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Concluding Remarks

I'd like to express my thanks to the organisers for the honour and responsibility of reporting on a very rich and profound discussion.

And I'd like to congratulate them for this extremely well done manual, which shows how sophisticated and complex European HR law is, being as it is at the forefront of human rights developments worldwide on many issues.

As you know, contrary to most people in the room, I'm not a specialist of European law. I have listened to the discussions today from my position, once removed, as UN special rapporteur on the human rights of migrants, trying constantly to link European human rights guarantees with the universal human rights framework that I'm working with.

I recently presented to the U.N. Human Rights Council my annual report, which bears on the protection of the human rights of migrants at the external borders of the European Union. This report is the culmination of a yearlong thematic study that involved research on the EU's policy framework, consultations with EU institutions, and visits to four countries on both sides of two external EU borders: Tunisia, Italy, Turkey and Greece. The visits served as case studies for my research. I've been particularly satisfied with the extensive response that I've received from the European Union, Italy and Greece. It showed the interest they had taken in my report and a manifest will to engage on the issues that I've raised.

I'd also like to signal that my 2012 Report to the U.N. Human Rights Council bore on the detention of migrants and highlighted in particular the need to put in place alternatives to detention.

My report to the U.N. General Assembly in New York next October will bear on Global Migration Governance in view of the High Level Dialogue that will take place at the U.N. General Assembly on 4 October 2013.

I cannot hope to do a summary of the discussions we had today. They were too rich, and I'm happy to report that I've learned a lot. I'll suggest a series of ideas, coming from my perspective and experience, which I'll relate to what has been said today.

1. Migration is a massive issue

The numbers are and will remain high. No deterrence policy has really achieved a durable reduction of irregular migration.

It is also a complex issue. This is reflected in the complexity of case law, as was mentioned today. The issues are numerous and varied: persecution, family violence, access to health care, death penalty, refoulement, detention, procedural safeguards... It was said today that we need a broad perspective, if we are to understand what is happening and why.

But this is not new issue. We've always migrated. We're all migrants, although we rarely recognise ourselves as migrants. We treat migration as if it was an anomaly, when it is the normal condition of mankind.

Irregular migration is not a new phenomenon either. In France, during the '60s, official immigration mechanisms only covered 18-20 % of the needs, and 80% of migration was irregular and got regularised when they found a job, with very little fuss.

Since then, migration policies have been securitized, although the security threats posed by irregular migrants have never been really defined, nor proven.

Some countries even make irregular migration a criminal activity, when crossing the border without documentation is not a crime against persons, nor against property, nor against state security. Even if they violate an administrative requirement regarding documents and crossing the border, irregular migrants are not criminals, and shouldn't be treated as such.

While acknowledging the push factors, we must also recognised the pull factors. The economies of all countries attracting migrants have unrecognised labour needs. There is a labour market for exploited irregular migrants: irregular employers profit from their vulnerability and there's little political appetite to repress this, since this could cost jobs and taxes in low profit-margin sectors, such as agriculture, construction, care giving, hospitality. They wouldn't come in such numbers if it weren't for such unrecognised labour markets that everyone knows about. The E.U. employer sanction directive doesn't seem to see any real implementation on the ground. In that sense, irregular migrants don't "steal jobs", since very few locals would accept the labour conditions of such jobs. We shy away from tackling that issue head on and the dominant anti-immigration public discourse makes scapegoats of the migrants.

As was mentioned today, fighting trafficking in persons and including it under the interpretation of art. 4 ECHR is important, but it is not sufficient to combat the structural labour exploitation of many sectors of our economies. As mentioned in my report on Italy, I've met, in the region of Castel-Volturno, sub-Saharan African migrants working in the agricultural sector who lived in tragic and abject poverty, without the means to either go back or move on. This exploitation is a cancer that we could get rid of, with some political will.

2. We need to hear individual migrants

It was said today that individual suffering is masked by the numbers, as is often the case with statistics.

One key issue, in my mind, is that migrants are always perceived and presented as a collective, a faceless and threatening mass, when the whole thrust of the human rights movement, since the end of the '40s, is about individualising, recognising individual identities instead of applying collective stereotypes.

We don't hear the migrants' voices. They were not here today. They were not at the U.N. Human Rights Council two weeks ago. We talk about them, we discuss their rights, but they rarely speak for themselves. They are the object of the public debate. They rarely are subjects in the conversation.

