

Panel: European Migration Policy and the Protection of Fundamental Rights

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Dear ladies and gentlemen, good morning!

- 1) I would like to thank the organizers for having invited me. And I'm happy to be talking on this panel today on the European Union's migration policy and the protection of fundamental rights. Obviously, this is a very broad topic. Within the given time constraints, I will be able to deal with selected points only.

- 2) My short presentation intervention will be hence be structured as follows:
 - I) (a few words on) Migration and IOM's role
 - II) Migration policy of the European Union
 - III) Policy of the European Union and the protection of fundamental rights in selected areas

I) Migration and IOM's Role

Migration as a phenomenon in today's world

- 3) Migration is considered one of the most important global issues of the early twenty-first century, as more people are on the move today than at any other point in human history. The total number of international migrants worldwide in 2010 is estimated to be 214 million persons (UN DESA, 2009¹).

¹ United Nations Department of Economic and Social Affairs (UNDESA), *Trends in total migrant stock: the 2008 revision*, UNDESA, New York.

- 4) The task of formulating a workable global approach to the management² of international migration remains a formidable challenge.
- 5) However, it is acknowledged that carefully managed migration has the potential to help economic growth and innovation in destination countries, and poverty reduction and development in poorer origin countries. Migration can provide important human freedom and human development outcomes for migrants and their families.

IOM's role

- 6) The International Organization for Migration (IOM) is the principal intergovernmental organization in the field of migration. It was founded in 1951 and has today 127 Member States. IOM runs over 2,360 programmes world-wide with more than 7,000 staff members in more than a hundred countries.
- 7) IOM is dedicated to promoting humane and orderly migration for the benefit of all, i.e. meaning migrants, host countries and countries of origin. IOM provides services and advice to governments and migrants. IOM works closely with governmental, intergovernmental and non-governmental partners.

Migration

- 8) One of the challenges of the migration debate actually defining migration and the migrant. At the international level, no universally accepted legal definition of migrant exists. However, the term **“migrant”** is usually understood to cover all cases where the decision to migrate is taken freely by the individual concerned for reasons of “personal convenience” and without any intervention of an external compelling factor. This term, therefore, applies to persons, and family members, moving to another

² The word “management” has occasionally been criticized as a euphemism for “restriction” or “control” and for giving insufficient attention to human rights concerns. As used in *World Migration 2008*, it refers to a planned and thoughtful approach to policy development; and to the careful selection and implementation of appropriate policy responses to the key questions confronting the international community.

country or region to better their material or social conditions and improve the prospect for themselves or their family³.

- I.e. no refugees, as there is a force element, namely persecution

II) Migration Policy of the European Union

9) I would now like to come to my second point, i.e. the migration policy of the European Union. I would like to highlight that in my presentation I will focus on migration policy with respect to third-country nationals, i.e. those nationals that are not nationals of EU Member States. Nationals of EU Member States enjoy freedom of movement within the territory of the EU.

10) Two recent and important developments to talk about here are :

- European Charter of Fundamental Rights
- Stockholm Programme

European Charter of Fundamental Rights

11) In June 1999, the Cologne European Council concluded that the fundamental rights applicable to the European Union (EU) level should be consolidated in a charter to give them greater visibility. The European Charter of Fundamental Rights was formally proclaimed in Nice in December 2000 by the European Parliament, Council and Commission.

12) In December 2009, the Charter was finally given legally binding effect with the entry into force of the Lisbon Treaty. The Fundamental Rights' Charter now has the same legal value as the European Union Treaties

³ IOM Glossary, 2004.

13)The Charter recognizes a range of personal, civil, political, economic and social rights of EU citizens and residents. For the first time, it brings together, in a single document, rights previously found in a variety of legislative instruments, such as

- national and EU laws
- international conventions from the Council of Europe, the United Nations (UN) and the International Labour Organisation (ILO).

14)The Charter applies to the European institutions, subject to the principle of subsidiarity, and may under no circumstance extend the powers and tasks conferred to them by the Treaties. The charter also applies to EU countries when they implement EU law. Any of the rights must be interpreted in accordance to those traditions.

15)Poland, United Kingdom and Czech Republic have secured Protocols that restrict the interpretation of the charter by the Court of Justice and the national courts of these countries.

16)Added value: binding and one single document.

Stockholm Programme

17)The Stockholm Programme was adopted by the European Council at its meeting on 10-11 December 2009 in Stockholm. It is the EU's 5-year-plan in the area of freedom, security and justice, from 2010 to 2014. It follows the The Hague Programme (2004 - 2009). Following the Stockholm Programme, the European Commission presented an Action in April 2010.

18)The Stockholm Program's introduction highlights migration as a priority area. The program's long list of action points include migration and development, labor migration, rights of third-country nationals, integration, irregular migration, and a range of asylum issues.

