



The future of EU policies in the area of freedom, security and justice: a human rights perspective

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“While the EU’s promise on human rights is good news and needs to be supported, its deeds have to improve if it wants to leave a positive imprint on Europe’s future.”

(Council of Europe Commissioner for Human Rights, *Talk about human rights in the EU*, 5 December 2013)

Introduction

The adoption of the Stockholm programme (2009-2014)¹ coincided with the entry into force of the Lisbon Treaty. The Lisbon Treaty reinforced the importance of human rights in European Union (EU) policies, both inside and outside of the Union, including by making the EU Charter of Fundamental Rights legally binding. The Stockholm programme served to guide some positive action in the field of freedom, security and justice. It led the EU to adopt protection standards for suspects and victims of crime, to a draft agreement with the Council of Europe on the EU's accession to the European Convention on Human Rights and Fundamental Freedoms (ECHR),² and to the completion of the Common European Asylum System (CEAS).

Despite some significant steps forward in relation to human rights, the Stockholm programme fell short of its stated objective to ensure that “the area of freedom, security and justice, must, above all be a single area in which fundamental rights are protected”. Five years on, the EU remains an area where certain groups, such as Roma, are targets of widespread discrimination and hate motivated violence. Intolerance towards lesbian, gay, bisexual, transgender and intersex (LGBTI) people continues. Violence against women remains a pervasive problem. Further, the rights of migrants, refugees and asylum-seekers are inadequately protected. Migrants, refugees and asylum-seekers continue to die at EU borders. Their detention is systemic, rather than exceptional. And their lack of agency makes them vulnerable to abject exploitation and physical and verbal abuse.

The EU approaches a crucial turning point, as it shapes future policies in the area of justice and home affairs. It is vital that the Union steps up to the challenge of ensuring that respect for human rights is the bedrock of all its policies and action. This requires the commitment of all EU institutions and member states to protect and promote human rights, in line with articles 2 and 3 of the Treaty of the European Union (TEU). Furthermore, the development of an overarching EU-internal human rights framework strategy and action plan should be at the forefront of any future programme.

Amnesty International's contribution, which builds on its longstanding human rights advocacy work at EU level,³ seeks to inform the ongoing discussions in the three EU institutions, such that human rights underline the orientation and objectives of EU policy.

This paper is organised into two chapters as follows:

I. **The need for a comprehensive human rights framework strategy and action plan**

The first chapter demonstrates the need and proposes an outline for an overarching EU-internal human rights framework strategy and action plan

II. **Thematic highlights for consideration in the area of justice and home affairs**

The second chapter builds upon this outline, highlighting thematic priorities for EU action, and detailing recommendations to ensure a proactive, protective EU response to pressing human rights challenges across all policy and legislation

i. **Part 1: Justice and non-discrimination**

ii. **Part 2: A human rights-based approach to asylum and migration**

¹ European Council, *The Stockholm Programme – An open and secure Europe serving and protecting citizens*, 2010/C 115/01.

² Council of Europe, *Draft revised agreement on the accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 3-5 April 2013, 47+1(2013)008rev2.

³ See, with particular regard to the development of EU policies in the justice and home affairs area, Amnesty International, *Briefing on the future Stockholm Programme*, July 2009, available at <http://www.amnesty.eu/static/documents/2009/AIBriefingStockholm.pdf>; Amnesty International, *Observations on the Stockholm Programme on the area of freedom, security and justice*, 13 July 2009, available at <http://www.amnesty.eu/static/documents/2009/130709AILetterStockholmProg.pdf>; and Amnesty International, *Comments on the mid-term review of the Stockholm programme*, 5 December 2012, available at http://www.amnesty.eu/content/assets/Stockholm_document.pdf

I. **The need for a comprehensive human rights framework strategy and action plan**

“To swing the pendulum to the Human Rights direction. I am profoundly aware of how hard this will be. But, as the Strategic Framework emphasises, EU Foreign Policy and Human Rights need not be competing goals. Our aim is to make them complementary (...)”

(EU Special Representative for Human Rights, Brussels, 3 September 2012)

“The adoption of the EU Strategic Framework on Human Rights and Democracy represents a watershed in EU policymaking.”

(Council of the EU, *EU adopts Strategic Framework on Human Rights and Democracy*, Luxemburg, 25 June 2012)

Despite occasional breakthroughs, the debate on the EU’s performance on human rights within its own region is consistently obstructed by the – real or perceived – lack of EU competency to act on behalf of or in place of member states, to preserve and promote the EU’s founding principles, which include respect for human rights.

Amnesty International believes that a framework strategy enshrining human rights at the core of the EU’s internal legal and political machinery (including normative and enforcement powers, as well as political dynamics) would help to overcome this perceived dichotomy between the EU’s aspiration to promote human rights, and the reality of human rights violations in member states. By setting common guiding principles for devising and assessing EU action on human rights, which take into account the specificities of the EU’s legal framework, this strategy would bring together existing instruments and policies, and provide direction. A strategy geared towards human rights action would not provide immediate or magic solutions, but it would help the EU institutions to confront the reality of human rights violations in member states together, on a common human rights basis. This includes the development of effective actions to resolve problems, and a measurement tool for building accountability for what EU tools deliver.

In a joint statement as part of the Human Rights and Democracy Network (HRDN) on strengthening the EU’s response to human rights abuses inside its own borders, Amnesty International highlighted the need for a human rights framework strategy.⁴

Amnesty International’s call is inspired by the ‘EU Strategic Framework and Action Plan on Human Rights and Democracy’, which was adopted by the Foreign Affairs Council in June 2012.⁵ This is a powerful pledge by all member states, the European External Action Service (EEAS), the European Parliament (EP) and the European Commission (the Commission) to advance the protection and promotion of human rights together, and to put human rights at the centre of EU foreign policy. The action plan lays out specific actions for the various actors, allocating specific responsibilities to each actor, including reference to genuine partnership with civil society. The key principles are endorsement by all actors, and empowerment to act together.

⁴ Human Rights and Democracy Network, *Strengthening the European Union’s response to human rights abuses inside its own borders*, August 2013, available at http://www.amnesty.eu/content/assets/Doc2013/HRDN_Statement_EU_response_to_human_rights_abuses_inside_its_own_borders.pdf

⁵ Council of the European Union, *EU Strategic Framework and Action Plan on Human Rights and Democracy*, 25 February 2012.

The forthcoming EU accession to the ECHR represents a key opportunity for the EU to embark on this task. In the spirit of accession, the EU must comply with the obligations set by the ECHR, as interpreted by the European Court of Human Rights (ECtHR). More generally, the EU must promote the work of the various human rights bodies of the Council of Europe, including through enhanced cooperation with them.

The upcoming Commission Communication on possible new mechanisms to safeguard the rule of law in the EU is another opportunity to reinforce the EU's capacity to abide by articles 2 and 3 TEU and pay specific attention to safeguarding respect for human rights.

Amnesty International suggests that this comprehensive internal human rights strategy (the strategic framework and the action plan) be built around the four main objectives outlined below. These objectives should guide and prompt EU action towards the obligation to respect, protect and fulfill human rights as defined by international human rights law.⁶ To be legitimate and operational, the strategic framework would have to be endorsed by all three institutions and all member states, committing them to a shared and indivisible responsibility for implementing the objectives set out in the strategy, alongside to their commitment in the field of EU external relations.

1. Develop a strong and comprehensive EU human rights based approach

a) Putting human rights at the heart of all EU policies

The strategic framework and action plan on external relations contains two decisive overall guiding principles: (1) it assigns clear responsibilities to all relevant EU actors; and (2) it contains a joint agreement that the EU will promote human rights in all areas of its external action without exception.

Both aspects are key to ensuring respect and protection of human rights throughout the EU. Parallel to the comprehensive policy list in the external framework strategy, the internal one should state a clear political commitment by all EU institutions and member states to protect and promote human rights in all areas of the EU's internal competence without exception.

One way to put this commitment into practice is to ensure that human rights impact assessments are carried out before drafting EU proposals, and that, once the proposals are drafted, an examination of their compliance with human rights is carried out accurately and equally across all the Commission's services.

Following the 2010 Commission's Strategy on the effective implementation of the Charter of Fundamental Rights of the European Union (the Charter),⁷ operational guidance on how to carry out human rights impact assessments in practice was issued in 2011.⁸ This guidance detailed procedures and content for such impact assessments.

⁶ "International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights"(website of the Office of the UN High Commissioner for Human Rights, *International Human Rights Law*, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>).

⁷ Communication from the Commission, *Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union*, COM(2010) 573 final.

⁸ European Commission, Staff Working Paper, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, 6 May 2011, SEC(2011) 567 final.

The mandate of the Impact Assessment Board (the Board) to control the quality of all the Commission's impact assessments includes systematic checks on the human rights aspects of the assessments submitted to its review. However, the Board is currently not bound to systematically issue an opinion in this respect. In order to ensure the effectiveness of this procedure, it would be important to issue such opinions systematically and make them public. These opinions should address not only the substantive human rights issues raised by the impact assessment draft, but also review the initial evaluation done by the Impact Assessment Steering Group on whether the proposal impacts on human rights issues, and when this is the case, how the procedure outlined in the guidelines was carried out (including the consultation with Directorate-General (DG) Justice, the inclusion of relevant human rights aspects when drafting consultation documents, and the engagement with other stakeholders, including the European Union Agency for Fundamental Rights (FRA) and human rights NGOs).⁹ In addition, the annual report issued by the Board should include a dedicated section on human rights impacts assessments.

The Commission's Strategy on the implementation of the Charter does not foresee any consultation on human rights aspects during the drafting phase of EU proposals. In order to ensure that human rights issues raised in the impact assessment stage are duly addressed in the draft, the Commission should seek the advice from external experts, including the FRA, Council of Europe and civil society experts before adopting its proposal.

Once the Commission proposal is published, all the institutions have a commitment to ensuring that the text remains 'Charter compliant' throughout the legislative process. This important commitment set by the Commission in its Strategy on the effective implementation of the Charter was further endorsed by the Council¹⁰ and the EP. However, greater transparency is needed to ensure EU institutions are held accountable to respect their commitment. This implies some level of public access to the various drafts throughout the negotiations and to the legal opinions issued by EU legal services, as well as more information on referrals for advice made to the Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) working party.¹¹ This would enable open expert debates in cases of conflicting interpretations on human rights issues involved. As with impact assessments, the FRA's opinion and advice from the Council of Europe should be sought as a matter of principle.

b) Enhancing EU institutions' capacity to properly address human rights issues

Reinforcing the EU's institutional capacity to properly address human rights issues is necessary to ensure effective processes as described above and further below.

Council of the European Union

Transforming the Council's *ad hoc* working group on human rights (originally designed to negotiate the regulation establishing the FRA) into a permanent FREMP working party was an important development that followed the adoption of the Stockholm programme and the entry into force of the Lisbon Treaty.

The challenge is now to enable and empower FREMP to become a strong human rights actor that can properly lead the Council's action in the direction of human rights. As outlined in the joint NGO statement from HRDN on strengthening the EU's response to human rights abuses inside its own borders (mentioned above), this implies that FREMP embraces an ambitious mandate on human rights and broadens out the scope of its work in this area, including by: systematically considering and responding

⁹ European Commission, *Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments*, cited above, p. 11 to 13.

¹⁰ Council of the European Union, *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies*, 18 May 2011 and *Conclusions on the Council's actions and initiatives for the implementation of the Charter of Fundamental rights of the European Union*, 23 May 2011.

¹¹ In its *Guidelines on methodological steps to be taken to check fundamental rights compatibility at the Council's preparatory bodies*, cited above, the Council recommends that "If [a] working party is unable to resolve the issues arising on the compatibility of a particular proposal with the fundamental rights, on a limited case by case basis, it should seek the advice of the FREMP Working Party (...)" (p. 7).

to all reports prepared by the FRA and the EP's Committee on Civil Liberties, Justice and Home Affairs (LIBE); opening itself up to relevant third party actors (such as NGOs, the Council of Europe Commissioner for Human Rights, UN special mechanisms and treaty bodies) for briefings and exchanges; and initiating a regular form of engagement with LIBE as its counterpart in the EP with a mandate pertaining to fundamental rights.¹²

In addition, the Council should engage in a reporting exercise on internal human rights issues. The necessary *inward looking* dimension of such a report in the field of internal EU policies would require member states to accept some level of peer review in order to enable specific country examples to find their way in the report, whilst avoiding a "finger pointing" exercise, largely dependent on the member states' agenda. The review should take into account international human rights standards and make use of the various existing UN documents, such as the Universal Periodic Review (UPR) documents as a basis for discussions. To avoid "finger pointing" the reviews should take place on a regular basis and be based on a set rotation of member states, in addition to situations where international and European human rights bodies identify a particular crisis or structural problem in one or several member states.

