framework for Action to Implement the Protocol will be published in the coming months and we hope it will be of some use to both policy-makers and practitioners, as it aims to set out in tables for each Protocol objective and article, a minimum standard for required action, examples of related implementation measures and corresponding operational indicators to both measure implementation and help monitor change over time.

We have previously published a similar framework on trafficking on persons which demonstrates the approach and structure of the product. For example, with regard to the Protocols requirement on the State to preserve and protect the right not to be subject to torture [or other cruel, inhuman or degrading treatment or punishment], a minimum action requirement is for a State to ratify or accede to relevant international instruments such as the Convention Against Torture and the International Covenant on Civil and Political Rights. Other implementation measures we have suggested include detailed capacity-building activities and providing for the investigation and prosecution of cases or torture or ill treatment by State actors.

In concluding, I'd like to underline again that there is a clear basis at the international level for the protection of the human rights of smuggled migrants. More than that, the collective discourse, experience and promising practices of trying to actively confront migrant smuggling are rapidly developing, which are all positive encouragements in the context of such bleak practices that occur daily. As such, I'm very much looking forward to a practical discussion and exchange of experience with you this morning, regarding the precise difficulties and realities pointed to by many of the questions in the background paper.

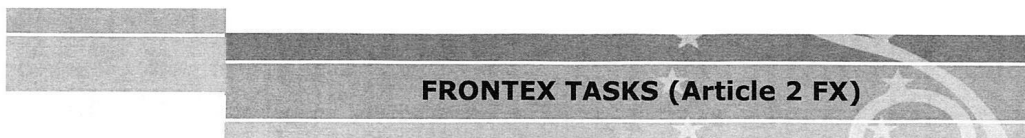Thank you.

Richard Ares, Frontex
(Powerpoint presentation)
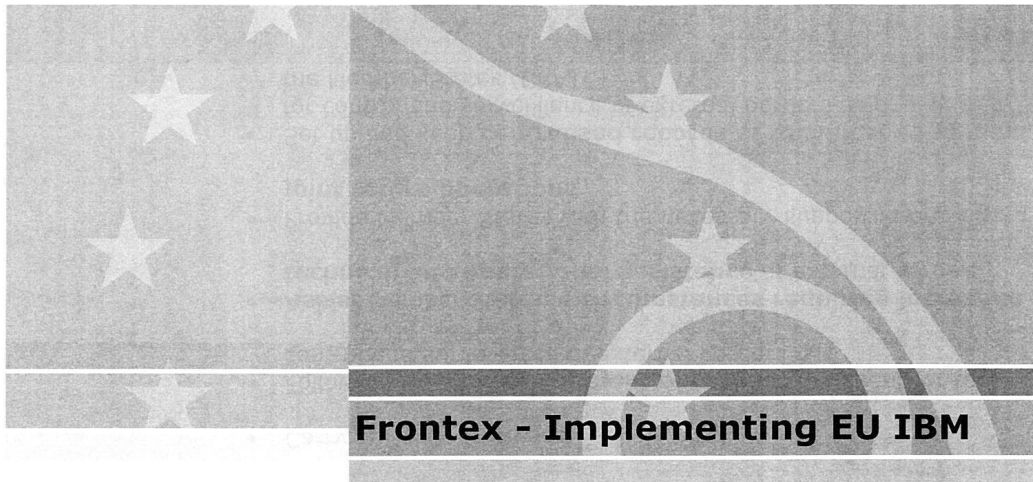
Frontex - Implementing EU IBM

FRONTEX
LIBERTAS SECURITAS JUSTITIA

Council of Europe

Seminar on the human rights dimension of migration in Europe

Richard Ares Baumgartner
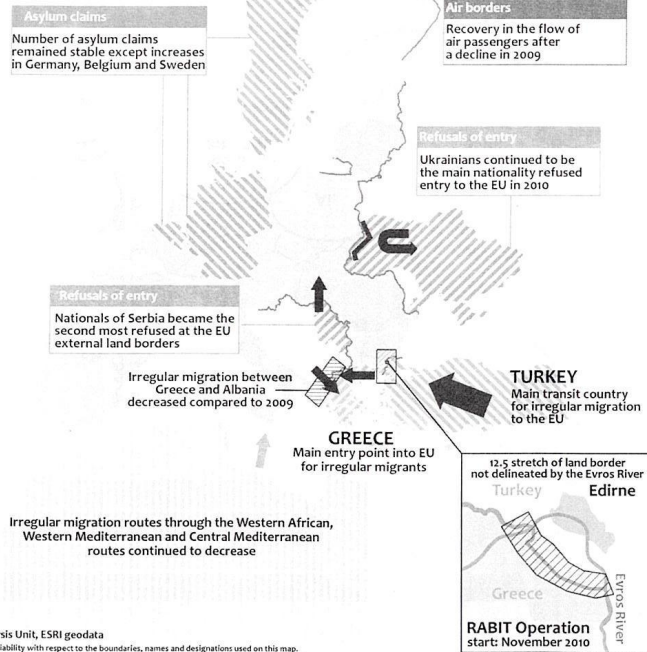Senior External Relations Officer
Istanbul, 17-18 February 2011