- 19) The so-called Global Approach⁴ to Migration is recognized as a key element of EU acquis and the Stockholm programme follows three established priorities: promoting mobility, establishing links between migration and development, and working to prevent irregular migration.
- 20) The Stockholm Program explicitly highlights the need to identify common interests with third countries, arguably one of the major challenges for the European Union. The main innovation in this section is the development of migration profiles for third countries. These profiles would gather together relevant data and should support both EU Member States and profiled countries in their efforts to develop cooperative immigration policies.
- 21) The new element here is that the Commission has been explicitly mandated to investigate the potential impact of climate change on migration flows. Member States are both concerned about the issue, yet lack detailed knowledge.
- 22) One significant element of the immigration program is the commitment to grant third-country nationals "rights and obligations comparable to those of EU citizens" by 2014⁵.
- 23) According to the Stockholm Programme, an effective and sustainable return policy remains an essential element of a well-managed migration system and the central policy response for irregularly residing third-country nationals. The program

⁴ The global approach can be defined as "an approach that brings together migration, external relations and development policy to address migration in an integrated, comprehensive and balanced way in partnership with third countries. It comprises the whole migration agenda, including legal and illegal migration, combating trafficking in human beings and smuggling of migrants, strengthening protection for refugees, enhancing migrant rights and harnessing the positive links that exist between migration and development. It is underscored by the fundamental principles of partnership, solidarity and shared responsibility and uses the concept of 'migratory routes' to develop and implement policy" (Global Approach 2007, p. 18).

⁵ The exact text of the Programme reads as follows: 6.1.4 Proactive policies for migrants and their rights
The European Union must ensure fair treatment of third country nationals who reside legally on the territory of its Member States. A more vigorous integration policy should aim at granting them rights and obligations comparable to those of EU citizens. This should remain an objective of a common immigration policy and should be implemented as soon as possible, and no later than 2014.

emphasizes the need for a sustainable return policy, supplemented by the encouragement of voluntary return, and renewed efforts to sign readmission agreements with more countries of origin and transit.

24) The Stockholm Programme also refers to unaccompanied minors (they were not addressed in the Tampere or Hague Programmes). The Commission developed an action plan to highlight possible measures to address the issue. UAM in Europe:

- Challenge for European Member States
- with respect to reception, treatment, durable solutions, data
- high on political agenda/ working groups

III) **Policy of the European Union and Protection of Fundamental Rights in Selected Areas**

25) As outlined at the beginning of my presentation I would now like to look at selected areas of the European Union's Policy, namely trends in family reunification vs labour migration, and the EU Returns Directive, and Rescue at Sea.

Developments Family Reunification vs Labour Migration

26) Migration is high on both national and EU agendas. The decline and aging of the European population has contributed to an increased awareness concerning the need for immigration. The demographic factor, coupled with its foreseeable implications on the various social welfare systems, has provoked increased debate concerning immigration within EU institutions and EU Member States alike. There is a growing awareness that without migrants, Europe will not be able to maintain the same standard of living.

27) However, as much as European States are competing with other business locations (such as the USA and Japan) for highly skilled third country nationals, a trend can be seen among some Member States towards more restrictive policies with regard to other forms of legal immigration, such as family reunification.

- 28) Member States are struggling to find a well-balanced and comprehensive approach to migration that will serve such diverse objectives as to attract highly skilled migrants, prevent irregular migration and safeguard the human rights of migrants.
- 29) Member States have for a long time been reluctant to give up competencies in the field of labour migration. With the Policy Plan on Legal Migration adopted in 2005 this position seemed set to change. In 2009, the “Council Directive on the conditions of entry and residence of third country nationals for the purposes of highly qualified employment” (Highly Qualified Migrants Directive or Blue Card Directive) as adopted.⁶ The Directive should help to improve the competitiveness of the EU economy, as it is aimed at responding to the demands for highly qualified labour and the off-setting skill shortages by harmonizing the admission of this category of workers. Highly qualified third country nationals are given preferential conditions for entry and stay by the Directive.
- 30) Interestingly, EU Member States are increasingly offering students the possibility of remaining in the country for a limited period of time after successful graduation in order to search for a job. This measure facilitates the retention of highly qualified third country nationals who have the potential to contribute to the national (and European) economy.
- 31) On the other hand, a trend can be observed in several EU Member States towards the restriction of immigration in the area of family reunification through, for example, the introduction of integration-related conditions. Integration related conditions are examinations on the language and civic knowledge of the relevant host country. Also, discretion that is provided for by Council Directive 2003/86/EC on the right to family reunification can lead to restrictions on the eligibility of family members that are not part of the nuclear family (e.g. parents, adult children and unmarried partners) and age restrictions on spouses and children, as well as waiting periods before family members can join the sponsor.

⁶ However, the Proposal does not create a right of admission; Member States will maintain control over admission to their labour markets. The Proposal also underlines and reinforces the Community Preference Principle.⁶ Key elements of the Proposal include a fast-track procedure⁶ for admission based on common criteria: a work contract or a binding job offer, professional qualifications, and a minimum salary level that has to be at least three times the level of the existing national minimum wage or, alternatively, three times the minimum income under which social assistance is granted in the Member States in question.

32) These measures can, in individual cases and under certain circumstances, lead to violation of human rights of the family unit of concerned persons.