European Commission

The appointment of a new EU Commissioner for Justice, Fundamental Rights and Citizenship was an important development signaling a change of direction towards more justice and human rights, concomitant with the adoption of the Stockholm programme and the entry into force of the Lisbon Treaty.

Experience over the last five years has shown that more needs to be done to ensure that this position fully embraces all human rights related issues and serves as a human rights 'catalyst' within the College of Commissioners by:

- leading the overall debate on human rights policy, including critically assessing the EU's action on human rights on the internal front, and ensuring coordination and coherence with EU action on the external front
- equally delivering in all the areas assigned to the position (or at least giving due account of how priorities are decided), and ensuring coordination with the thematic areas assigned to other Commissioners.

In addition, adequate human rights expertise and resources should be allocated at all levels throughout all the Commission departments. This should be a priority when assigning posts and deciding on rotation of staff.

European Parliament

The EP and its LIBE Committee have gained decisive legislative power with the Lisbon Treaty. The EP has, for example, played a key role in co-deciding with the Council the new standards for protection of suspects and victims of crime that it had long called for. It defended a progressive line in that area, whilst also continuing to push proposals like the new horizontal anti-discrimination directive¹³ for which unanimity in the Council remains the rule. Moreover, LIBE took up important human rights issues neglected by the Council and the Commission (which usually argued lack of competence). These were:

¹² The network noted that these are already well established practices embraced by the Council Working Party on Human Rights in foreign relations (COHOM). With particular regards to cooperation with civil society, the Council's annual report on Human Rights in the World 2012 specifically stressed the importance that "civil society representatives regularly engage with the Council Working Party on Human Rights [...] and are debriefed on its conclusions" (Council of the European Union, *EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports)*, 13 May 2013, p. 33).

¹³ European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, COM/2008/0426 final.

the follow-up of its 2007 inquiry into the complicity of EU member states in the illegal US-led rendition and detention programmes – including growing allegations of secret detention in EU countries;¹⁴ and the human rights situation in Hungary – far beyond the scope of the Commission’s intervention.¹⁵

All these achievements must be built on to ensure that the EP grows as an influential human rights actor and fully plays its role in holding EU institutions and member states accountable for respecting and protection human rights. This implies the need for more in-house expertise and resources on justice and human rights issues, as well as greater and more systematic coordination and dialogue with other EU institutions and bodies, and with external actors, such as the Council of Europe and NGOs.

c) Strengthening dialogue with civil society

Enhancing the EU’s capacity to properly identify, process and address its internal human rights challenges requires more transparent and more meaningful dialogue with civil society at all stages. Currently engagement with civil society does not comply with any uniform standards.¹⁶

Civil society’s expertise should be actively sought by all three institutions and its input factored in all human rights monitoring and law and policy making processes. EU actors should further ensure that they are accountable for the way they deliver on protecting human rights and reflect on this in its public reporting and evaluation on their human rights work.

As stressed throughout the developments above and below, this notably implies that civil society should be briefed and debriefed on the EU’s ongoing work and invited to give expert input on human rights aspects, upstream and downstream of EU initiatives in the various policy areas. This includes ensuring active participation of civil society in all relevant public events such as hearings and seminars. It will also be vital that dialogue with civil society actors is planned well in advance and that it genuinely informs policy and legislative decisions.

2. Setting standards to strengthen the EU’s legislative framework on human rights and remedying existing gaps in protection

“In the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms (...) constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings (...) At the same time, there is room for further action by the EU to ensure full implementation and respect of the Convention standards and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards. (...) Any new EU legislative acts in this field should be consistent with the minimum standards set out by the Convention, as interpreted by the European Court of Human Rights”.

(Council of the European Union, *Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 30 November 2009)

¹⁴ European Parliament, *Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report, 2012/2033(INI)* and European Parliament, *Resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA, 2013/2702(RSP)*.

¹⁵ European Parliament, *Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), 2012/2130(INI)*.

¹⁶ A commitment to engage further with and provide more support to civil society organisations has been expressed by the European Commission in the field of external relations (European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *The roots of democracy and sustainable development: Europe’s engagement with Civil Society in external relations*, COM(2012) 492 final), and welcomed by the Council (Council of the European Union, *Conclusions on “The roots of Democracy and sustainable development: Europe’s engagement with Civil Society in external relations”*, 15 October 2012). However, there is still no explicit corresponding engagement in the field of EU internal policies.

An approach to law-making building on the existing human rights obligations of all members states, such as the one followed in the field of procedural rights of suspected and accused persons in criminal proceedings (a similar approach has been later adopted with regards to victims)¹⁷ should guide the EU's legislative work. It serves to ensure that new legislative proposals are put forward whenever the approximation of laws can bring added value to the protection of people's human rights, and that EU standards never undermine member states obligations under international and European human rights law.

With regards to the opportunity of setting new standards at the EU level, the EU should rely on existing work from the FRA, the Council of Europe, UN mechanisms and civil society which highlights gaps in human rights protection at EU and national level. Failure of the EU to follow-up on authoritative calls for action should be justified on the basis of objective reasons and open to challenge.

When a proposal is put forward, it is crucial that the standards set are developed in accordance with relevant international and European human rights law from the outset and throughout the negotiation process – in line with the commitments following on from the Commission's Strategy on the effective implementation of the Charter (see above).

After the adoption of new standards, the Commission should make more use of the possibility of issuing guidelines and roadmaps to help members states comply with relevant human rights standards when transposing EU legislation at national level.

3. Monitoring human rights in the implementation of EU law

The compliance with human rights of member states' implementation of EU law remains an area of concern that needs to be urgently addressed. This crucial aspect is neglected in the Commission's Strategy on the effective implementation of the Charter and needs to be further elaborated on.

It is essential that the Commission takes into due consideration all relevant human rights issues when reporting on the implementation of EU measures. Reference to international and European human rights standards as well as data 'from the field' including research from the FRA and 'shadow reports' from civil society must underpin the Commission's assessments. The Commission should also engage in a transparent dialogue with civil society to identify the problems and challenges on the ground, and discuss together possible EU action to remedy existing protection gaps.

The Commission's reports tend to focus on the formal transposition of EU standards into national law, failing to consider existing gaps and overlooking the human rights implications which relate to the measures in question. A wider approach is key to properly assess and remedy the problems on the ground, but also to identify possible new action that may be necessary at the EU level (see above on strengthening EU standards).¹⁸

The Commission's Annual Report on the effective implementation of the Charter should be reviewed in order to become an accountability tool to feed into the above process, as opposed to being a formal

¹⁷ Council of the European Union, *Resolution on a roadmap for strengthening the rights and protection of victims, in particular in criminal proceedings*, 9 and 10 June 2011.

¹⁸ For instance, Amnesty International has expressed concerns that the upcoming report on the implementation of the Framework Decision on Racism and Xenophobia will not question the limited scope of the instrument, failing to take into consideration data and recommendations highlighting substantial shortcomings of the existing instrument as an effective tool to combat hate crime in Europe (Amnesty International, *Submission to the European Commission and the Council of the European Union on the Framework Decision on racism and xenophobia (Council Framework Decision 2008/913/JHA)*, October 2013, available at http://www.amnesty.eu/content/assets/Doc2013/AI_submission_EU_FD_racism_and_xenophobia_final_approved.pdf).

activity report on EU action.¹⁹ The report could for instance bring together and analyse the main findings from the Commission's implementation reports, combined with findings from relevant reports from other EU institutions, the FRA and external actors including Council of Europe bodies; thus providing a critical assessment of EU action on human rights and identifying possible areas for future work.

4. Preventing and reacting to human rights violations by member states

As guardian of the Treaties, the Commission has a leading role to play in making sure that the EU remains true to its founding 'values' and properly anticipates and responds to actual violations of human rights by member states, in line with articles 2, 3 and 6 TEU. This is another crucial aspect which is overlooked in the current strategy of the Commission on the implementation of the Charter.

- Preventing human rights violations

In order to adequately prevent human rights violations by member states, the Commission should make a more effective use of available mechanisms. This includes for instance a more proactive use of EU pilots. This procedure was introduced in 2008 "to produce quicker and better answers to questions and solutions to problems" relating to the enforcement of EU law".²⁰ The idea was to use this method of working to correct infringements of EU law at an early stage wherever possible without the need for recourse to infringement proceedings".²¹ This is in fact an opportunity for dialogue and negotiation with member states which should be used to urge member states to revise their laws and/or practices in cases where the Commission has spotted signs of systemic human rights violations in the application of EU law. The steps undertaken on both sides, together with the positive or negative outcome of EU pilots in terms of human rights violations should be recorded and publicized.

The Commission should also consider recourse to *interim* measures, which could be an effective way to assert the authority of the Commission's warnings and suspend the controversial measure in order to avoid any negative impact on the protection of human rights. In that regard, the two last EP Fundamental Rights Reports recommended establishing a new 'freezing procedure' to ensure "that Member States, at the request of the EU institutions, suspend the adoption of laws suspected of disregarding fundamental rights or breaching the EU legal order".²²

In addition to this infringement related procedure, which can be activated only where a human rights violation risks occurring in an area where there is EU competence, the EU must follow up on the EP and civil society recommendations, and stop ignoring article 7 TEU. As stated by the Commission, article 7 TEU allows the EU to "act not only in the event of a breach of common values in this limited field [EU law] but also in the event of a breach in an area where the member states act autonomously".²³ Whilst the threshold for determining the existence of a serious and persistent breach of one of the values listed in article 2 TEU and for triggering sanctions (the 'penalty mechanism') is indeed unconvincingly high, this should not stop EU institutions from at least activating the 'preventive mechanism', which allows the EU to confront member states where there is a "clear risk" of such breach (article 7(1) TEU). This

¹⁹ Amnesty International, *Comments on European Commission 2010 Report on the Application of the EU Charter of Fundamental Rights*, COM (2011) 160 final, 30 March 2011, available at http://www.amnesty.eu/content/assets/Doc2011/AI_comments_on_the_Commission_2010_Report_on_the_FR_Charter_May_2011_FINAL.pdf

²⁰ European Commission, Report from the Commission, *EU Pilot evaluation report*, COM(2010) 70 final, p. 2.

²¹ The procedure was developed on the basis of the communication from the Commission, *A Europe of results – Applying Community law*, COM(2007) 502 final. In March 2010 the Commission adopted the first EU Pilot Evaluation Report (Report from the Commission, *EU Pilot evaluation report*, cited above).

²² European Parliament, Directorate General for internal policies, *The triangular relationship between fundamental rights, democracy and rule of law in the EU - Towards an EU Copenhagen Mechanism*, p. 46.

²³ European Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, COM(2003) 606 final, p. 5.

preventive mechanism could be further operationalised: for example, the EU could establish formalized partnerships with the FRA and the Council of Europe when examining the existence of a “threat or a risk of serious breach” by a member state of article 2 TEU principles;²⁴ and consider following up on the idea of issuing a ‘formal notice’ to the member states(s), a proposal that was put forward by the Commission²⁵ and also endorsed by the EP in the draft report on the situation of fundamental rights in the EU 2012.²⁶

- Reacting and putting an end to human rights violations

Infringements proceedings and article 7 TEU could be further used to address ongoing human rights violations by member states.

In line with its strategy on the implementation of the Charter, the Commission should proactively and thoroughly uphold its commitment to carry out infringement proceedings to address human rights violations committed by member states when acting within the scope of EU law. When activated, the infringement proceedings should aim at securing effective protection of human rights, “rather than aiming for negotiating settlements with member states”, as highlighted by the EP.²⁷

Such a commitment should be clearly articulated as part of the Commission’s general policy on infringement proceedings, for example in the context of a revision of its 2007 Communication.²⁸

This would require that:

- a compliance check of national law with human rights is mentioned as a strategic objective of infringement proceedings;
- specific guidelines are formulated to make sure that infringement proceedings are effectively geared towards human rights protection, in all policy areas;
- infringements concerning violation of human rights are included among the categories to be prioritised, meaning that they will be dealt with by the Commission “more immediately and more intensively than others”.²⁹ This shall imply a clear commitment to:
 - setting tight benchmarks to accelerate the closure of the pre-litigation procedure;
 - taking the matter before the Court of Justice without undue delay whenever a satisfactory solution is not reached within a reasonable time;
 - excluding the closure of proceedings ‘for political reasons’ and committing to clearly and publicly stating the grounds of any settlement with member states;
 - revising the rules on access to documents and on confidentiality in order to ensure greater transparency of the procedures, especially with respect to the individuals concerned by the alleged violations and to the persons or organizations that have engaged with the Commission on the issue.