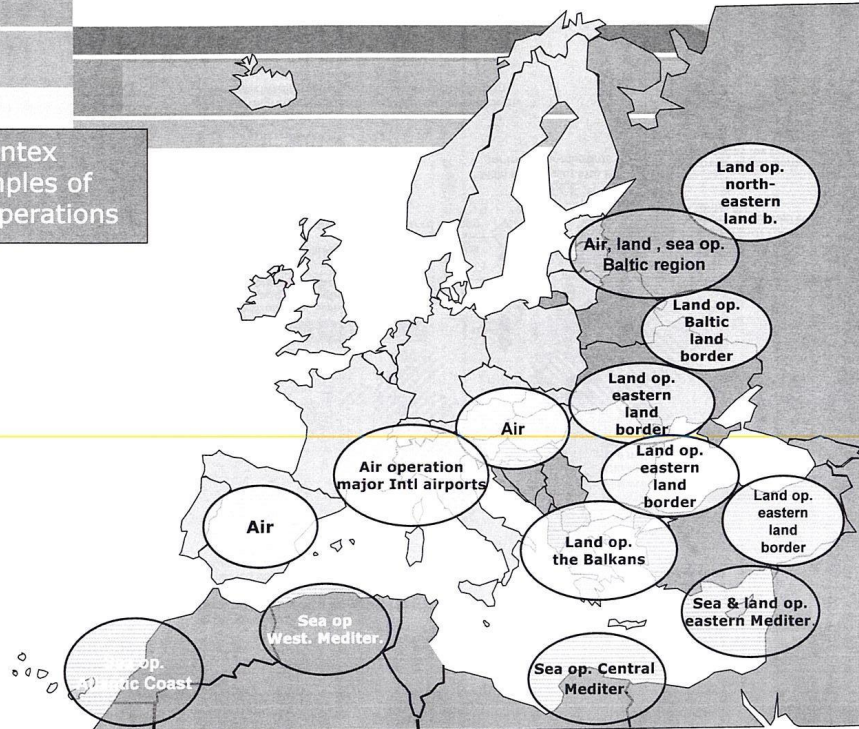**FRONTEX TASKS (Article 2 FX)**

FRONTEX

- **Coordinate operational cooperation** between Member States in the field of management of external borders

- **Assist** Member States **on training** of national border guards, including the establishment of common training standards

- Carry out **risk analyses**

- Follow up on the **development of research** relevant for the control and surveillance of external borders

- **Assist** Member States in **circumstances requiring increased technical and operational assistance** at external borders

- Provide Member States with the necessary support in organising **joint return operations**

- Set up and keep **centralised records of technical equipment** for control and surveilllance of external borders belongining to the Member States (CRATE)

43

Situation at the EU External border 2010

FRONTEX

Asylum claims
Number of asylum claims remained stable except increases in Germany, Belgium and Sweden

Air borders
Recovery in the flow of air passengers after a decline in 2009

Refusals of entry
Ukrainians continued to be the main nationality refused entry to the EU in 2010

Refusals of entry
Nationals of Serbia became the second most refused at the EU external land borders

Irregular migration between Greece and Albania decreased compared to 2009

GREECE
Main entry point into EU for irregular migrants

TURKEY
Main transit country for irregular migration to the EU

Irregular migration routes through the Western African, Western Mediterranean and Central Mediterranean routes continued to decrease

12.5 stretch of land border not delineated by the Evros River

Turkey   Edirne

Greece   Evros River

RABIT Operation
start: November 2010

Source: Frontex Risk Analysis Unit, ESRI geodata
Disclaimer: Frontex disclaims any liability with respect to the boundaries, names and designations used on this map.

Frontex Examples of Joint Operations

Land op. north-eastern land b.

Air, land , sea op. Baltic region

Land op. Baltic land border

Land op. eastern land border

Air

Land op. eastern land border

Air operation major Intl airports

Land op. eastern land border

Air

Land op. the Balkans

Sea & land op. eastern Mediter.

Sea op West. Mediter.

Sea op. Central Mediter.

op. tic Coast
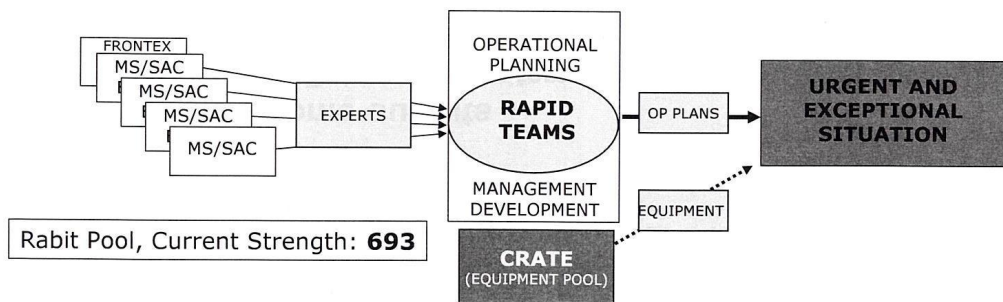
RAPID BORDER INTERVENTION TEAMS