The reason for this is that they have no access to the political stage. They do not constitute a political constituency. They do not mobilise and there's no political mobilisation in their favour. In that sense, politicians are not really accountable for what they say about migrants. They too often repeat slogans that social science research has most often disproved: migrants steal jobs, migrants drain social security budgets, migrants increase the crime rate, migrants create health hazards, etc. We hear politicians who keep wanting to deport some migrants when it is clear that they might face ill treatments in their home country, contrary to the ruling of the *Saadi* decision, mentioned today. And ranting against foreign tribunals, who prevent them from dealing with migrants as they wish, will earn some politicians even more political points in the polls. These politicians openly claim they should be able to balance the security of the local population against the fundamental rights of migrants, when the absence of a balancing act is a key legal principle that was underlined today. Some politicians even claim that migrants should not be covered by international or European human rights law.

In that sense, the Committee of Ministers of the Council of Europe, in its function relating to the execution of the judgements of the European Court of Human Rights, is a peculiar institutional animal. Being composed of State representatives not coming from the departments in charge of security, they bring to the migration issue a different perspective, and can insist on the proper implementation of the Court's rulings with less pressure from the

security-minded politicians. We have heard today that this Committee of Ministers welcomes information from all sources, including NGOs and international organisations, in order to decide upon implementation.

We shouldn't necessarily fault all the politicians. This is a structural limit of democracies. Only "we the people" are represented. Migrants are not and will not, in the foreseeable future, be significantly represented politically. All human rights battles have been won through political mobilisation and judicial battles, but irregular and vulnerable migrants don't vote, rarely mobilise and mostly don't protest. When they do, like recently in Greece, they are threatened or killed. Mostly, they duck and move on.

Therefore, the only line of defense for migrants' rights is often that of courts, tribunals, national human rights institutions. I must say that I count a lot on the European Court of Human Rights and the European Court of Justice, as well as on national courts, to resist the electorally motivated pressures of politicians on how migrants are treated.

In consequence, migrants need and we need to guarantee them, as was several times remarked today: proper access to effective remedies, an increased sensitivity of judges and lawyers to the issue, appropriate training of all involved, access to legal aid funding and interpretation services, an effective right to appeal...

Border guards, law enforcement officers, judges, lawyers, case workers, social workers, all involved need – and actually often call for – a more appropriate legal framework, such as national action plans, better information and sensitisation, better connectivity between stakeholders... Such stakeholders are often on the receiving side of political orders that place them in a quandary: a participant today mentioned the welcome "push to the government" that courts and tribunals could provide. As was also mentioned today, it is especially important to support the front-line operators, who perform very difficult and varied tasks, often in difficult material conditions, because they are the ones who actually physically meet migrants, listen to their stories and therefore hear their voice, and then decide on a principled response to their plight.

In this sense, the Handbook will be a key operational tool for setting the legal standards, policies and practices relating to migration within a proper human rights framework.

3. Migrants have rights

In international human rights law, migrants have all the same rights as citizens, except two, the right to vote and be elected, and the right to enter and stay on the territory. All other rights are for "everybody", including all migrants, including irregular migrants. They are rights-holders, like you and I. This is not yet well understood, and most people would believe it is counter-

intuitive. One very well-known Canadian reporter once asked me how come irregular migrants had rights since they were “illegal”.

The subtext of most anti-immigration public discourse and of many administrative practices is that irregular migrants don't have the same human rights as citizens, if at all. As was said today, many believe that « les étrangers n'ont pas de droits ou ne devraient pas en avoir ».

It is important that migrants with specific vulnerabilities be tended to: asylum seekers and refugees, children, women, victims of trafficking... But let's not forget that all migrants have rights. Not being an asylum seeker or a victim of trafficking doesn't mean you don't have protection needs.

As regards children, it is noteworthy that all E.U. and Council of Europe member states are also parties to the Convention on the Rights of the Child, and it is good to hear that the European Court of Justice and the European Court of Human Rights do refer to this Convention in their judgments.

The “best interest of the child” principle applies to all, and should therefore translate into a best interest of the child determination procedure, which I haven't seen being applied at ground level to migrant children during my country visits. I have observed the conspicuous absence of a best interest of the child determination procedure in the return of Albanian children from Greece, in the push-back of Afghani children by Italian authorities by maintaining them on the ferries returning to Greece, in the frequent detention of children or of families when detention can never be in the best interest of a child, in the prosecution of an Afghani child accused of smuggling by Greek authorities because he had helped steer the boat.

Unfortunately, as a consequence of the securitisation of migration policies, every issue relating to a migrant is treated first and foremost as a migration issue, if not a security issue, when, in many cases, it should be treated as a health issue, or a labour rights issue, or an education issue, or a social housing issue, or a law and order issue. One participant today showed how, in Belgium, clandestine work is used as evidence that justifies the detention of irregular migrants, when this should be dealt as a labour issue.