As recalled above, article 7 TEU offers the EU, in addition to a ‘preventive mechanism’, the power to intervene where a serious breach of one of the common values listed in article 2 TEU has occurred in any of the member states (the ‘penalty mechanism’). However, due to the very high thresholds that are

²⁴ European Parliament, *The triangular relationship between fundamental rights, democracy and rule of law in the EU - Towards an EU Copenhagen Mechanism*, cited above, p. 51.

²⁵ See the speech given by Vice-President of the European Commission, EU Justice Commissioner Viviane Reding at the Centre for European Policy Studies, Brussels, on 4 September 2013, *The EU and the Rule of Law – What next?*, available at http://europa.eu/rapid/press-release_SPEECH-13-677_en.htm

²⁶ European Parliament, Committee on Civil Liberties, Justice and Home Affairs (LIBE), *Draft report on the situation of fundamental rights in the European Union (2012)*, 2013/2078(INI).

²⁷ European Parliament, *Fundamental rights in the European Union (2010-2011)*, 2011/2069(INI), p. 28.

²⁸ Communication from the Commission, *A Europe of results – Applying Community law*, cited above.

²⁹ Communication from the Commission, *A Europe of results – Applying Community law*, cited above, p 10.

needed in the Council to trigger such a procedure,³⁰ this has been presented as a ‘nuclear option’ which is very unlikely to ever be used.

This approach must be challenged. The EU institutions and member states should assert their full political commitment to make use of the article 7 TEU ‘penalty mechanism’ whenever necessary to properly address severe and systemic human rights abuses violating article 2 TEU whatever the field in which the breach occurs. To that extent, ongoing discussions on how to revise and/or better operationalise article 7 TEU must pursue the objective of ensuring that such a penalty mechanism gains practical relevance as a mechanism that can and should be used to adequately address serious breaches of any of the common values listed in article 2 TEU, including the respect for human rights. Such discussions must build on the 2003 Commission Communication on article 7 TEU³¹ and reflect the calls from the EP,³² the FRA³³ and civil society.³⁴

³⁰ These are unanimity for determining the existence of a serious and persistent breach (article 7(2) TEU) and qualified majority for imposing sanctions (article 7(3) and (4) TEU).

³¹ European Commission, *Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based*, cited above.

³² See, recently, European Parliament, *Resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)*, and *idem*, *Draft report on the situation of fundamental rights in the European Union (2012)*, both cited above.

³³ Fundamental Rights Agency, FRA Symposium Report, *Promoting the rule of law in the European Union*, 7 June 2013, available at <http://fra.europa.eu/sites/default/files/fra-2013-4th-annual-symposium-report.pdf>

³⁴ Amnesty International, *Response to the European Commission Communication on Article 7 of the Treaty on European Union*, December 2004, available at http://www.amnesty.eu/static/documents/AI_response_to_EC_Comm_on_Article_7_of_Treaty_on_EU.doc; Amnesty International, *Comments on European Commission 2010 Report on the Application of the EU Charter of Fundamental Rights, COM (2011) 160 final*, cited above; Amnesty International, *Speech at the European Parliament LIBE Committee Public Hearing on “The Situation of Fundamental Rights in the European Union: how to strengthen fundamental rights, democracy and the rule of law in the EU”*, 5 November 2013, available at http://www.amnesty.eu/content/assets/Doc2013/AI_LIBE_Speech_051113_Written_version_FINAL.pdf

II. Thematic highlights for consideration in the area of justice and home affairs

The ultimate aim of elaborating an internal strategic framework and action plan on human rights is to enable the EU to develop a proactive, protective response to pressing human rights challenges within its territory, at its borders and beyond.

i. Part 1: Justice and non-discrimination

1. Taking appropriate action to combat discrimination on all grounds mentioned by Article 19 TFEU

Discrimination and violence against minorities remain a Europe-wide concern affecting all EU policies in the area of freedom, security and justice. Upholding the human right to non-discrimination for all people should feature as a priority in itself, and run throughout EU policies in all areas.

When defining its future priorities in the field of justice, the EU should address the need to develop a more comprehensive legal framework to close protection gaps; and the need to ensure full implementation of existing standards by member states on the ground. This should include:

- The adoption of comprehensive EU standards in the field of non-discrimination
Over the past five and a half years, the European Commission's constructive proposal for an equality directive to help fill gaps in existing EU anti-discrimination standards on age, disability, religion or belief, and sexual orientation,³⁵ has reached political deadlock in Council. Amnesty International remains very concerned that this initiative - which received strong support from the EP and civil society - has been stalled by the Council for so long. The member states should engage to overcome this political deadlock to ensure that the adoption of strong EU standards to protect people from discrimination on all grounds in all areas of life is a priority for the EU's area of freedom, security and justice.
- Ensuring effective monitoring and implementation of existing EU anti-discrimination legislation
Amnesty International expects that the Commission's long awaited review of member states' implementation of existing EU anti-discrimination standards, namely the Race Equality Directive³⁶ and the Employment Equality Directive,³⁷ will be based on a robust human rights analysis. And that this analysis will uncover ongoing violations by member states, and prompt appropriate remedial action by the institutions. In its submission on the Commission review,³⁸ Amnesty International identified a number of flaws in the implementation of these directives. Crucial issues included the lack of effective measures tackling discrimination against Muslims in the area of employment, and systemic discrimination against Roma regarding access to education and housing. Carrying forward infringement proceedings against member states until the violations are effectively remedied is a

³⁵ European Commission, *Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation*, cited above.

³⁶ Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

³⁷ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³⁸ Amnesty International, *Submission to the European Commission on the implementation of the Equality Directives*, January 2013, available at <http://www.amnesty.org/en/library/asset/IOR61/002/2013/en/bbf813ce-2ebf-471f-8fa8-541832eaf4e0/ior610022013en.pdf>

necessary step forward in ensuring the respect of EU legislation on the ground, and asserting the EU's role as a credible human rights actor.

- Developing targeted EU policies that comprehensively tackle discrimination faced by minorities in the EU

In contrast to the EU Framework for National Roma Integration Strategies (see below) and other strategies adopted in the field of equality, such as the EU Strategy for equality between women and men and the European Disability Strategy, the EU has still not adopted an LGBTI Equality Roadmap despite repeated calls by the EP,³⁹ and several member states.⁴⁰ The findings of the FRA's 2013 survey on the perceptions and experiences of LGBTI persons are alarming:⁴¹ almost half of all respondents said that they felt personally discriminated and harassed in various areas of life, in particular in employment and education, in the year preceding the survey; a quarter of all respondents had been attacked or threatened with violence in the last five years - this figure rises to 35% for transgender respondents. Such figures highlight the pressing need for enhanced action and mobilisation at EU level to combat discrimination on the grounds of sexual orientation and gender identity. A comprehensive policy to tackle discrimination and violence against LGBTI people should, among others, consider new legislation to outlaw homophobic and transphobic crimes, as well as specific action to ensure the protection of transgender people's human rights, including their rights to privacy and family life, to be free from ill and degrading treatment, and to enjoy the highest attainable standards of health, particularly in the context of gender legal recognition procedures.

2. Ensuring Roma fully enjoy their human rights

More than a decade after the EU adopted the Race Equality Directive banning racial or ethnic-based discrimination, and despite the promise of the Stockholm programme to put EU citizenship and fundamental rights at the centre of EU policies, research by the FRA⁴² and civil society⁴³ show that Roma still face widespread racially-motivated violence and discrimination throughout Europe. This severely impacts on the enjoyment of their human rights, such as the right to housing, health care, employment and education, often also in flagrant violation of their EU citizenship rights.

When defining its future priorities in the field of justice, the EU should specifically commit to reinforcing its actions to fight against discrimination faced by Roma in the member states. Particular attention should be paid to the following issues:

- The EU Framework for National Roma Integration Strategies (NRIS) adopted under the Stockholm programme represents a positive step to address some of the challenges.⁴⁴ However, the assessment by the European Commission and civil society of the NRIS reveals that improvements can be made to render this tool more effective. The majority of the national strategies developed under the EU

³⁹ See, recently, the LIBE *Draft report on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity*, 2013/2183(INI).

⁴⁰ Joint statement by the Equality Ministers of Austria, Belgium, Croatia, Denmark, Finland, France, Italy, Luxembourg, Malta, the Netherlands and Sweden, *Call for a Comprehensive Approach to LGBT Issues at the European Union Level*, May 2013.

⁴¹ European Union Agency for Fundamental Rights, *EU LGBT survey - European Union lesbian, gay, bisexual and transgender survey - Results at a glance*, May 2013, available at http://fra.europa.eu/sites/default/files/eu-lgbt-survey-results-at-a-glance_en.pdf

⁴² European Union Agency for Fundamental Rights, *The situation of Roma in 11 EU Member States – Survey results at a glance*, May 2012, available at http://fra.europa.eu/sites/default/files/fra_uploads/2109-FRA-Factsheet_ROMA_EN.pdf

⁴³ See for example the research published by Amnesty International, available at <http://www.amnesty.org/en/roma>, and by the European Roma Rights Center, available at <http://www.errc.org/research-and-advocacy>

⁴⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *An EU Framework for National Roma Integration Strategies up to 2020*, COM(2011) 173 final.

framework are weak: they lack clear targets, adequate implementation structures, and necessary budgets for implementation; they also fall short of addressing discrimination against Roma, neglecting crucial human rights violations at the core of the social exclusion that the strategies intend to remedy. The EU should provide further support to member states to ensure that effective inclusion measures that go hand in hand with ambitious anti-discrimination policies are introduced. In addition, the Commission must continue to actively monitor the implementation of the NRIS, with particular attention to how EU funding is used in programmes and projects included in the strategies.

- Ongoing violations by member states of the Race Equality Directive, including the systematic discrimination against Roma in regarding access to education and housing have been thoroughly documented. Amnesty International has submitted evidence to the Commission of such violations in the Italy,⁴⁵ building a case for the Commission to open infringements proceedings against the member states in question.⁴⁶ It is crucial that the future priorities on justice policies include a commitment to take immediate action to put an end to the ongoing abuses.
- Anti-Roma rhetoric that incites hostility and violence is increasingly used, even by public officials, and as such appears to be growing in terms of acceptance. All of the EU institutions must commit to taking a stance against this trend, including systematically condemning any discriminatory rhetoric by public officials.

3. Preventing and combating violence against women

The Stockholm programme and action plan have prioritized work on violence against women. They included a commitment to the adoption of a comprehensive strategy focusing on the protection, comprising international protection, against all forms of violence against women (VAW), including female genital mutilation (FGM).

Amnesty International welcomes the efforts subsequently deployed by the EU in ensuring that the issue of gender-based violence is adequately addressed in the Victims' Rights Directive.⁴⁷ The European Protection Orders in civil and criminal law⁴⁸ will also contribute to greater protection of women from violence. Similarly, Amnesty International commends the Commission's actions detailed in the Communication on the elimination of FGM.⁴⁹ This particular policy framework provides a comprehensive and integrated approach to tackling the practice in Europe.

However, all of these efforts will only be effective if supported by a broader strategic framework on preventing and combating all forms of VAW. It is crucial that the EU action on VAW is developed in a coordinated and holistic manner across all relevant areas of EU work. The Council has called for such a

⁴⁵ Amnesty International, *Double standards: Italy's housing policies discriminate against Roma*, 30 October 2013, available at http://www.amnesty.eu/content/assets/Reports/4231_DD_Roma_Italy_complete_web.pdf

⁴⁶ Following a briefing sent to the European Commission (Amnesty International, *Italy's discriminatory treatment of the Roma breaches EU Race Directive. Briefing to the European Commission*, July 2012, available at <http://www.amnesty.org/en/library/asset/EUR30/011/2012/en/657daa73-4570-4103-9a64-44c4b9ad0b72/eur300112012en.pdf%20>.) Amnesty International formally requested access to information from the Commission on the process and state of play of the pre-infringement proceedings against Italy, for the discriminatory treatment against Roma and the specific failure of the national government to ensure equal access to adequate housing for all (see http://www.asktheeu.org/en/request/discrimination_against_roma_eu_p).

⁴⁷ Directive 2012/29/EU of the European Parliament and of the Council on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

⁴⁸ Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order.

⁴⁹ European Commission, Communication from the Commission to the European Parliament and the Council, *Towards the elimination of female genital mutilation*, COM(2013) 833 final.

framework on many occasions.⁵⁰ Yet, the commitment to produce a comprehensive strategy on violence against women contained in the Stockholm action plan has not been honoured.

The elaboration of future priorities in the area of justice provides an opportunity for the EU to reiterate its commitment to effectively tackle all forms of VAW, including taking active steps to secure:

- EU accession to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)
- The development of a strategic framework on VAW which would in fact support the implementation of the Istanbul Convention both at member states' and EU levels.