FRONTEX

"RABIT"

*Regulation of **European Parliament** and of **Council 863/2007***

MANDATORY FOR MSs

Rabit Pool, Current Strength: **693**

FRONTEX logo boxes: FRONTEX, MS/SAC, MS/SAC, MS/SAC, MS/SAC → EXPERTS → OPERATIONAL PLANNING — **RAPID TEAMS** — MANAGEMENT DEVELOPMENT → OP PLANS → URGENT AND EXCEPTIONAL SITUATION; EQUIPMENT → CRATE (EQUIPMENT POOL)

Frontex work in combating THB

FRONTEX

- **Understanding the role of border control authorities (BCA)**

- **Some outputs**
  - **Data collection template for annual THB data**
  - **Data collection template for JOs**
  - **An updated common situational picture**
  - **Risk profiles of VOT and traffickers**
  - **Improved information exchange on THB with EU ATC, Europol and international organisations**

- **Recommendations for BCA**

- **Frontex Programme of Work 2010-2011**
  - **Annual report on THB for Border Control Authorities**
  - **Joint Operations (JO) – Agelaus**
  - **Training : Training Module on THB**

Victims of Trafficking 2009 by Third Country Nationality

FRONTEX

Number of potential victims
from third countries 2009

1 - 6
7 - 12
13 - 80
81 - 298
299 -

Nigeria	904
China	276
Brazil	203
Morocco	119
Paraguay	111

Total number of
reported potential
VoT : 3.023

Frontex study on unaccompanied minors (UM)

FRONTEX

Main Findings

Top 5 nationalities (2009):

- **Unreliable data** to reach an estimate but certainly an increase in proportions of UM among IM

- Sharp increase AFG and SOM in 2009 compared to 2008

- Decrease of IRQ and Sub-Saharan nationals

- GRC point of entry and SWE main destination country

8

Frontex and Human Rights

FRONTEX

1. **Legal aspects**

- **Responsibilities**

    - **Member States** responsible for control of their external borders and law enforcement actions

    - EU, EC, ECJ and Frontex responsibilities

- **The EU and International Acquis**

    - The legal complexity in the maritime operations

2. **Concrete steps**

- Human rights in training for border guards

- Best practices, guidelines (e.g. Identification of people in need of protection or victims of trafficking)

- Independent monitoring of operations

- Cooperation with FRA, EASO, UNHCR, IOM, CoE

Nuray Ekşi, Istanbul Kültür University Law Faculty

Administrative And Legislative Developments On Smuggling Migrants In Turkey
(Powerpoint presentation)

A.I. ADMINISTRATIVE AND LEGISLATIVE STEPS FOR INTERNATIONAL COOPERATION

1. Conclusion of Readmission Agreements with Certain Countries and Conducting Negotiations for Readmission Agreement with the EU

2. Turkey's Action Plan for Asylum and Migration

3. Establishment of Integrated Border Management Coordination Board

4. Ratification of the Constitution of IOM and Close Cooperation with IOM

5. Participation in Joint ICMPD-Europol-Frontex Project

6. Acceding to the Palermo Protocols

7. Ratification of the International Convention on the Protection of All Migrant Workers and Members of Their Families

A.II. CURRENT DEVELOPMENTS IN TURKISH NATIONAL LAW IN COMBATING WITH SMUGGLING OF MIGRANTS

1. Amendments to Article 79 of Turkish Criminal Code No. 5237 in 2010 Because of Inadequate Provisions for Combating Smuggling of Migrants

2. The Draft Code Prepared for the Effective and Human Rights Centered Migration Management

A.III. CONCLUSION

Turkey confronted mass influx from Iraq. During the Saddam Hussein regime 500.000 Peshmerga came to Turkish border. With the assistance and cooperation of the UN, a red line zone was built and Peshmerga settled in the tents.

During the Iran–Iraq war in 1988, 51.542 people were granted residence permits.

During the civil war in former Yugoslavia and the events took place in Bosnia Herzegovina between 1992 to 1997, around 20.000 foreigners came to Turkey and all of them were obtain residence permit.

345.000 Turkish origin Bulgarian citizens came to Turkey and granted resident permits in 1989.

7.489 foreigners between 1990–1991 before and during the Gulf Crisis, and 460.000 afterwards were granted residence permits.

Following the events took place in Kosovo in 1999, 17.746 people settled in Turkey.

On exile from their countries, 32.577 Ahiska Turks also settled in Turkey.

