



Public consultation –

**Debate on the future of Home Affairs policies: An open and safe Europe –
what next?**

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In response to the public consultation on the future of EU Home Affairs policies, I would like to take this opportunity to present some issues I hope will be considered in the development of the “post-Stockholm” programme.

In my capacity as the UN Special Rapporteur on the human rights of migrants, I presented a report to the United Nations Human Rights Council in May 2013 on the management of the external borders of the EU and its impact on the human rights of migrants.¹ This report was the culmination of a yearlong study that involved research on the EU’s policy framework, consultations with EU institutions in Brussels, and visits to both sides of two external EU borders: Tunisia-Italy and Turkey-Greece. The visits served as case studies for my research. The study was undertaken in close consultation with the EU, particularly with DG Home.

In my report, I noted that one has witnessed recently the broadening of a rights-based approach within EU migration policy, mainly in relation to regular migration. I also note some advances relating to the external border management, such as the 2011 revision of the Frontex Regulation, the appointment of a Fundamental Rights Officer and the establishment of a Consultative Forum. However, the increasing competence of the EU in the field of migration has not always been accompanied by a corresponding increased guarantee of rights for those who find themselves the objects of migration policy, the migrants themselves, and in particular irregular migrants. I regret that, within the EU policy context, irregular migration remains largely viewed as a security concern that must be stopped. This is fundamentally at odds with a human rights approach, concerning the conceptualization of migrants as individuals and equal holders of human rights. Within the EU institutional and policy structures, migration and border control have been increasingly integrated into security frameworks that emphasize policing, defence and criminality over a rights-based approach. Investments in security apparatus have not been matched with investments in providing adequate protections for the human rights of migrants.

In this respect, I would like to stress that any attempt at “sealing” borders, preventing irregular migrants from entering the EU, will fail. Sealing international borders is impossible, and migrants will continue arriving despite all efforts to stop them. Currently, migrants themselves, often with the help of migrant smugglers, are crossing borders regardless of State policies. They see no other option but to migrate irregularly, due to a lack of regular migration channels, particularly for low-skilled persons. They migrate due to the push-factors in their countries of origin, which may include war, conflict, natural disasters, persecution or extreme poverty. But they also migrate due to pull-factors, that is largely in response to unrecognized needs in the labour markets in the EU, as migrants are often willing to do the “dirty, difficult and dangerous” jobs that nationals will not, at the exploitative wages that unscrupulous employers will offer, including in the construction, agriculture, hospitality and care-giving sectors.

At some point, repression of irregular migration is even counterproductive, as it drives migrants further underground, thereby empowering and entrenching smuggling operations,

¹ A/HRC/23/46

and creating conditions of alienation and marginalization that foster human rights violations, such as discrimination, exploitation, trafficking and violence against migrants. The discourse that emphasises the protection of territorial sovereignty through “combatting” irregular migration, is actually paradoxical because the framework it creates empowers the criminal rings that deplete the State from its power to effectively control the border. This is a lesson learned at the time of the Prohibition in America, and it is a lesson we are slowly learning from the “war on drugs”. It has yet to influence our debates and policies on irregular migration. States can thus be seen as co-responsible for creating conditions that encourage smuggling and make it more dangerous.

I urge the EU to establish a human rights-based, coherent and comprehensive migration policy which takes all these issues into account. This policy should address the pull-factors for irregular migration, namely the unrecognized needs for migrant labour in destination States. States should acknowledge these labour needs, including for low-skilled work, and open up more regular migration channels. They should also foster a healthy social debate on how to ensure a viable future for some soft economic sectors without labour exploitation. Dealing with such pull-factors would lead to less irregular border crossings, less smuggling of migrants, less loss of life at borders, less labour exploitation, and less migrants’ rights violations.

In order to protect the rights of irregular migrants, efforts must also be undertaken to establish a “firewall” between immigration enforcement and all other public authorities, who should not be used as auxiliaries of immigration enforcement. Irregular migrants should be able to access health care, education, police, social services, public housing and labour inspectors without risking being reported to immigration authorities. Migrant workers should be considered as workers first, and all labour standards must be respected and proper wages and adequate compensation must be paid despite the migrant worker being in an irregular situation and susceptible to being deported.

Of course, States have the power to admit on their territory, to deny entry to or to return migrants, but they equally have an obligation to respect the human rights of all migrants in the process. While it may constitute an administrative offence, irregular migration is not a crime. As the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime has clearly established, irregular migrants are not criminals per se, and should not be treated as such. Terminology is important in this respect: migrants may be irregular or in an irregular situation, but they are not “illegal”, and I regret the Council’s systematic use of this term. Incorrect terminology contributes to negative perceptions on migration, reinforces negative stereotypes against migrants, and legitimates a discourse of the criminalisation of migration, which in turn contributes to further alienation, marginalisation, discrimination and violence against migrants. This is further exacerbated by legislation in some countries which criminalizes the provision of assistance to irregular migrants, including in relation to the provision of health services and housing.

Criminalization is often linked to anti-migrant sentiments, based on a flawed conceptualisation of the role of migration in our diverse societies, and on inappropriate language in the political and media discourse. There is thus a need for a counter-discourse, noting the benefits migration brings to both countries of origin and destination. However, this remains difficult as long as migrants do not have access to the political stage. The EU must thus fight racism and xenophobia much more vigorously, celebrating the diversity of cultures and religions as an enrichment for everyone, citizens and foreigners alike.

Access to justice is key, as courts, unlike politicians, will defend the rights of migrants without being subjected to any electoral pressure. We have seen good examples in this regard both in national courts, the European Court of Human Rights, and the European Court of Justice.

Although EU law under the Return Directive stipulates that detention for the purpose of preparing deportation proceedings should be a measure of last resort, I have observed that, within the discourse of securitization of migration and border control and of criminalisation of irregular migration, the systematic detention of irregular migrants has come to be viewed as a legitimate tool in the context of EU migration management. In my research and country visits, I have witnessed inadequate procedures for detention, including the failure to respect legal, procedural and substantive guarantees, the detention of persons without prospect of removal, and the detention of children. Similarly, return procedures, particularly when facilitated through readmission agreements, failed to provide the necessary procedural and substantial safeguards.

In this context, I refer to my report to the Human Rights Council from 2012, which I dedicated to the topic of detention of irregular migrants². In that report, I emphasized that detention is not an effective deterrent for irregular migration, and that in order not to violate international human rights law, detention must be prescribed by law and necessary, reasonable and proportional to the objectives to be achieved. I thus urge the EU in its future migration policy, to systematically explore alternatives to detention: non-custodial measures should always be preferred and detention should be reserved to a minority of specifically motivated cases.

Finally, let me stress that the distinction between irregular migrants and asylum seekers is often an artificial one. Just because someone does not fit into one of the categories of the Convention on the Status of Refugees does not mean they do not have any protection issues: irregular migrants are placed in a precarious situation where exploitation, discrimination and violence is rife. I of course welcome the strong focus on the protection of asylum seekers and refugees in the EU, however this has often resulted in the neglect of the rights of irregular migrants, who are sometimes referred to as “mere” or “economic” migrants with no protection needs, even though this is often not the case.

² A/HRC/20/24