It is also important to integrate measures relating to the implementation of existing EU commitments on VAW at both policy and legislative levels. If actions on implementation are not adequately planned, it is likely that these commitments will remain dead letters. This would affect the EU's credibility to act consistently and with a long-term vision. In this respect, there are two key instruments which the future priorities on justice should pay attention to: the Victims' Rights Directive and the Communication from the Commission on FGM. In particular, the EU should:

- Recall the need for a gender-sensitive transposition and implementation of the Victims' Rights Directive
- Include a commitment to support the implementation of the Commission action plan on FGM in accordance with the UN General Assembly Resolution on "Intensifying global efforts for the elimination of female genital mutilation".⁵¹

4. Combating hate crime

The EU's commitment to combat hate crime should figure among the priorities of the EU's upcoming justice programme, building on the renewed focus on hate crime at the EU level in the course of 2013. The next period should be an opportunity to devise more comprehensive and robust EU action in this area that looks beyond judicial cooperation and that 'joins the dots' between criminal justice, non discrimination, and human rights.

Hate crimes are a form of discrimination as victims are targeted because of their real or perceived belonging to a group defined by an identity-related characteristic such as ethnicity, religion or sexual orientation, that constitute protected grounds of discrimination under articles 19 TEU and article 21 of the Charter. As such, hate crimes are a special category of crime which is distinguished from other types of crime by the motive of the perpetrator, and which impacts not only on the immediate victim but the whole group with which that victim identifies. Combating hate crime thus requires a comprehensive response including both legislative and other policy measures that link the objective of the fight against all forms of discrimination with the need for an effective criminal law response. As the Commission itself acknowledges, criminal law can, and should, serve as a tool to ensure the effective implementation of EU policies "where common rules have been developed over the last decades for the well-being of citizens".⁵²

⁵⁰ See Council of the European Union, *Conclusions on Combating Violence Against Women, and the Provision of Support Services for Victims of Domestic Violence*, 6 December 2012 and *idem*, *Conclusions on the Eradication of Violence Against Women in the European Union*, 8 March 2010.

⁵¹ United Nations General Assembly, *Intensifying global efforts for the elimination of female genital mutilations*, 5 March 2013, A/RES/67/146.

⁵² See European Commission, Communication from the Commission to the European Parliament, the Council, the European economic and social committee and the Committee of the Regions, *Towards an EU criminal policy: ensuring the effective implementation of EU policies through criminal law*, COM (2011) 573 final, p. 9. The same

Research recently undertaken by human rights bodies, including the FRA, and human rights NGOs, demonstrate alarming trends of hate motivated violence against migrants, Roma, Muslims, Jews and LGBTI individuals, sometimes perpetrated even by law enforcement authorities.⁵³ These findings question the effectiveness of responses to hate crime both at national and EU level. Amnesty International is particularly concerned by the effectiveness of the existing EU Framework Decision on Racism and Xenophobia,⁵⁴ to date the EU's only instrument on hate crime: it does not cover hate crimes beyond those on the grounds of race and ethnicity, it focuses on criminalising hate speech over addressing violent acts, and it provides no guidance on investigation and prosecution of such acts.⁵⁵ While combating hate crime has been a focus for the EU in 2013, the conclusions from the EU's Justice and Home Affairs (JHA) Council of 5 December 2013 fail to commit the EU to any substantive review of its legislation and policies.⁵⁶

When shaping the future of justice policies, the EU should:

- Outline the need for new binding instruments to address protection gaps that exist under the current legal framework.⁵⁷ In particular, the EU should consider adopting a new legislative instrument that: provides protection against hate crimes perpetrated on all the grounds included in article 21 of the Charter; and that includes reference to investigation and prosecution practices and phases, to ensure that any alleged hate motive behind the perpetration of a crime is unmasked and thoroughly taken into account in these phases
- Commit to ensure the effective implementation of existing relevant instruments. In particular, the EU should elaborate detailed guidelines on the protection and rights of victims of hate crime in the context of the transposition of article 22 of the Victims' Rights Directive, which stresses the need to assess the protection needs of victims of a "crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics", and whose importance was also reflected in the Council's conclusions.⁵⁸

approach is also reflected in the discussion paper on criminal law published by the Commission for the public consultation launched at the *Assises de la Justice*. It is however regrettable that the fight against discrimination does not appear among the priority areas mentioned by the Commission.

⁵³ See, for example, Amnesty International's reports of April 2009 *Victim or suspect – A question of colour. Racial discrimination in the Austrian justice system*, available at <http://www.amnesty.org/en/library/asset/EUR13/002/2009/en/2489f108-4004-4330-8bb5-181d93a3c69a/eur130022009en.pdf> and *Public outrage - Police officers above the law in France*, available at <http://www.amnesty.org/en/library/asset/EUR21/003/2009/en/591478d5-8e7a-45d8-a166-bd326e1caa1f/eur210032009en.pdf>; and, more recently, the report of Amnesty International on Greece, *Police Violence in Greece : Not Just 'Isolated Incidents'*, July 2012, available at <http://www.amnesty.org/en/library/asset/EUR25/005/2012/en/edbf2deb-ae15-4409-b9ee-ee6c62b3f32b/eur250052012en.pdf>, p. 20.

⁵⁴ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

⁵⁵ See Amnesty International, *Submission to the European Commission and the Council of the European Union on the Framework Decision on racism and xenophobia (Council Framework Decision 2008/913/JHA)*, cited above.

⁵⁶ See Amnesty International, Press Release, *Is the EU turning its back on victims of hate crime?*, 11 December 2013, available at <http://www.amnesty.eu/en/news/press-releases/all/is-the-eu-turning-its-back-on-victims-of-hate-crime-0681/#.UrhD9NJDu84>

⁵⁷ Our organisation believes that EU Treaties do provide some legal basis for such legislation building on the strong provisions (article 21 of the Charter, article 10 of the Treaty on the functioning of the European Union (TFEU), and article 19 TFEU) and the existing legal framework on non discrimination combined with EU competence in the area of criminal law (see article 83 (2) TFEU on definitions and article 82 (2)(d) TFEU on procedural aspects) or with the subsidiary legal basis of article 352 TFEU.

⁵⁸ While Amnesty International welcomes that the Council stressed the need to assess protection needs of hate crime victims' under article 22 of the Victims Rights Directive, we believe, as said above, that the effectiveness of this provision, which is based on a correct understanding of the concept of "crime committed with a bias or

5. Strengthening the rights of suspects, accused and detainees

The Stockholm programme's endorsement of the Council's Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings adopted in November 2009⁵⁹ was an important achievement that allowed the EU to make significant progress over the past four years towards securing the rights of suspected or accused persons in criminal proceedings in member states.

In line with the Roadmap, three key directives were adopted under the Stockholm programme, notably on the right to interpretation and translation in criminal proceedings,⁶⁰ on the right to information in criminal proceedings⁶¹ and on the right to access to a lawyer.⁶² The Commission has also recently put forward new proposals for legislation on the presumption of innocence,⁶³ on procedural safeguards for children suspected or accused in criminal proceedings,⁶⁴ and on legal aid;⁶⁵ these proposals were accompanied by two draft recommendations presented by the Commission on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings,⁶⁶ and on the right to legal aid.⁶⁷

While these achievements are to be welcomed as significant steps in the right direction, continued work is needed to ensure that the Roadmap is fully implemented and that strong and comprehensive EU-wide standards offer effective protection to suspects, those accused, and detainees in all member states.

When shaping its future justice policies, the EU must reiterate its commitment to developing a criminal justice policy where the advancement of human rights is seen as a priority, and a key feature for facilitating mutual trust and recognition between member states. This notably implies clear commitments by all of the EU institutions and the member states to:

- Ensure proper implementation of existing instruments, in full compliance with international and European human rights law, both in legislation and in practice
- Work together towards the swift adoption of the latest proposals put forward by the Commission on the presumption of innocence, procedural safeguards for vulnerable suspects, and legal aid. In this regard, the EP and the Council should restate their commitment that all stages of the negotiations must be driven by the objective to ensure that new legislative instruments uphold the highest possible human rights standards. This implies allowing and facilitating transparent debate and meaningful consultation whenever necessary to clarify the interpretation of international and European standards

discriminatory motive which could, in particular, be related to their personal characteristics", can only be achieved by adopting common EU criminal law standards on that point.

⁵⁹ Council of the European Union, *Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings*, 30 November 2009.

⁶⁰ Directive 2010/64/EU of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings.

⁶¹ Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

⁶² Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

⁶³ European Commission, *Proposal for a directive on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings*, COM(2013) 821 final.

⁶⁴ European Commission, *Proposal for a directive on procedural safeguards for children suspected or accused in criminal proceedings*, COM(2013) 822 final.

⁶⁵ European Commission, *Proposal for a directive on provisional legal aid for suspects or accused persons deprived of liberty and legal aid in European arrest warrant proceedings*, COM(2013) 824 final.

⁶⁶ European Commission, *Commission recommendation on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings*, C(2013) 8178.

⁶⁷ European Commission, *Commission recommendation on the right to legal aid for suspects or accused persons in criminal proceedings*, C(2013) 8179.

- Commit to adopt the remaining measures envisaged by the Roadmap and put forward concrete initiatives to address legislative gaps that undermine a full protection of the fundamental rights of suspects, those accused, and detainees in member states. In this regard, particular attention should be paid to the rights of detainees which, despite being mentioned in the Stockholm programme, have not yet been substantially addressed at the EU level. As documented by Amnesty International, situations of ill-treatment and deaths in custody either deliberate or resulting from poor prison conditions, are not a rare occurrence.⁶⁸ The EU should take concrete steps to promote and enhance international standards in the field of detention and detention conditions by incorporating those standards in criminal justice legislation. New legislation should with particular urgency address the important issue of minimum and enforceable standards for the use of pre-trial detention thus ensuring a proper follow-up to the Roadmap agenda and the Commission's broad consultations on the issue.⁶⁹ The EU's future priorities on justice should also take a strong stance for and actively support all member states' ratification of or accession to the Optional Protocol to the Convention against Torture (OPCAT).⁷⁰

6. Urging accountability for human rights violations in relation to rendition and secret detention

After more than a decade of widespread impunity for human rights violations that have occurred in the context of the CIA secret detention and rendition programmes – including unlawful transfers, enforced disappearances, torture, and secret detention - the legal obligation to look back and ensure full accountability for such human rights violations remains largely ignored by member states.

At the EU level, despite renewed calls from the EP in 2012⁷¹ and 2013,⁷² the Council and the Commission continue to refuse any responsibility of the EU for ensuring that the truth is revealed and that justice is finally served.

The idea that governments and individuals must be held accountable for violating people's rights underpins the modern human rights movement and as such, must be at the heart of the EU's policies on justice, rule of law and fundamental rights. The upcoming new policy cycle is the opportunity to assert that the EU's area of freedom, security and justice will not become an 'accountability-free zone', allowing member states to ignoring their obligations under international and European human rights law to

⁶⁸ Amnesty International has received reports of at least 11 deaths in custody over the last five years, and data from 2010 and 2011 show that at in least 15 member states there is evidence of torture in detention, deliberate ill-treatment and poor prison conditions resulting in ill treatment: see, among others, Amnesty International Annual Report 2010; Amnesty International Annual Report 2011; more recently, Amnesty International, *Belgium: Submission to the United Nations Committee Against Torture - 51st Session of the United Nations Committee Against Torture (28 October – 22 November 2013)*, available at <http://www.amnesty.org/en/library/asset/EUR14/002/2013/en/257d9084-4d3b-4e75-b26b-e01868978b14/eur140022013en.pdf>

⁶⁹ European Commission, *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, COM(2011) 327 final. Amnesty International participated in the consultation highlighting how human rights standards in the field of detention could be incorporated in EU action and legislation (Amnesty International, *Contribution to the European Commission's Green Paper "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention"*, 30 November 2011, available at http://ec.europa.eu/justice/newsroom/criminal/opinion/files/110510/amnesty_international_response_en.pdf).

⁷⁰ United Nations General Assembly, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 18 December 2002, A/RES/57/199.

⁷¹ European Parliament, *Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report*, cited above.

⁷² European Parliament, *Resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA*, cited above.

investigate human rights violations in relation to rendition and secret detention (whether by direct perpetration, complicity, or failure to prevent).