B.I. Administrative and Legislative Steps for International Cooperation

1.	Conclusion of Readmission Agreements with Certain Countries and Conducting Negotiations for Readmission Agreement with the EU

2.	Turkey's Action Plan for Asylum and Migration

3.	Establishment of Integrated Border Management Coordination Board

4.	Ratification of the Constitution of IOM and Close Cooperation with IOM

5.	Participation in Joint ICMPD-Europol-Frontex Project

6.	Acceding to the Palermo Protocols

7.	Ratification of the International Convention on the Protection of All Migrant Workers and Members of Their Families

**B.II.	Current Developments in Turkish National Law in Combating with Smuggling of Migrants**

1.	Amendments to Article 79 of Turkish Criminal Code No. 5237 in 2010 Because of Inadequate Provisions for Combating Smuggling of Migrants

2.	The Draft Code Prepared for the Effective and Human Rights Centered Migration Management

Migrant Smuggling
Article 79

(1)	Any person who, by illegal means and with the purpose of obtaining, directly or directly, a material gain:

(a) enables a non citizen to enter, or remain in, the country, or

(b) enables a Turkish citizen or a non citizen to go abroad,
shall be sentenced to a penalty of imprisonment for a term of three to eight years and a judicial fine of up to ten thousand days. Even if the crime is not accomplished, it is penalized as if accomplished.

(2) If the Crime,

a) endangers the lives of victims

b) entails inhuman or degrading treatment of victims

the penalty shall increased up to two third.

(3) Where the offence is committed in the course of the activities of a criminal organization, the penalty to be imposed shall be increased by one half.

(4) Where the offence is committed by a legal entity, the relevant security measures shall be imposed upon that legal entity.

Programme

Seminar on the human rights dimensions of migration in Europe

Istanbul, 17-18 February 2011

PROGRAMME

Thursday, 17 February 2011

9.00 – 9.30   Registration of participants

9.30 – 10.00   **OPENING STATEMENTS**

- Zekeriya Şarbak, Deputy Undersecretary of the Ministry of the Interior, Representative of the Turkish Chairmanship

- Thomas Hammarberg, Council of Europe Commissioner for Human Rights

Session1: 10.00 - 13.15: Human rights challenges of migration in Europe **Moderator: Professor Turgut Tarhanli**

10.00 - 10.15	Thomas Hammarberg, Council of Europe Commissioner for Human Rights
10.15-10.30	Marc Pierini, Head of the Delegation of the European Union to Turkey
10.30-10.45	Karim Atassi, UNHCR Deputy Representative to Turkey
10.45 - 11.00	Helena Wilson, ECHR Litigation Officer, AIRE Centre
11.00-11.30	**Coffee break**
11.30-13.15	Discussions

Buffet lunch offered by the Turkish Chairmanship

Session 2: 15.00 - 18.00: Unaccompanied migrant children **Moderator: Thomas Hammarberg**

15.00-15.15	Ivi-Triin Odrats, Secretariat of the Council of Europe Parliamentary Assembly
15.15-15.30	Emily Logan, Irish Ombudsman for Children
15.30-15.45	Rebecca O'Donnell, Save the Children, Brussels
15.45-16.15	**Coffee break**
16.15-18.00	Discussions

Buffet dinner offered by the Turkish Chairmanship

Session 3: 09.00 - 11.45: Session 3: Smuggling of migrants Moderator: Elisabet Fura, Judge, European Court of Human Rights

09.00 - 09.15	Martin Fowke, Unit on Trafficking in Persons and Smuggling of Migrants, United Nations Office on Drugs and Crime (UNODC)
09.15-09.30	Richard Ares Baumgartner, Senior External Relations Officer, FRONTEX
09.30-09.45	Professor Nuray Ekşi, Chair of Private International Law Department at the Law Faculty of İstanbul Kültür University
09.45-11.15	Discussions
11.15-11.45	**Coffee break**

11.45 - 13.00: Concluding session General Rapporteur: Professor Theodora Kostakopoulou

12:30-13:00	**CLOSING REMARKS**

- Thomas Hammarberg, Council of Europe Commissioner for Human Rights

List of Participants

Speakers:

Mr Zekeriya Şarbak, Deputy Undersecretary of the Ministry of the Interior

Mr Thomas Hammarberg, Council of Europe Commissioner for Human Rights

Mr Marc Pierini, Head of the Delegation of the European Union to Turkey

Mr Karim Atassi, UNHCR Deputy Representative to Turkey

Ms Helena Wilson, ECHR Litigation Officer, AIRE Centre

Ms Ivi-Triin Odrats, Secretariat of the Parliamentary Assembly of the Council of Europe

Ms Emily Logan, Irish Ombudsman for Children, European Network of Ombudspersons for Children

Ms Rebecca O'Donnell, Policy and Advocacy Officer, Asylum, Migration and Trafficking Save the Children

Mr Martin Fowke, Officer-in-Charge, Anti-Human Trafficking & Migrant Smuggling Unit, United Nations Office on Drugs and Crime (UNODC)

Mr Richard Ares Baumgartner, Senior External Relations Officer, FRONTEX

Professor Nuray Ekşi, Chair of Private International Law Department at the Law Faculty of İstanbul Kültür University

Moderators

Professor Turgut Tarhanli, Dean of Faculty of Law, Istanbul Bilgi University, Turkey