EU Returns Directive

33) Another selected area worth mentioning in this context is the EU Returns Directive.

34) The Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals (the Returns Directive) was adopted on 16 December 2008. EU Member States shall transpose this Directive into national legislation by 24 December 2010.⁷

35) The Returns Directive is an important element of EU policy for common standards in the fight against irregular migration. It is to be positively noted that the Directive reaffirms the respect for fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations. Moreover, the Directive explicitly spells out the need for a two-step procedure that ensures that priority is given to enabling the irregular migrant to opt for voluntary return (as the preferred option over forced return).

36) However, the Directive is also criticized for a number of aspects.

37) With regard to the scope of the Directive, there is discretion for States to apply the Directive or not to « border cases »⁸. This may lead to situations where crucial safeguards and the right to an effective remedy are not guaranteed.

⁷ By way of “opting-out”, the United Kingdom and Ireland did not take part in the adoption of this Directive.

⁸ According to Article 2 of the Directive “Member States may decide not to apply this Directive to third-country nationals who: (a) are subject to a refusal of entry in accordance with Article 13 of the Schengen Borders Code, or who are apprehended or intercepted by the competent authorities in connection with the irregular crossing

- 38) There is an obligation to issue a return decision but no corresponding obligation to grant legal status if return is not feasible, for example, for technical reasons.
- 39) The voluntary departure period set out in the Directive is 7 to 30 days. This is short and, hence, might not be sufficient to prepare a sustainable return.
- 40) The return and removal of unaccompanied children is allowed not only to family members in the home country but also when there are « adequate reception facilities in the state of return. » This might raise questions as regards to respect for the best interests of the child.
- 41) Member States are obliged to include an entry ban for up to 5 years in return decisions for certain cases and they are free to include the re-entry ban in every other return decision. There is no obligation to withdraw the re-entry ban, even if third-country nationals left in full compliance with the return decision.
- 42) Legal remedies can be of non-suspensive character, which might put at risk the human rights for persons being returned. This puts a question mark on effective remedies.
- 43) The Directive provides the possibility to detain third-country nationals, including families and unaccompanied minors, as well as other vulnerable persons, for up to 18 months. Alternatives to detention are not considered in the Directive.
- 44) The Returns Directive has been much discussed internationally. It received criticism from non-EU states and scholars. Some of the points mentioned above are currently under discussion at the EU level, e.g. UAM. A first judgment of the European Court of Justice on the Returns Directive indicates that the Court is going to stand firm for the

by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to stay in that Member State; (b) are subject to return as a criminal law sanction or as a consequence of a criminal law sanction, according to national law, or who are the subject of extradition procedures.”

rights of migrants and will interpret the rights of the State under this Directive restrictively.

Rescue at Sea

45) The last area I want to mention today is rescue at sea. The world's oceans cover 70 percent of the globe. Hence, migrants often find themselves travelling by sea. It is an issue in several regions of this world, such as the Mediterranean Sea and the Gulf of Aden. Many people risk and lose their lives traveling by sea in unseaworthy and overcrowded boats. The natural danger of the oceans, coupled with unscrupulous networks of smugglers and traffickers, make migration by sea one of the most dangerous methods of irregular migration.

46) Migration by sea is politically a very sensitive issue, particularly for destination countries. It has been for some years now one of the most urgent issues on the European Union's agenda and has been included in its external policies. EU Member States at the southern border complain about the disproportionate burden of migrants arriving on their shores. Those countries call for burden sharing among all EU Member States. It is noteworthy that, as a first initiative in this regard last year, a pilot project was undertaken whereby France accepted to take in approximately 100 recognized refugees from Malta.

47) While there is a clear obligation under international law to rescue persons found in danger at sea, there are no regulations under international or EU Law addressing what to do with the rescued persons afterwards, i.e. which State should take in persons rescued at sea. And States do have concerns with respect to rescue at sea. We remember the incident of last year when Italy pushed back boats with migrants to Libya.

48) However, there are certain protection considerations under international law that have to be applied. The human rights of all beneficiaries of rescue at sea operations,

regardless of legal status, have to be respected. Discrimination on the grounds of sex, race, ethnic or social origin, religion or nationality is prohibited.

49) The special needs of vulnerable groups, such as unaccompanied minors, women, victims of trafficking, and persons in need of medical care must be considered in all response activities, that is, during rescue operations on board, at disembarkation and thereafter. Principles of international refugee protection, most importantly the principle of non-refoulement, must always be respected.

50) A Council Decision supplementing the Schengen Borders Code was recently adopted. It reiterates in its general principles the human rights considerations outlined above. While this is to be positively acknowledged, rescue at sea is certainly a topic to be developed further in the future.

IV) Conclusions

51) In conclusion, I would like to summarize by stating that in recent developments of EU Migration Policy an emphasis has been placed on fundamental rights through the Charter on fundamental rights as well as through the Stockholm Programme. Moreover, fundamental rights are referred to as the overarching principles in current EU legislative instruments. However, we have also seen that there are certainly points that should be reviewed with view to ensure full respect for the fundamental rights of migrants.