Despite the secrecy surrounding these CIA operations and national governments' reluctance to cooperate, evidence of rendition and secret detention on EU territory continues to emerge, and alleged victims, detained at Guantanamo Bay, are fighting for their rights. Three individuals have officially been granted victim status in the judicial investigation that has been ongoing for five years in Poland,⁷³ and a second alleged victim of secret detention in Lithuania has come forward.⁷⁴ Three cases against Romania, Lithuania and Poland are pending before the ECtHR,⁷⁵ which held a public hearing in the cases against Poland on 3 December 2013. This set an important precedent, as it was the first time the Court considered evidence concerning CIA sites in Europe. However, member states' commitment to investigate rendition and secret detention is rare and volatile as shown by recent developments in Lithuania⁷⁶ and the UK.⁷⁷

In the spirit of future accession to the ECHR, the future priorities for EU justice policies must include a strong call to all the member states concerned to fully cooperate with the ECtHR. Acting on the EP's concrete recommendations, the Council and Commission must support and promote, full, prompt, impartial and effective investigations in member states, in line with international and European standards, into all allegations of European complicity in the CIA rendition and secret detention programmes. As stated in the EP's 2012 report, "the difficulties encountered by Member States in conducting inquiries result in a failure to comply fully with their international obligations, which undermines mutual trust in fundamental rights protection and thus *becomes the responsibility of the EU as a whole*" (emphasis ours).⁷⁸

7. Combating impunity within the EU and its member states for serious international crimes

The EU and its member states have a fundamental role to play in ensuring that the EU does not become a safe haven for suspected perpetrators of crimes under international law, and guaranteeing justice for crimes under international law. It has been documented that a significant number of suspected perpetrators of crimes under international law are present within several member states, as well as victims and witnesses of these crimes.

⁷³ These are Abd al-Rahim al-Nashiri, Zayn al-Abidin Muhammed Hussein (Abu Zubaydah) and Walid bin Attash, whose cases have been documented by Amnesty International in its report *Unlock the truth: Poland's involvement in CIA secret detention*, June 2013, available at <http://www.amnesty.org/en/library/asset/EUR37/002/2013/en/4c2d64c3-efbd-40db-aca6-7d5568efcd80/eur370022013en.pdf> (Walid bin Attash was granted victim status after the publication of this report; see Amnesty International, Press Release, *Poland grants victim status to Guantánamo detainee over torture allegations*, 30 October 2013, available at <http://www.amnesty.org/en/news/poland-grants-victim-status-guant-namo-detainee-over-torture-allegations-2013-10-30>).

⁷⁴ Mustafa al-Hawsawi has been recently denied victim status by Lithuania (see Amnesty International, Press Release, *Lithuania again refuses to investigate secret detention of Guantanamo Bay detainee*, 3 October 2013, available at <http://www.amnesty.org/en/for-media/press-releases/lithuania-again-refuses-investigate-secret-detention-guantanamo-bay-detaine>).

⁷⁵ ECtHR, *Al Nashiri v. Romania*, no. 33234/12, communicated on 18 September 2012; ECtHR, *Abu Zubaydah v. Lithuania*, no. 46454/11, communicated on 14 December 2012; ECtHR, *Al Nashiri v. Poland*, no. 28761/11, communicated on 10 July 2012; ECtHR, *Husayn (Abu Zubaydah) v. Poland*, no. 7511/13, communicated on 9 July 2013.

⁷⁶ See Amnesty International, *Recommendations to Lithuanian EU Presidency: mid-term review*, 29 October 2013, available at http://www.amnesty.eu/content/assets/Doc2013/AI_Mid-term_review_FINAL.pdf

⁷⁷ See Amnesty International, Press Release, *UK: Decision to hand torture inquiry to intelligence committee strongly criticised*, 20 December 2013, available at <http://www.amnesty.eu/en/news/press-releases/all/uk-decision-to-hand-torture-inquiry-to-intelligence-committee-strongly-criticised-0685/#.UrhKd9JDu84>

⁷⁸ European Parliament, *Resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report*, cited above.

The debate on the future strategy of EU justice policies should be the occasion to express a renewed engagement from the EU to combat impunity for crimes under international law such as genocide, crimes against humanity, war crimes, and torture. All EU institutions must commit to strengthening their efforts to support cooperation and coordination among criminal justice authorities and other relevant actors, and to helping member states addressing the challenges faced by national police and prosecution authorities in the effective investigation and prosecution of these crimes.

8. Ensuring corporate accountability with respect to human rights violations

In 2011, the EU endorsed the UN Guiding Principles on Business and Human Rights (UNGPs)⁷⁹ and committed to fully implementing them.⁸⁰ The UNGPs provide a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.

When defining its priorities in the area of justice, and with particular regard to the debate on ‘justice for growth’, the EU and the member states should take concrete action to advance compliance of business-related policies with human rights standards. To that extent, the priorities should include a commitment by the EU and the member states to:

- Ensuring a systematic review and further reform of the existing legal framework for human rights protection in the context of business activity, after mapping all the areas of EU law for which the UNGPs and other human rights standards bear relevance
- Ensuring more effective enforcement of existing laws holding corporate actors to account
Within the scope of State regulation, there is an urgent need to address the legal enforcement gap that exists when it comes to holding companies to account for illegal conduct under existing laws. The EU should further explore gaps in accountability that exist between the different domestic legal regimes of the member states in relation to corporations, either guiding member states to bridge these gaps, or harmonising the different regimes to ensure that consistent human rights protection is guaranteed. Harmonisation should not lead to the lowest common denominator, but the highest possible protection according to international law
- Ensuring greater accountability for corporate actors, particularly with respect to business operations conducted abroad
The EU and its member states must enact specific measures to hold companies to account in order to ensure they respect human rights within their territory, as well as when operating abroad. Effective regulatory measures put in place by the EU and member states can take a number of forms. One possibility is to legally require businesses to respect human rights and to undertake human rights due diligence throughout their global operations in order to mitigate human rights risks, and prevent adverse human rights impacts. Others include the mandatory disclosure of information relating to potential or actual negative human rights impacts arising from business activities, such as mineral supply chains
- Improving access to justice for victims of corporate abuse
Corporate entities are currently able to operate across borders with ease, while the same borders simultaneously present institutional, political, practical and legal barriers to corporate accountability and redress for victims of corporate human rights abuses. The EU and its member states must ensure that victims of corporate human rights abuses can exercise their right to an effective remedy in line

⁷⁹ United Nations, Office of the High Commissioner for Human Rights, *Guiding principles on business and human rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, 21 March 2011, A/HRC/17/31. The Guiding Principles were endorsed by the General Assembly in its resolution on *Human rights and transnational corporations and other business enterprises*, 6 July 2011, A/HRC/RES/17/4.

⁸⁰ See <http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/>.

with international and European human rights law. This requires improving and facilitating access to both judicial and non-judicial remedies.

9. Safeguarding human rights in times of austerity

The economic crisis that has been affecting Europe for several years now has not only impacted on the economic and financial health of member states, but has also led to severe consequences for human rights. In an attempt to curb national deficits and public debts, many member states have been focusing on devising and implementing austerity policies. This has been strongly pushed and supported by European and international institutions of economic governance when designing bail-out agreements – including the European Commission and the European Central Bank.

In his recent report “Safeguarding human rights in times of economic crisis” (November 2013),⁸¹ the Council of Europe Commissioner for Human Rights pointed out the severe risks posed by austerity measures to the enjoyment of human rights, especially in the area of economic, social and cultural rights, but also in relation to the freedoms of expression and peaceful assembly, where concerns have been raised about the use of excessive force by law enforcement authorities against demonstrators.⁸² In the context of financial co-operation and assistance, the Commissioner stressed the crucial responsibility of regional and international institutions in preventing such human rights violations.

When designing the priorities for the future EU justice policies, the EU and its member states should explicitly commit to systematically conducting human rights impact assessments on the conditionality clauses and subsequent austerity measures prior to developing financial assistance programmes, in order to ensure that their obligation to protect human rights is fulfilled. In view of its central role in developing and monitoring financial assistance programmes to member states, the European Commission has an important responsibility in ensuring that policy conditions, associated with the various financial assistance agreements, do not impair the ability of those member states to protect and fulfill human rights for all on their territory.

⁸¹ Council of Europe Commissioner for Human Rights, Issue Paper, *Safeguarding human rights in times of economic crisis*, 4 December 2013, available at <https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2407768&ScMode=1&DocId=2088892&Usage=2>

⁸² Council of Europe Commissioner for Human Rights, Issue Paper, *Safeguarding human rights in times of economic crisis*, mentioned above, p. 21. The issue has been raised also by Amnesty International (see in particular the report *Policing demonstrations in the European Union*, 25 October 2012, available at <http://www.amnesty.org/en/library/asset/EUR01/022/2012/en/1e06df7d-6878-40e0-8e82-d07605e9a6e9/eur010222012en.pdf>).

ii. Part 2: A human rights-based approach to asylum and migration

The EU has developed a broad range of policies and legislative instruments in the field of asylum and migration. However, it has not done so in full respect of human rights and fundamental values. In particular, the EU's approach to irregular migration has failed to devote adequate attention to the protection of the rights of migrants, refugees and asylum-seekers.

In accordance with objectives set out in the Stockholm programme, the EU has increased the security-centred approach to migration, with huge investments in Frontex (the EU Border Agency) and new surveillance technologies, such as Eurosur. It has been significantly less ambitious in meeting objectives to develop comprehensive and flexible migration policies, taking into consideration labour market needs, guaranteeing the rights of migrants, and creating an area of protection and solidarity within the EU with the completion of the Common European Asylum System (CEAS).

In setting the agenda for the forthcoming years in the field of migration and asylum, Amnesty International calls for a major shift in approach: the human rights compliance of common policies in this field must be assessed and policies accordingly reviewed; human rights standards must be mainstreamed in all policies and legislation; and the Commission must remain vigilant in monitoring the full and proper implementation of these standards by member states.

The ultimate aim of elaborating an internal strategic framework and action plan on human rights is to enable the EU to develop a proactive, protective response to pressing human rights challenges it currently faces within its territory, at its borders and beyond. In this chapter, Amnesty International reviews certain current issues in the field of asylum and migration, and details objectives for particular consideration in the years to come. These objectives should guide and prompt EU action towards the obligation to respect, protect and fulfill human rights as defined by international human rights law.

1. Promoting human rights-compliant migration control policies

Ever since acquiring legislative competence by virtue of the amendments to the European Community Treaty introduced by the Treaty of Amsterdam and the integration of the Schengen acquis into the framework of the EU, legally binding instruments concerning irregular migration have focused on “control measures” to prevent entry without authorisation, assist with the removal of irregular migrants, and sanction those who facilitate irregular migration.⁸³ There is very little human rights content in these measures, apart from certain scant and selective references to human rights standards.

The same is evident in the plethora of soft law and operational measures adopted in the last decade to prevent the irregular arrival of migrants, refugees and asylum-seekers in Europe.⁸⁴ They have focused on improving external border controls through logistical and technological means, formalising cooperation

⁸³ See, amongst others, Council Directive 2001/51/EC supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (Carrier sanctions Directive); Council Directive 2001/40/EC on the mutual recognition of decisions on expulsion of third country nationals; Council Directive 2002/90/EC defining the facilitation of unauthorised entry, transit and residence; Council Framework Decision 2002/946/JHA on strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence; Council Directive 2003/110/EC on assistance in cases of transit for the purposes of removal by air; Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals (Return Directive).

⁸⁴ From the 2002 Council Plan to Combat Illegal Immigration to the 2012 ‘EU Action on Migratory Pressures – A Strategic Response’. The Strategy, which is periodically reviewed, sets out key actions and priorities to ‘prevent and combat illegal immigration in all its forms’ with scant attention to push or pull factors.

agreements with third countries to build capacity to counter irregular migration to the EU, and funding the development of the detention estate for irregular migrants both inside and outside Europe. Disquietingly, EU language is frequently couched in terms of “combating” or “fighting illegal immigration”, underlining a security approach which externalises the phenomenon of irregular migration, as if it were wholly unrelated to migration and economic governance within the territory of member states. The use of the term ‘illegal’ for migrants, who only commit administrative offences by attempting to cross borders irregularly and pose no threat to the security of the state or its people, is dehumanising and criminalising. Illegality is not a term that can be attached to personhood. People can be undocumented or have an irregular immigration status but cannot be illegal.

The absence of a strong human rights component in these laws and policies has been deleterious to the rights of migrants, asylum-seekers and refugees. It has meant their exposure to serious harm within the EU, at its borders and beyond; it has contravened international humanitarian duties such as safe and timely rescue at sea; and has resulted in an increasing number of people dying on their way to Europe. Numerous reports by international organisations such as the Council of Europe, the UN, the EU Fundamental Rights Agency (FRA), and the European Ombudsman urge the EU to take a hard look at the way its border management policies impact on the rights of migrants, refugees and asylum-seekers.⁸⁵ Amnesty International has also undertaken research in this field, highlighting egregious human rights violations as irregular migrants, refugees and asylum-seekers attempt to enter the EU.⁸⁶ These include life-endangering push back practices, violence and ill-treatment by border officials, and indiscriminate and automatic deprivation of liberty.