Ms Elisabet Fura, Judge, European Court of Human Rights

General Rapporteur

Professor Theodora Kostakopoulou, Jean Monnet Professor, University of Manchester

Participants :

I. Council of Europe member states:

Albania:
Mr Ermal Muça, Consul

Andorra:
Ms Florencia Aleix, Deputy Permanent Representative on Andorra to the Council of Europe

Austria:
Ms Gerda Vogl, Counsellor, Human Rights Department, Ministry of Foreign Affairs

Azerbaijan:
Mr Elkhan Valiev, Deputy Chief, Migration Department
Mr Emin Aslanov, Attache, Human Rights, Democratisation and Humanitarian Affairs Department

Bulgaria:
Mr Vesselin Vuchkov, Deputy Minister of the İnterior
Ms Mirella Bachvarova-Todarova, Desk Officer

Cyprus:
Ms Andriani Argyropoulou, Administrative Officer, Ministry of İnterior

Croatia:
Ms Romana Kozmanic Oluic, Diplomatic Counsellor, Ministry of Foreign Affairs and European Integration

Czech Republic:
Mr Petr Stepanek, Deputy Head of Mission, Embassy of the Czech Republic in Turkey

Finland:
Ms Sirkku Elise Paivarinne, Director of International Protection Unit, Ministry of the Interior, Migration Department
Ms Katja Kuuppelomaki, Legal Officer, Ministry of Foreign Affairs

Greece:
Ms Ioanna Kotsioni, Special Advisor to the Prime Minister of Greece on Immigration and Asylum Issues

Hungary:
Ms Judit Böröcz, Consul, Consulate General of the Republic of Hungary, Istanbul
Mr Tamas Molnar, Head of Unit, Ministry of Interior, Migration and Border Management Unit

Italy:
Vice-Prefect Umberto Campini
Mr Gianluca Alberini, Consul General, Consulate General of Italy, Ankara
Mr Emilio Giribone, Consul, Consulate General of Italy, Ankara
Mr Leonardo Scardigno, Commercial Attache, Consulate General of Italy, Ankara

Luxembourg:
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Russian Federation:
Mr Anatoly Viktorov, Head of Department, Ministry of Foreign Affairs

Slovakia:
Ms Katarina Gulasova, Consul

Slovenia:
Mr Blaz Slamic, III Secretary, Ministry of Foreign Affairs

Spain:
Ms Maria Paloma Martinez Gamo, Jefa de Área de Derechos y Libertades de los Extranjeros

Sweden:
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Turkey:
Mr M. Zafer Üskül, Parliamentarian and Chairman of the Commission, Commission of Human Rights Review

Mr Mehmet Firik, Chief Inspector of the Ministry of the Interior and Expert at the TGNA Commission, Commission of Human Rights Review

Ambassador Daryal Batıbay,Permanent Representative of Turkey to the Council of Europe
Ambassador Birnur Fertekligil, Deputy Undersecretary, Ministry of Foreign Affairs
Mr Kaan Esener, Deputy Director General, Ministry of Foreign Affairs
Ms Başak Türkoğlu, Head of Department, Ministry of Foreign Affairs
Mr Berlan Pars Alan, Head of Department, Ministry of Foreign Affairs
Mr Mehmet Erkan Öner, First Secretary, Ministry of Foreign Affairs
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Mr Atilla Toros, Chief Inspector of the Ministry of the Interior
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II. Council of Europe bodies

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III. International organisations:

UNHCR:
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International Organisation for Migration:
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Ms Helen Nilsson, IOM Head of Office in Istanbul
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OHCHR:
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European Commission:
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Amnesty International Turkey:
Mr Volkan Görendağ, Refugee Rights Coordinator

Associaton of Solidarity with Refugees:
Ms Pırıl Erçoban, Director

Caritas:
Mr George Joseph, Director Migration Department

CIMADE:
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Economic Development Foundation:
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Helsinki Citizens Assembly:
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APPENDIX

BACKGROUND DOCUMENT

Introduction

The protection of the human rights of immigrants, asylum seekers and refugees is one of the greatest challenges currently facing Council of Europe member states and one of the major themes in the Commissioner's work. Migration laws and policies have long-term effects on democratic societies in Europe and go to the heart of the question of Europe's pluralistic identity. Over-restrictive, dissuasive migration laws and practices in many countries raise serious concerns about their compatibility with Council of Europe and international human rights standards, and foster xenophobic and discriminatory reactions in the societies of the member states.

The Seminar is proposed as a forum for an exchange of views on the most important discrepancies between European migration laws and practices and human rights standards, as well as on optimal ways in which more assistance may be provided to states in reflecting on and revisiting their migration policies.

Participants

The Seminar brings together representatives from Council of Europe member states, migration experts from intergovernmental and non-governmental organisations, and academics.

All attendees are invited to participate actively in the discussions by commenting on the presentations, as well as by providing further information on and evaluating state policies and practices in the migration field in light of the applicable human rights standards.