There have also been some positive developments. In particular, Amnesty International welcomes the adoption by Frontex of a fundamental rights strategy and action plan, which preceded the adoption in 2011 of a revised legal framework for Frontex activities. The revised Regulation, amongst others, aimed to strengthen the Agency’s compliance with human rights standards, including by establishing a Consultative Forum and appointing a Fundamental Rights Officer.⁸⁷ While work is in progress to integrate a fundamental rights dimension in all relevant processes relating to Frontex work, the need remains to establish an effective human rights monitoring mechanism, which addresses how to deal with and follow-up on complaints against Frontex officials and those of individual member states. Moreover, as Frontex’ role has developed beyond mere coordination of member states’ activities, the distribution of competencies and responsibilities between the agency and the national border authorities remains unclear and non-transparent. This should be addressed by the forthcoming evaluation of Frontex, which will also include a specific analysis on the way the Charter of Fundamental Rights was complied with by Frontex.⁸⁸

Amnesty International also welcomes the attempts to ensure uniform rules and effective implementation of international rules on interception and rescue at sea for Frontex-coordinated operations.⁸⁹ We

⁸⁵ See for instance, Parliamentary Assembly of the Council of Europe, *Lives lost in the Mediterranean Sea who is responsible?*, Doc. 12895, 5 April 2012; Special Report of the European Ombudsman in own-initiative inquiry OI/5/2012/BEH-MHZ concerning Frontex; Report of the Special Rapporteur on the human rights of migrants, *Regional Study: management of the external borders of the European Union and its impact on the human rights of migrants*, A/HRC/23/46, 24 April 2013; Parliamentary Assembly of the Council of Europe, Resolution 1932 (2013) *Frontex: human rights responsibilities*; European Union Agency for Fundamental Rights, *Fundamental Rights at Europe’s southern sea borders*, 2013.

⁸⁶ See reports by Amnesty International: [Seeking Safety, Finding Fear: Refugees, Asylum-seekers and migrants in Libya and Malta](#) (December 2010); [S.O.S. Europe: Human Rights and Migration Control](#) (June 2012); [Frontier Europe: Human Rights abuses on Greece’s border with Turkey](#) (July 2013); [An International Failure: the Syrian Refugee Crisis](#) (December 2013); [Refugees in Bulgaria trapped in substandard conditions](#) (December 2013).

⁸⁷ Regulation (EU) No 1168/2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

⁸⁸ See Article 33 Regulation 2007/2004, as amended by Regulation 1168/2011.

⁸⁹ Proposal for a regulation of the European Parliament and of the Council establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the

recommend swift agreement of the proposed Regulation currently under negotiation, in line with relevant case law and with full respect of the principle of non-refoulement.⁹⁰ Clearer and more effective rules should also guide unilateral member state operations. On the other hand, we note that much reliance is being placed on the European Border Surveillance System (Eurosur), which entered into force in December 2013, to secure borders and prevent arrivals.⁹¹ The Regulation establishing Eurosur requires member states to apply it in compliance with fundamental rights, in particular, the principles of non-refoulement and respect for human dignity, and data protection requirements. However, it does not establish procedures to safeguard respect of these principles. Despite repeated reference to Eurosur's lifesaving potential, Amnesty International is concerned that it will be used primarily to contain irregular migrants in source countries and do little to prevent deaths at sea, as this is dependent upon clearer responses to search and rescue and safe disembarkation.

The tragic incidents of October 2013 off the coast of Lampedusa, Italy, which altogether claimed more than 500 lives, generated a debate on strengthening existing mechanisms and arrangements to respond more effectively and prevent deaths at sea. Yet this did not translate into concrete measures – even despite the establishment of a task force of member states, the Commission and EU agencies, specifically to take clear and determined action.⁹² Investigations into the incidents show that, yet again, lives could have been saved by the timely intervention of coastal authorities. The issue of disembarkation and the responsibilities of member states post-disembarkation for processing individuals, who are making a claim for international protection, or for addressing other needs, continue to delay intervention, which puts lives at risk. Laws sanctioning the facilitation of unauthorised entry, transit and residence undermine rescue efforts, as private vessels are deterred from saving people in distress out of fear of prosecution for having rescued migrants.

The EU's migration management objectives must be consistent with human rights obligations. In shaping future policies in the field of migration, the EU must move away from a security-centred approach to border control policies to one which fully integrates human rights. The following should, in particular, be prioritised:

- Ensure a human rights-based approach to all migration-related control measures
The EU should comprehensively review border management policies to ensure that a human rights-based approach is at the centre of border-related measures, including those implemented by states, whether unilaterally or with other states under the auspices of Frontex. New measures of border surveillance based on high technology, such as Eurosur, must also respect human rights obligations.
- A review of the EU acquis on the facilitation of undocumented entry and residence
The Commission should review the EU acquis on the facilitation of undocumented entry and residence to take account of the international humanitarian obligation to render assistance to any person in danger at sea. It should also review the extent to which the penalising of actions committed with a humanitarian aim has contributed to the marginalisation of irregular migrants.
- Effective search and rescue at sea
The Commission should assess sea border monitoring activities carried out by member states, to ensure that they are primarily focused on saving the lives of migrants in distress at sea, and

Management of the Operational Cooperation at the External Borders of the Member States of the European Union, COM(2013) 197 final, 12 April 2013 (Regulation on surveillance of external sea borders).

⁹⁰ See the Joint Briefing on draft Regulation on surveillance of external sea borders by Amnesty International, the European Council on Refugees and Exiles (ECRE) and the International Commission of Jurists (ICJ), September 2013, <http://ici.wpengine.netdna-cdn.com/wp-content/uploads/2013/09/EU-SurveillanceatSea-JointBriefing-ICJAI/ECRE-2013.pdf>.

⁹¹ Regulation (EU) No 1052/2013 of 22 October 2013 establishing the European Border Surveillance System (Eurosur).

⁹² See Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, COM(2013) 869 final, 4 December 2013.

disembarking them to a place of safety. Further measures should be considered to ensure shared responsibility among EU states for disembarkation and reception arrangements.

- Effective monitoring and complaints mechanisms

The EU should provide for a system to evaluate regularly the human rights impact of border management measures (including Eurosur and other information sharing platforms financed by the EU). Effective mechanisms must be established to monitor and investigate human rights violations at borders. Such mechanisms should enable individual complaints and provide effective remedies for victims of human rights violations.

a. Human rights-based approach to cooperation with third countries on migration management

As common EU policies on migration have focused on preventing irregular arrivals in Europe, much effort has been placed on securing cooperation from third countries of transit or origin to readmit irregular migrants or prevent departures to Europe, including through arrangements, which Frontex can stipulate, with third country border authorities directly. As of 2011, Frontex also has the capacity to finance technical assistance projects in, and deploy Liaison Officers to, third countries. Frontex' cooperation with third countries occurs across the Agency's activities: from exchange of information and risk analysis assessment, through training, research and development, to operational cooperation.

Third countries' cooperation on migration, whether by EU institutions and agencies or by member states, is sought despite the political and security situation in some of these countries, lack of asylum systems that are in line with international standards, and serious human rights concerns over the treatment of migrants, refugees and asylum-seekers. Negotiation mandates are not public and there is a lack of transparency, and little or no scrutiny of agreements, either at EU or national level. The absence of a human rights-based approach to third country cooperation on migration management has meant that no account has been taken of the effect of such cooperation on the ability of persons to seek international protection or move onwards for human rights concerns, or for reasons of economic hardship, or the desire to join family members. Further, the demands being placed on third countries, particularly those neighbouring the EU, to prevent irregular departures to Europe puts refugees, asylum-seekers and migrants in those countries at risk of prolonged and arbitrary detention, refoulement, and ill-treatment.⁹³ The capacity of the EU to act as a model for the protection of human rights worldwide is damaged by EU's migration management objectives which both fail to give primacy to human rights in negotiations with third countries, and indirectly encourage third countries to violate human rights law.

The EU developed the Global approach to migration (GAM) in 2005 as the main strategic policy framework for the development of the EU external migration policy and the reinforcement of relations with third countries of transit and origin of migration flows to the EU.⁹⁴ In 2011, with the Arab Spring prompting tens of thousands of migrants to attempt the dangerous journey across the Mediterranean to Europe, the GAM was revised to take account of human aspirations to mobility, and place at its core the concerns of migrants themselves - it became the Global approach to migration and mobility (GAMM) with four pillars: organising and facilitating legal migration and mobility; preventing and reducing irregular migration and trafficking in human beings; promoting international protection and enhancing the external dimension of asylum policy; maximising the development impact of migration and mobility.⁹⁵ Amnesty International welcomes the more rights-focused approach in the renewed GAMM of 2011. However, available instruments under the GAMM (such as Mobility Partnerships) have so far failed to ensure

⁹³ See reports by Amnesty International: [Libya: Rule of law or rule of militias?](#) (June 2012), [Scapegoats of Fear, Rights of Refugees, Asylum-Seekers and Migrants Abused in Libya](#) (June 2013), ['We cannot live here anymore': Refugees from Syria in Egypt](#) (October 2013).

⁹⁴ See Communication on *Priority actions for responding to the challenges of migration: First follow-up to Hampton Court*, COM(2005) 621 final, 30 November 2005 and *Global Approach to Migration: Priority Actions in Africa and the Mediterranean*, annexed to the Presidency Conclusions of the December 2005 European Council.

⁹⁵ Communication on the *Global Approach to Migration and Mobility*, COM(2011) 743 final, 18 November 2011.

orderly, regular and safe migration, and to promote the respect of rights, including the right to seek asylum. A credible alternative has yet to be offered to people attempting the dangerous journey to Europe.

When defining its future priorities in the field of migration, the EU must ensure that human rights and legal guarantees are fully integrated in all its negotiations on migration. Active steps to be taken include:

- Human rights impact assessment and external policy coherence prior to cooperation
EU institutions, bodies and agencies must assess the human rights impact of entering into cooperation with third countries to pursue migration control-related objectives. External migration policy must be guided by the principles inspiring the EU's external action,⁹⁶ and be coherent with the EU's development policy and human rights dialogues.
- Adequate human rights safeguards with appropriate implementation mechanisms in cooperation agreements with third countries
The EU, its agencies and member states must ensure that the human rights of migrants are the primary consideration in the negotiation of any migration cooperation agreement with non-EU states, including readmission agreements, technical cooperation with coast guards or other soft law instruments such as mobility partnerships. Arrangements and agreements must also offer tangible financial and technical support for civil society organisations assisting and supporting migrants, refugees and asylum-seekers, and include human rights law training for those implementing relevant agreements. The Commission should develop monitoring mechanisms which allow for public scrutiny of third country cooperation.
- Follow-up to the Commission's evaluation of EU readmission agreements
The EU and its member states must implement the fundamental rights safeguards suggested by the Commission in its 2011 evaluation of EU readmission agreements, particularly its recommendations concerning the exclusion of third country nationals from these agreements, international and non-governmental organisations' participation in the Joint Readmission Committees, and suspension clauses in the event of persistent and serious risks of human rights violations of the persons readmitted.⁹⁷

2. End systematic detention of irregular migrants and asylum-seekers and promote alternatives

EU law clearly stipulates that detention should be a measure of last resort and decisions to detain must be subject to the principle of proportionality and necessity.⁹⁸ Yet in Europe, there is widespread use of immigration detention as a migration management tool. Extension of detention capacity in member states has also been funded and supported by the EU. The increasing practice of immigration detention is not consistently accompanied by the assurance of legal guarantees and basic human rights protection for detainees. As highlighted by Amnesty International's research and other reports, conditions of detention can be extremely precarious, if not wholly sub-standard; detention can be for prolonged periods and include children and families, and there is a near-total absence of meaningful alternatives to detention.⁹⁹

⁹⁶ See Article 21.1 of the Treaty on the European Union: "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."

⁹⁷ *Evaluation of EU Readmission Agreements*, COM(2011) 76 final, 23 February 2011.

⁹⁸ Article 6 of the EU Charter of fundamental rights protects the right to liberty and security of the person. Any interference with this right needs to be subject to the test of necessity and proportionality (Article 52 EU Charter).

⁹⁹ See, for example, Amnesty International, *Greece: Irregular migrants and asylum-seekers routinely detained in substandard conditions* (2010); Amnesty International, *Italy: New legislation violates right to liberty for migrants* (2011); Médecins Sans Frontières (MSF), *Emergency Intervention in Migrants' Detention Facilities in Evros* (2011);

Detention of migrants and asylum-seekers largely escapes public scrutiny; publicly accessible information on detention is scattered and patchy. Lack of detailed knowledge about this issue hinders initiatives aimed at improving the treatment of immigration detainees.