Programme and structure of the Seminar

The Seminar's duration is one a half days, and will be split into three sessions.

During the first session - in the morning of 17 February - the general human rights challenges currently raised by migration in Europe will be discussed. A second session will follow in the afternoon, focusing on the treatment afforded by countries to unaccompanied migrant children and the human rights issues arising in this context. The third session, which will take place in the morning of 18 February, will be dedicated to the humanitarian and human rights implications of migrant smuggling in Europe.

A General Rapporteur will present a summary of the discussions during the closing session, which will follow immediately after the third session.

The following background notes are provided as a starting-point for a constructive and stimulating discussion.

Session 1: Human rights challenges of migration in Europe

State practice not complying with European human rights standards has intensified with the introduction by various countries of particularly strict border surveillance patrols and the signing of readmission agreements with countries that do not respect international refugee law and human rights standards. Measures of stricter border control have included the strengthening of FRONTEX and the deployment of Rapid Border Intervention Teams to the Greek-Turkish land border.

Migrants who attempt to access Europe are increasingly targeted. Various countries have criminalised the irregular entry and presence of migrants, and some governments have even set annual quotas for the number of people that are to be pursued and deported. However, criminalising migration is not only a disproportionate measure that exceeds a state's legitimate interest in controlling its borders, but

it also undermines the right to seek asylum. Moreover, it further fosters the stigmatisation and marginalisation of migrants.

The European Union plays an increasingly important role in shaping immigration and asylum law and policy. The European Commission is working towards a comprehensive immigration policy that would improve border controls, and prevent irregular employment in EU countries. However, EU legislation in the migration field aimed at harmonising state practice and setting certain minimum standards for the treatment of migrants does not always fully reflect international and Council of Europe human rights standards. Moreover, in some EU countries there is a tendency to lower standards to the minimum extent possible, and even more restrictive legislative and administrative provisions have been introduced during the transposition of EU law into national practice. It is important to bear in mind that EU migration policies and practice inspire and also affect the countries neighbouring the EU, which are nowadays increasingly given the task of acting as Europe's border guards.

Although the 'right to seek and to enjoy asylum from persecution' is a key provision in the Universal Declaration of Human Rights, this fundamental principle is not fully protected in Europe today. In recent years European states have adopted a series of policies aimed at deterring migrants from entering into their territories, disregarding the fact that some of them may be refugees, and thus entitled to protection under international law. The responsibility to rescue persons at sea and the fundamental right to be protected from *refoulement* are not always respected.

Under international law, refugees' freedom of movement may only be restricted if such restrictions are considered 'necessary': that is, in clearly defined exceptional circumstances, and in full consideration of all possible alternatives. Detention upon entry of asylum seekers should be allowed only on grounds defined by law, for the shortest possible time, and only for predefined purposes, such as the need to verify the identity of the asylum seeker or to handle the situation where the asylum seeker has destroyed his or her travel or identity documents or has used fraudulent ones. These principles are, however, not fully respected by states. Some states detain asylum seekers when their transfers are underway to the state responsible for examining their application, particularly in the context of the application of the 'Dublin mechanism'. Irregular immigrants are also detained on a regular basis – a measure sanctioned by the 'Return Directive', which allows for the detention of immigrants for a period of up to 18 months pending the procedure of return to their country of origin or transit.

The weaknesses of the 'Dublin mechanism' have recently been markedly exposed in the judgment of the European Court of Human Rights in the case of *M.S.S. v. Belgium and Greece* of 21 January 2011. The Strasbourg Court confirmed that the assumption that all EU countries respect fundamental rights and may thus automatically transfer asylum seekers to the member state of first entry cannot be maintained. As the Commissioner has stressed, the 'Dublin mechanism' clearly requires rethinking, and should be replaced by a more humane and equitable system.

Restrictive asylum and immigration policies in European countries have also affected the principle that separated families should be reunited. Family reunification, of particular importance for the well-being and successful integration of migrants in host societies, is often hampered by states through the introduction of ever more restrictive criteria for the entry into and residence in the host country of family members, such as the application of language and integration exams, requirements concerning the age and income of the sponsor or the use of DNA testing to verify whether the applicant is genuinely the child or parent of the resident family member. A number of governments have chosen to narrowly interpret their obligations as regards the right to family reunification – a stance reflected in the EU 'Family Reunification Directive'. Under this directive, only spouses and unmarried minors benefit from favourable treatment, and only persons with full refugee status are accepted as sponsors, while those with subsidiary protection or other migrants do not.

Precise statistics on the number of irregular migrants in Europe are not available, but it is estimated that there are some 5.5 million irregular migrants within the European Union, and still more in other parts of Europe. Even if their right to remain in the country is not protected, irregular migrants enjoy certain human rights, such as the right to basic health care and education. Moreover, the prohibition of *refoulement* also applies to this category of migrants. Despite the measures taken by European countries the reality is that irregular migrants remain in Europe and work in various sectors, such as agriculture or cleaning services, in which their labour is very much needed. This raises the issue of regularisation – government decisions to legalise the presence of certain irregular migrants. Although controversial, this needs to be considered, being perhaps the only means of safeguarding the dignity

and human rights of a group of persons that is particularly vulnerable and prone to exploitation and abuse on account of their irregular status.