Urgent measures are needed to bring member states' detention practices in line with human rights standards, both in terms of conditions and length of detention, and legal guarantees attached to it. This must include a review of unacceptable EU standards, such as allowing a maximum 18-month detention period, and the detention of children, including those who are unaccompanied or separated from their families. In addition, priority must be given to pursuing policies that promote the use of alternatives to immigration detention. Considering non-custodial or less coercive alternative measures first, before detention can be used, is a requirement both in respect of irregular migrants under the Returns Directive, and for asylum-seekers, under the recast Reception Conditions Directive¹⁰⁰ and the recast Dublin Regulation.¹⁰¹

There have been instances in which alternatives to immigration detention have been tried in some member states, but they have been of limited scope (concentrating, for instance, only on families) and have generally been employed only at the end of the process, prior to removal. Alternatives to detention should not be exclusively understood as traditional alternative approaches, which are still set within an enforcement mentality: regular reporting to the authorities, deposit of an adequate financial guarantee, submission of identity documents, or the obligation to stay in a certain place. For an alternative approach to be truly effective, a systemic change in the approach to managing migration, from enforcement to engagement, is required. An approach based on engagement involves individual case management, to explore options at all stages of the process.¹⁰² An alternative to detention procedure, based on a fair case examination, is more likely to foster cooperation in the process, including cooperation in return.

Future policies on immigration and asylum must be premised on promoting the use of alternatives to detention measures and making only exceptional use of immigration detention. This involves:

- Ensuring comprehensive, accurate and up-to-date statistics on immigration detention
The European Asylum Support Office (EASO) and the Commission, within their respective fields of competence, must ensure the comprehensive collection and analysis of data on detention. Member states should be required to provide extensive information on their immigration detention rules and practices, including on places where migrants' are detained, how many are detained and for how long, and a breakdown of nationality, gender, age.
- Comprehensive review of the EU acquis on immigration detention
EU law governing immigration detention must be reviewed, particularly with a view preventing prolonged detention and narrowing down circumstances which would justify detention, thus making it truly exceptional.
- Setting up a mechanism for regular and independent monitoring of places of detention
Places of detention should be independently monitored, to ensure greater transparency. Indeed, member states should be required to facilitate independent monitoring, in accordance with relevant international legal standards.¹⁰³ The Commission must ensure that instances of arbitrary detention,

UN Human Rights Council, *Report of the Working Group on Arbitrary Detention, Mission to Malta* (2010); Report of the Special Rapporteur on the Human Rights of Migrants, A/HRC/20/24, 2 April 2012.

¹⁰⁰ Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast).

¹⁰¹ Regulation (EU) establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

¹⁰² The International Detention Coalition (IDC) has identified good practices from around the world and compiled them in a handbook, while also introducing a new model, the Community Assessment and Placement model. See <http://idcoalition.org/cap/>.

¹⁰³ For instance, the Optional Protocol to the Convention against Torture provides a strong legal basis for regular and independent monitoring of places of detention.

deficiencies in detention standards, and any violations or abuse of the human rights of detained migrants are investigated and appropriately sanctioned.

- Ending the detention of children and other particularly vulnerable individuals
Immigration detention of children can never be said to be in their best interests. The detention of children solely for immigration purposes, whether they are unaccompanied or held together with their family members, can never be justified, and represents an abject failure of the obligation to respect, care for, and protect children's human rights. The jurisprudence of the European Court of Human Rights, arising from cases involving the detention of asylum-seeking children and other children, solely for immigration purposes, has rightly emphasised their extreme vulnerability, in particular, but not exclusively, the vulnerability of unaccompanied or separated children.¹⁰⁴ Other particularly vulnerable individuals, such as persons with physical, mental, intellectual and sensory impairments, victims of torture and other physical, psychological or sexual violence, pregnant woman and nursing mothers, should not be detained.
- Developing detailed guidance on alternatives to detention
The Commission should develop detailed guidance for implementing alternatives to detention requirements under EU law. Alternatives to detention should involve open reception arrangements based on free movement. Guidance should also be given on adequate assessment procedures, sensitive to the special needs of vulnerable individuals, and the particular needs of women, including safeguards against sexual and gender-based violence. It is crucial that alternative arrangements incorporate relevant support services to avoid people being left destitute, homeless, and falling out of touch with the authorities.

3. Ensure adequate implementation of the EU's legislative framework on asylum and remedy existing gaps in protection

With the adoption of the recast asylum package, the Union has met the objective set by the Stockholm Programme of completing the establishment of a Common European Asylum System (CEAS). While, overall, the recast asylum measures have improved a number of legal standards, opportunities have been missed to achieve high protection standards, and provide sufficient legal clarity to allow for their uniform implementation by member states. After over 10 years of harmonisation, there continues to be great disparity between EU member states, not only in the number of asylum-seekers they receive, but also in the way that asylum-seekers are treated and supported, in protection statuses granted, and in their prospects of integration. There continue to be real challenges to achieving a truly common asylum system in practice. One challenge in particular relates to the lack of a harmonised gender-sensitive approach to the qualification of beneficiaries of international protection, as well as in asylum procedures and reception conditions.¹⁰⁵ Amnesty International welcomes the approach to gender and international protection promoted in the recast Directives and the Commission Communication on the elimination of female genital mutilation (FGM).¹⁰⁶

The European Asylum Support Office (EASO), which has been operational since June 2011, will play a key role in the post-legislative phase. The EASO is entrusted with supporting the quality, consistency and effectiveness of the CEAS, by gathering information and reporting on the situation of asylum in the Union, and by supporting practical cooperation between member states. The EASO should also gather and analyse information to assess the needs of states under particular pressure, including by making use of or setting up early warning systems, for the purpose of identifying and preparing support actions. While

¹⁰⁴ *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, Judgment of 12 October 2006; *Mushkhadzhiyeva and others v. Belgium*, Application No. 41442/07, Judgment of 19 January 2010.

¹⁰⁵ European Parliament, Gender Related Asylum Claims in Europe, study Policy Department Citizen's Rights and Constitutional Affairs, 2012 available at [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET\(2012\)462481_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf)

¹⁰⁶ *Towards the elimination of female genital mutilation*, COM(2013) 833 final.

an early warning system has yet to be developed, the gaps analysis to support implementation of the CEAS has, to date, not been performed with the required effectiveness and independence.

As already noted in Amnesty International's mid-term review of the Stockholm Programme,¹⁰⁷ the financial resources allocated to this agency do not reflect the high expectation placed on it to support EU member states and institutions. This is in sharp contrast to the large and constantly increasing attributions to Frontex. Moreover, lack of transparency around its activities and of organised input from NGO experts remains largely unaddressed. The EASO is coming up for independent review under its founding Regulation.¹⁰⁸ This presents a crucial moment to enhance EASO working methods, and ensure that it develops as an independent centre of expertise in the asylum field, rather than just executing decisions taken by the management board, the agency's main governing, which is comprised of member states' asylum authorities.

When defining its future priorities in the field of asylum, the EU should address the need to close protection gaps, and to ensure the full implementation of existing standards by member states. This should include:

- The adoption of comprehensive guidelines covering the asylum acquis
The Commission should use the possibility of issuing guidelines and roadmaps to help members states comply with relevant human rights standards, including those related to gender, when transposing EU legislation at national level.
- Developing practical cooperation through EASO
States and EU institutions, coordinated by EASO, should work to improve practical cooperation in areas where protection is not consistently ensured in practice. In particular, EASO should further develop training tools for people working with asylum-seekers; improve access to and use of accurate and updated Country of Origin information; develop best practices for working with vulnerable individuals, a gender sensitive approach to international protection, and quality of decision-making.
- Ensuring the EASO can perform its key role in identifying protection gaps and enhancing solidarity
The review of the EASO should aim to put in place reliable assessment tools and data collection mechanisms in order to identify gaps, or support overburdened national asylum systems. It should also enhance cooperation with non-governmental organisations, which have the knowledge and ground experience to play a key role in identifying gaps in national asylum systems.
- Ensuring effective monitoring and evaluation of the implementation of the EU asylum acquis
The Commission should develop structural and well-resourced mechanisms for evaluating the implementation of the asylum acquis, including onsite inspections and accountable use of EU funding. The Commission services must be adequately resourced in order to carry out important post-legislative monitoring and evaluation, including taking prompt remedial action in the case of violations by member states.

¹⁰⁷ http://www.amnesty.eu/content/assets/Stockholm_document.pdf.

¹⁰⁸ Regulation (EU) No 439/2010 establishing a European Asylum Support Office, Article 46: "No later than 19 June 2014, the Support Office shall commission an independent external evaluation of its achievements on the basis of terms of reference issued by the Management Board in agreement with the Commission. That evaluation shall cover the Support Office's impact on practical cooperation on asylum and on the CEAS. The evaluation shall take due regard to progress made, within its mandate, including assessing whether additional measures are necessary to ensure effective solidarity and sharing of responsibilities with Member States subject to particular pressure. It shall, in particular, address the possible need to modify the mandate of the Support Office, including the financial implications of any such modification and shall also examine whether the management structure is appropriate for carrying out the Support Office's duties. The evaluation shall take into account the views of stakeholders, at both Union and national level."

4. Strengthen solidarity and responsibility sharing

The Stockholm programme recognised the need to develop a comprehensive and flexible migration policy, centred on solidarity and responsibility. Article 80 of the Treaty on the Functioning of the European Union (TFEU) requires that the principle of solidarity and fair sharing of responsibility, including its financial implications, governs all policies on border checks, asylum and immigration.

The need for solidarity and responsibility sharing has been increasingly claimed by those member states geographically situated at the external border of the EU, that are confronted with sudden influxes of migrants, refugees and asylum-seekers, particularly in conjunction with upheaval, wars, or other crises outside Europe. Although these countries might not, overall, be the major recipients of refugees and asylum-seekers in the EU,¹⁰⁹ sudden influxes can put reception arrangements under strain and demand urgent and concerted action; people arriving irregularly at the external EU border are often traumatised and have particular humanitarian needs.

The EU legal framework offers a variety of solidarity and responsibility-sharing tools and instruments:¹¹⁰ EU resources under relevant funding instruments are allocated in proportion to asylum claims and protection statuses granted. Emergency funding is available to address the situation in member states facing particular pressures. The EASO can deploy Asylum Support Teams to support states that are experiencing difficulties through the provision of interpreting services, information on countries of origin, and knowledge of the handling and management of asylum cases. There have been instances of physical relocation of beneficiaries of international protection from Malta to other EU member states, although these have been limited in number.¹¹¹

One issue that frequently arises in conjunction with migration influx situations is the burden that the application of the Dublin system could put on those states receiving migration influx. Aside from the need to ensure the fundamental rights compliance of Dublin arrangements, as evidenced by national and European Courts' rulings,¹¹² the operation of the Dublin system can contribute to putting overburdened or under-resourced asylum and reception systems under strain, and subject to sub-standard treatment those who are returned.¹¹³ The Commission proposal for a recast Dublin Regulation addressed such situations by providing for a mechanism for the temporary suspension of transfers of asylum-seekers, which the Council did not accept. Rather, negotiations concluded with the provision for an Early Warning, Preparedness and Crisis Management Mechanism, aimed at identifying, in a timely manner, particular pressures on member states' asylum systems. Although this mechanism, in itself, is unlikely to ensure that measures taken in applying the Dublin system fully respect fundamental rights, if effectively developed and implemented in a way that allows for early detection of lack of capacity or quality in member state asylum practice, it could be a useful tool in triggering remedial action and relevant solidarity measures.

The recast Dublin Regulation has not remedied the underlying structural problems of a system based on greatly diverging asylum systems and reception conditions in member states. However, it contains more

¹⁰⁹ In 2012, out of 335,365 asylum applications in the EU, Bulgaria received 1,385 asylum-seekers (rank 20); Greece 9,575 (rank 11); Italy 17,350 (rank 7) and Spain 2,565 (rank 14). The main countries receiving asylum-seekers over the same period were Germany (77,650), France (61,455) and Sweden (43,945). See [EMN bulletin first semester 2013](#).

¹¹⁰ See for comprehensive overview, the Commission Communication on *enhanced intra-EU solidarity in the field of asylum. An agenda for better responsibility-sharing and more mutual trust*, COM(2011) 835final, 2 December 2011.

¹¹¹ See EASO's evaluation of the Project for intra-EU Relocation from Malta (EUREMA – phase I and II) and bilateral arrangements between EU Member States, Associated Countries and Malta: [EASO fact finding report on intra-EU relocation activities from Malta](#), July 2012.

¹¹² See particularly, *M.S.S. v. Belgium and Greece*, Application No. 30696/09, Judgment of 21 January 2011; Joined cases C-411/10 *NS* and C-493/10 *ME*, Judgment of 21 December 2011.

¹¹³ See for instance recent call to suspend transfers of asylum-seekers under the Dublin Regulation to Bulgaria by UNHCR, Amnesty International and other organisations.

extensive procedural safeguards and has changed in other aspects which should improve respect for family life and the best interests of the child. It further stresses the need for solidarity and emphasises respect for the rights enshrined in the EU Charter of fundamental rights. States participating in the Dublin system should therefore apply the provisions fully in line with fundamental rights and the principle of solidarity. A protection-sensitive and solidarity-oriented application of the Dublin Regulation would involve, for instance, the use of discretion under the system to allow asylum-seekers to lodge their claims in countries where they have wider family ties or stronger links and who would otherwise attempt to reach those countries irregularly – rather than seeking to contain them in the EU country where they first arrived, regardless of whether overburdened or underdeveloped national asylum systems are able to offer adequate protection.

Pressures on certain member states could also be alleviated by removing obstacles to free movement rights for beneficiaries of international protection. The 2011 Directive amending the Long-term Residence Directive extends to beneficiaries of international protection the acquisition of free movement rights, but requirements are onerous and subject to the five-year residence rule, without including the entire duration of the asylum procedure.¹¹⁴ It is therefore unlikely to be an additional avenue for mobility within the EU for asylum-seekers, in the same way as EU long-term residence status has been of limited use to third country nationals themselves.¹¹⁵

A key priority for future policies in the area of immigration and asylum is to provide adequate responses to the issue of solidarity and fair sharing of responsibility. Measures to this effect should include the following:

- Implementation of Dublin in accordance with fundamental rights and the principle of solidarity
The Commission should ensure adequate monitoring of the implementation of the recast Dublin Regulation, and consider further revision of the system to ensure that asylum-seekers' rights are safeguarded in any arrangements seeking to attribute responsibility for determining their claims. Focus should be on limiting reasons for onward movement by allowing claims to be lodged where asylum-seekers can rely on extended family or community support, or have better long-term integration prospects and opportunities, as well as fair responsibility sharing between member states.
- Developing an effective Early Warning, Preparedness and Crisis Management Mechanism
To work effectively, the Early Warning, Preparedness and Crisis Management Mechanism under the Dublin Regulation must provide for comprehensive information gathering, and critical analytical processes on asylum practice in the Union. This has the potential to ensure early detection of the lack of capacity or quality in member state asylum practices, and to be a useful tool for triggering remedial action and relevant solidarity tools.
- Further developing intra-EU relocation of beneficiaries of international protection
Intra-EU relocation should remain an option, under the coordination of the EASO. To address concerns that it could disincentivise member states from investing in their national protection system, it must be accompanied by clear conditions, and verifiable, measurable steps being taken by the member state benefitting from relocation, to build capacity for protection and integration in their national asylum system. Criteria for selection and procedures for intra-EU relocation should be harmonised.
- Enhancing free movement of beneficiaries of international protection
The Commission should consider a further revision of the Long-Term residence directive as it applies to beneficiaries of international protection. Pressures on member states could be alleviated if beneficiaries of international protection were able to take up residence in another member state. This

¹¹⁴ Directive 2011/51/EU amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection.

¹¹⁵ Report from the Commission on the application of Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents, COM(2011) 585final.

would also reduce underlying reasons for onward movement. The right to free movement must be attached to mutual recognition of protection statuses granted under the Qualification Directive.¹¹⁶ The Commission should initiate a legislative proposal in this respect.

a. Sharing international responsibility to protect refugees

While admission of refugees for resettlement remains within the decision-making power of EU member states, further efforts must be made to provide coordinated responses to recurrent refugee crises. EU responses to the Iraqi refugee crisis in 2008, to refugees fleeing from the war in Libya in 2011, and to the current massive refugee outflow generated by the war in Syria, demonstrate the need for better joined-up EU responses and scaled-up resettlement opportunities in the EU. UNHCR has set a goal of securing 30,000 places for Syrian refugees by the end of 2014. The EU is finding it challenging to meet even this modest goal: it has pledged a total of 14,315 - the vast majority (11,000 places) offered by Germany, in the form of humanitarian admission and sponsorship programmes. Excluding Germany, the remaining 27 EU countries have pledged a mere 3,315 places.

The adoption in 2012 of an EU Resettlement Programme was a positive step towards more coordinated efforts, and more effective use of financial assistance for resettlement provided by the European Refugee Fund.¹¹⁷ The EU Resettlement programme enables the setting of common priorities for resettlement, and enhances, therefore, political and practical cooperation between member states, potentially increasing the humanitarian and strategic impact of resettlement. It also provided some impetus for more EU member states to engage in resettlement.¹¹⁸ However, despite the increase in the number of EU countries resettling, the overall resettlement rate in the EU has not significantly increased, and efforts by EU member states for resettlement are still limited, particularly vis-à-vis global resettlement needs, and Europe's potential capacity to absorb more refugees: 4,125 refugees were resettled in 2011, and 4,405 in 2012.¹¹⁹ Numbers of refugees resettled in the EU are not evenly distributed, but concentrated in a few traditional resettlement countries. Perhaps unsurprisingly, it is the countries receiving more asylum-seekers that also tend to resettle more refugees.¹²⁰ The EASO, which is tasked with coordinating member states' resettlement actions, is expected to play an increasing role and will start undertaking targeted activities during 2014.¹²¹

In the coming years, the EU must take steps to enhance its capacity to respond to international refugee crises and better contribute to the global protection of refugees. This should be done through the following:

- Further developing the EU Programme for the Resettlement of Refugees
The EU Programme for the Resettlement of Refugees is an important step in providing protection to refugees in protracted situations with more member states engaging in resettlement. The EASO should develop this programme further, and strive for the resettlement of at least 20,000 refugees per year by 2020. The EASO should also promote more practical cooperation in resettlement to exchange know-how and best practice, and more cost-effective joint up activities, such as selection missions. The EU's financial incentive for member states to undertake resettlement should be strengthened. Whilst meeting quantitative expectations, the EASO must strengthen logistical support

¹¹⁶ Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).

¹¹⁷ Decision No 281/2012/EU of the European Parliament and the Council of 29 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme 'Solidarity and Management of Migration Flows'.

¹¹⁸ Currently 14 member states implement resettlement programmes, many with relatively small numbers.

¹¹⁹ See [EU Resettlement factsheet](#) of the European Resettlement Network.

¹²⁰ KNOW RESET Research Report 2013/04.

¹²¹ See EASO Work Programme 2014.

to member states and ensure that resettlement is accompanied by adequate integration packages for resettled refugees.

- Identifying other ways of sharing responsibility

Consideration should also be given to other arrangements enabling refugees and asylum-seekers to find protection in Europe, such as Protected Entry Procedures, which allow for international protection to be requested in EU embassies and consular posts abroad, greater use of humanitarian visas, and lifting of visa restrictions.

5. More channels for legal migration and protection against abuse and exploitation

Enabling refugees and asylum-seekers to find protection by travelling to Europe by regular means is not only a tangible gesture towards international solidarity. It also allows them to move safely, avoiding dangerous journeys to escape border detection, and exposure to abuse and exploitation by the smuggling or trafficking rings, which organise those journeys. The same holds true for those who decide to move because of other human rights concerns, to escape economic hardship, or to join members of their family in Europe.

The opening of legal migration channels is one of the four pillars of the GAMM. Despite the high demand in the EU for seasonal and/or low-skilled work in several sectors, regular migration channels for low-skilled workers from third countries in the EU are largely insufficient. Besides being a major pull factor for irregular migrants, unrecognised or underestimated labour needs are often met by informal, irregular arrangements, often accompanied by dramatic abuse and exploitation.¹²²

Irregular migrants are not only particularly vulnerable to abuse by employers, landlords and other private actors. Without required documentation, irregular migrants may have difficulty accessing essential services, such as healthcare and education. Authorities in some countries require service providers to report suspected irregular migrants, effectively closing off these services to them. When their rights are violated, irregular migrants may be unable to access legal protection without facing detention and deportation. Access to basic rights for migrants in an irregular situation differs significantly between EU member states, both in law and practice.¹²³

The security-centred approach of the EU's migration policy is impervious to the problems often faced by irregular migrants on its territory. These problems are not a necessary consequence of irregular migration status; rather, they are human rights violations or abuses, and should be addressed as such. EU law acknowledges the need to prevent destitution of irregular migrants in a single instrument, the Return Directive, specifically in respect to those who cannot be removed. The recognition that basic conditions of subsistence should be defined in national legislation is, however, not followed up by specific legal requirements.¹²⁴

A human rights-based migration policy should aim to respect, protect, and fulfil the human rights of all individuals subjected to the country's jurisdiction, without discrimination based on nationality or migration status. In shaping future migration policy, the EU must pay more attention to positively addressing the situation of migrants in an irregular situation. In particular, the EU should:

- Develop new and more flexible regular migration channels

The EU should strengthen the GAMM pillar that promotes legal migration and develop new and more flexible legal channels for labour migration to Europe. This will contribute not only to alleviating

¹²² Amnesty International, *Exploited labour: Migrant workers in Italy's agricultural sector* (December 2012).

¹²³ See European Union Agency for Fundamental Rights Report, *Fundamental Rights of migrants in an irregular situation in the European Union*, 2011.

¹²⁴ Return Directive, preamble recital 12. See on this the study by Flemish Refugee Action, Detention Action, France Terre D'Asile, Menedek and ECRE, *Point of No Return: The futile detention of unreturnable migrants*, January 2014.

demographic pressures and meeting immediate EU labour market needs, but will also support the aims of other GAMM pillars, namely those on preventing and reducing irregular migration and trafficking in human beings, and maximising the impact of migration on development. More importantly, the opening of new and more flexible legal migration channels would help to protect migrant workers from human rights abuses and exploitation.

- Prevent and address impunity for human rights violations of migrants with an irregular status
The EU should develop a rights-based approach to the situation of migrants with an irregular status. Such an approach needs to address legal and practical barriers migrants in an irregular situation face in accessing basic services, such as healthcare, housing, education, access to justice and labour redress mechanisms. Where a decision to return a person cannot be enforced, their legal status while they remain in the host country should allow them to enjoy their human rights fully. The EU should examine processes that push people into an irregular situation and promote necessary reform of national laws and practices.

6. Human rights compliant, effective, and accountable EU funding

The EU is about to adopt the future DG Home Affairs budget (2014-2020), which will include two DG Home Affairs funds: the Migration, Asylum and Integration Fund (AMIF) and the Internal Security Fund (ISF). AMIF focuses on people flows and the integrated management of migration. It aims to support actions addressing all aspects of migration, including asylum, resettlement, legal migration, integration and the return of irregularly staying non-EU nationals.¹²⁵ Allocation for the financing period is 3,137 million Euro. The ISF will support the implementation of the Internal Security Strategy and the EU approach to law enforcement cooperation, including the management of the union's external borders. It will also cover the development of new IT systems, such as the future entry/exit system and the Registered Traveller Programme. The allocation is 3,764 million Euro.

Both funds include a new external dimension component, which will give the EU the means to pursue the external elements of its migration policy and support implementation of the GAMM. These instruments will also provide for rapid response in cases of emergency. Several other funding instruments managed by other Commission services, agencies and the EEAS, include migration-related interventions in third countries.¹²⁶

Future dialogues, policies and interventions on funding must ensure the following:

- Balanced distribution of funding
The EU needs to ensure a balanced allocation of funds in all asylum and migration-related interventions, both internally and in third countries. Resources should be prioritised to ensure implementation of important human rights and protection standards for refugees, asylum-seekers and migrants. Funding should be more closely linked to formulation and measuring of progress vis-à-vis indicators. There must also be more transparent monitoring and reporting.
- Consistency with human rights obligations
The EU must ensure that internal priorities in the field of migration do not negatively influence activities funded in third countries, to the detriment of the rights of refugees and migrants. In particular, concerning financial assistance in third countries, procedures should be put in place to monitor the impact of funds on the rights of migrants and refugees in these countries.

¹²⁵ DG Home, *Funding home affairs beyond 2013*, http://ec.europa.eu/dgs/home-affairs/financing/fundings/funding-home-affairs-beyond-2013/index_en.htm

¹²⁶ Amongst others, Development Cooperation Instrument, Instrument for Stability, Partnership Instrument, European Neighbourhood Instrument, and Instrument for Pre-Accession Assistance.

- Coordination of funding instruments

The external dimension component within DG Home funding requires increased coordination with funding instruments that are managed by other Commission services, agencies and the EEAS. The EU should put in place coherent and integrated institutional dialogue to plan and manage external and internal funds, addressing migration-related issues.