Restrictive state policies in the migration field have brought along a rise in xenophobic and racist rhetoric and hate crime in Europe. In recent years extremist political parties in various European countries have advanced and maintained their popular support thanks to their anti-migrant rhetoric. Xenophobic speech by public figures further fosters prejudices against migrants, thus creating a vicious circle. In this context, the Council of Europe's standards, its institutions and monitoring mechanisms provide valuable guidance to states.

Questions:
- How should European migration policy and practice be shaped to make it more compliant with international and Council of Europe human rights standards? In particular, given the growing impact of EU law, how can human rights be mainstreamed into the EU *acquis* and European state practice concerning immigration and asylum?
- How should the 'Dublin mechanism' be reformed to ensure that the human rights of asylum seekers are respected at all times and the principle of sharing of responsibility between European states is better safeguarded?
- In your country, do restrictive border surveillance measures impede the right to seek asylum? Do persons in need have effective access to asylum procedures?
- How are asylum seekers accommodated in your country? Is the principle of freedom of movement of asylum seekers respected?
- What is your country's practice with respect to irregular immigrants? Are irregular immigrants subject to criminal sanctions? Is detention applied with respect to them? How does your country envisage tackling the issues concerning irregular immigrants in the long run? Are regularisation programmes considered as an option?
- Has your country concluded readmission agreements with non-European states? Does your country return migrants that have resided in the host state for many years and are successfully integrated in society?
- What is the tone of public debate on migration in your country and how does it influence law and policy in this field? How can we reduce xenophobic public discourse and prejudices in European societies?
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Session 2: Unaccompanied migrant children

The precise number of unaccompanied migrant children in Europe is not known due to a lack of reliable statistics. However, according to some estimates, as many as 100 000 unaccompanied migrant minors may be present in Council of Europe member states, the majority of them being boys between the age of 14 and 17. Unaccompanied minors constitute a particularly vulnerable group of migrants – they are not only children remaining outside their country of origin but are moreover separated from their family members or their primary caregiver.

The UN Convention on the Rights of the Child requires that a child temporarily or permanently deprived of his or her family environment be entitled to special protection and assistance by the state. State parties should ensure alternative care for such children, in accordance with their national laws and taking the best interest of the child as a primary consideration.

However, unaccompanied migrant minors are not always granted the special care they require. National practice with respect to these children varies considerably among Council of Europe countries.

Within the ambit of their border control activities some states deny migrant children access to their territory, without due regard to fact that they might be asylum seekers. Upon arrival in host states, migrant children are frequently accommodated in an unsuitable environment or denied appropriate care and assistance. Certain countries detain unaccompanied migrant children, pending the verification of their age or asylum applications or prior to their return to the country of origin.

In the cases of unaccompanied minor asylum seekers the asylum procedure should be conducted in a child-sensitive manner and take into consideration the minors' particularly vulnerable situation on account of their separation from their family environment. It is of great importance that unaccompanied

migrant children understand the asylum procedure, are assisted by a legal guardian and represented by a lawyer free of charge. Age determination should be made on the basis of a multidisciplinary approach with due respect to the child's integrity and not be based exclusively on a medical assessment. Since 2007, the Council of Europe has been promoting the establishment of life projects that would take into account children's expectations, as well as the available possibilities in the host country.

Some member states regard the return of unaccompanied migrant children to the country of origin as the optimal solution. They assume that family tracing should lead automatically to reunification in the country of origin. Moreover, several Council of Europe states have adopted in recent years or are currently considering the adoption of a policy that foresees the financing of reception centres in countries of origin, to which unaccompanied migrant children may be returned if they cannot be reunited with their families. Frequently children are sent back to war-torn or dysfunctional countries, without other options having been considered, such as integration in the country of destination or relocation to another state. The European Council's Conclusions on unaccompanied minors of 3 June 2010 invite EU countries to, among other things, finance projects in third countries to facilitate the return and reintegration of unaccompanied minors to their countries of origin.

Questions:
• How does your country ensure that border control officials are able to identify upon entry whether a migrant is an unaccompanied minor, possibly an asylum seeker or a victim of trafficking in human beings? Are border guards trained to identify such persons and ascertain his or her individual circumstances? Are migrant children informed of their rights immediately upon arrival?
• In which conditions are unaccompanied migrant minors accommodated upon arrival? Are they held in detention during the age determination process, the asylum procedure or prior to their return to the country of origin or transit? Do they have access to proper health care, education, vocational training, leisure activities?
• Is age determination performed in a child-friendly manner using a multidisciplinary approach? Are other methods than bone X-ray used?
• Are legal guardians appointed for unaccompanied migrant children in your country? Do they receive legal, social and psychological assistance? Is special care provided to children who are victims of trafficking in human beings?
• Is the asylum procedure in your country child-sensitive? Are applications from unaccompanied migrant minors given priority? Are there time limits for the processing of applications of children? Are children represented by a lawyer during the asylum procedure, provided free of charge by the state?
• Does your country apply effective mechanisms for family tracing? How is the search for durable solutions conducted? Is the best interest of the child taken into consideration and are individual life projects determined? How is the assessment made before a child's return to the country of origin or transit? In the case of return – does your country follow up on the children that have been sent back?

Session 3: Smuggling of migrants

The smuggling of migrants is an issue that has received considerably less attention than other human rights challenges in migration policies. However, it is a real and pressing problem, affecting especially the Euro-Mediterranean member states, which frequently serve as transit points for further migration to other European countries. It is a highly profitable business that is developing and evolving rapidly, depending on the changes in demand and states' migration policies.

Thousands of smuggled migrants have perished at sea or lost their lives or limbs while trying to cross land borders, including those contaminated by anti-personnel mines. Many of the survivors have remained without help in Europe despite states' responsibilities towards these persons arising notably from the European Convention on Human Rights.

The basic purpose of the main relevant international instrument, the 2000 UN Protocol against the Smuggling of Migrants by Land, Sea and Air ('Smuggling Protocol'), is primarily the combating and prevention of smuggling of migrants, and the promotion of inter-state co-operation, whereas the protection of the human rights of smuggled migrants is stated somewhat as a subsidiary goal. This approach is reflected in the wording of the entire instrument, as well as in state policy and practice in this field throughout Europe.

Under the Smuggling Protocol, although a smuggled migrant is not to be considered and punished as a perpetrator, an accomplice or a conspirator in the act of smuggling, he has not been defined as a 'victim', as is the case for trafficked persons in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ('Trafficking Protocol'). This approach stems primarily from the conviction that, unlike trafficked persons, smuggled migrants have not been the subject of exploitation or abuse, and that while trafficked persons have had no real control over their decision to migrate, smuggled migrants consciously took such a decision, the element of coercion thus being absent in their case.

These distinctions frequently bring about a difference in the treatment of these two types of migrants by the countries of destination, which is to some extent sanctioned by the wording of the two 'Palermo Protocols'. Whereas the Trafficking Protocol requires states to consider implementing measures *inter alia* to provide for the physical, psychological and social recovery of victims of trafficking, as well as housing, counselling, medical and material assistance, employment and training opportunities, such provisions do not appear in the Smuggling Protocol. Moreover, the Trafficking Protocol requires states to consider adopting legislation to enable trafficking victims to remain in the country of destination 'temporarily, or permanently, in appropriate cases'.

However, many smuggled migrants are subject to serious human rights violations – at different stages of their journey. The line between human trafficking and migrant smuggling can be very thin, particularly as the methods of payment for smuggling may vary and the position in which migrants find themselves can change in the course of their travel.

The main focus of European states is currently on border control and the prevention, investigation and prosecution of smuggling-related offences. Extensive border surveillance operations frequently put the lives of smuggled migrants at risk. Vessels abiding by the fundamental principle of rescue at sea are increasingly encountering problems as states refuse to let migrants disembark.

Smuggled persons that reach their country of destination are generally perceived as irregular migrants seeking an economic advantage, and may thus not be given the possibility of filing an asylum claim, even though asylum seekers are often among such groups. In spite of the fact that according to the Smuggling Protocol migrants should not be held criminally liable for being the object of smuggling, most states impose criminal or administrative sanctions on smuggled migrants, including detention and deportation to the country of origin or transit.

Smuggled migrants, moreover, frequently act as witnesses in criminal cases brought against smugglers. However, they are often not able to benefit fully from victim and witness protection schemes, and due attention is not paid to their vulnerable position and special needs.

Questions:
- Do border guards in your country ensure that the principle of rescue at sea is fully respected during border surveillance operations? Do smuggled migrants, once on your state's territory, have access to a fair and efficient asylum procedure? Do your country's border guards receive special training in order to be aware of the particularly vulnerable situation in which smuggled migrants find themselves?
- How can FRONTEX promote and protect human rights standards in the context of its close collaboration with European states' border authorities?
- Does your country impose sanctions on vessels which bring migrants to shore after rescuing them at sea?
- Does your country participate in joint anti-smuggling operations – bilaterally or under the auspices of international organisations? In such situations, what are the rules concerning the treatment of smuggled migrants?
- What treatment is afforded to smuggled migrants once they have entered your country? Are smuggled migrants detained and/or criminalised? Do they receive any form of protection and assistance?
- How is the assessment made in your country to ascertain whether an individual is a victim of trafficking or migrant smuggling? Do smuggled migrants receive medical and/or psychological support?
- Are smuggled migrants participating in criminal cases against smugglers granted victim and witness protection? How can these procedures be strengthened to take into account the smuggled persons' needs and human rights?

- How does your country promote or strengthen development programmes to combat the socio-economic causes of migrant smuggling, in accordance with the Smuggling Protocol?

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