Firewalls: police officers, health care, education, labour inspectors: Portugal, USA

There are good practices going in this direction all over the place. In Portugal, The department of Social Affairs maintains a registry of migrant children in an irregular situation who ask for medical treatment or for access to schools, in order to provide for such children: this registry is inaccessible to immigration enforcement services. In the USA, many cities prevent their police force from asking for immigration papers, in order to foster trust between the police and local communities in the fight against crime: the recently famous Arizona and Alabama immigration

legislation aimed at, inter alia, forbidding cities to prevent their police force from asking for immigration papers.

This is the idea of the “firewall”. Immigration enforcement must be done by a competent, well-trained, human-rights-sensitive immigration enforcement corps, and other State function must not be burdened with functions which might distract them from their core objectives. If we want police officers, labour inspectors, health care workers, educators, social workers to be able to perform the public service they’re entrusted with, we must make sure that the population of irregular migrants will trust them enough to call on them when needed. Therefore, these public servants must not be asked to become auxiliaries of immigration enforcement: if they were, migrants would not call them and public health could be threatened, family violence and local crime would go unchecked, labour exploitation wouldn’t be denounced and repressed, dysfunctional families would not be supported, children would be unschooled or at risk...

Unfortunately, immigration policies and practices are guided more by political sensitivities than by common sense.

4. Mass detention has become a politically acceptable means of deterring irregular migration

The media-degradable political discourse fuels the idea that detention is a solution to irregular migration, despite all the findings of social science research to the contrary, despite statistics showing otherwise, despite claims by States that they respect the human rights of migrants.

Yes, there are appropriate standards regarding administrative in EU legislation, as well as often in domestic law.

Yet, I haven’t heard of any infringement procedure undertaken by the European Commission against Greece after the latter announced a policy of systematic detention of migrants during the summer of 2012 (Operation Xenios Zeus). This policy was implemented to try to stem the political attractiveness of the Chrysi Avgy political movement by “emptying the cities’ downtown areas of all the migrants” (as it was put to me by Greek authorities during my visit to Greece). There was little protest in European circles. There seems to have been a political consensus at European level that this was politically advisable. Whether it could also be a human rights violation on a massive scale was manifestly downplayed.

Even in the standards, there are gaps. Some participants mentioned that European standards can be restrictive, instead of protective, and the 18-month maximum period for the detention of migrants who are in the process of being returned, provided for in the EU Return Directive was an example of that: many States increased their maximum detention duration to the

maximum allowed in the directive. And practices on the ground go in all directions and remain mostly undetected.

Freedom should be the rule and detention should be the exception, a measure or last resort. This should be the case especially in preventive administrative detention of persons who are not criminals. Yet, administrative detention is generally not covered by the higher standards applying to penal detention. And alternatives to detention are generally nowhere to be seen: no example was available in the country visits made for the report. The EU Return Directive provides for alternatives to detention. But the EU financial support in migration matters seems to have gone to building detention centres and not to fostering alternatives to detention, such as shelters for children or families. On this issue, one can consult my thematic report of last year to the U.N. Human Rights Council.

In my visits, I noted:

- The lack of a national normative framework. I've encountered very different premises (containers, police station basements, former army barracks, brand new camps, old prisons...), very different practices (some centres allowed for cell phones, but most confiscated them, for unspecified "security" reasons; one detention centres forbade the possession of pencils for fear of self-harm; some cells had no artificial light at all; the state of the toilets was often appalling...).
- That some migrants who were in migration detention centres following several years in prison after a criminal conviction wanted to return to prison, as they considered the prison regime much better than the one in migration detention centres.
- Some persons with manifest mental illness who were kept in detention for lack of other possibilities.
- The illusory nature of an access to effective remedy: lawyers are not there (legal aid is not easily available), NGOs have difficult access (detention centres are often build far from downtown cores), information is not forthcoming (especially not in appropriate languages)...

5. Administrative law is more dangerous than criminal law

Criminal law has built its guarantees over centuries because it was the field of law that could lead to death, torture and arbitrary detention. Today, in many countries of the global North, administrative law is more dangerous than criminal law: it is the only field of law that can lead to death, torture and arbitrary detention.

And yet, administrative law has not adopted many of the guarantees developed in criminal law, regarding rules of evidence and rules of procedure in particular.

Some State authorities are very happy to use such lower standards, relating to the level of proof (balance of probabilities instead of “beyond a reasonable doubt”), the use of information or intelligence instead of proper admissible evidence, the increased possibilities for secret proceedings. And since migrants have very little political voice, there’s not much pressure to enhance the standards.

It was mentioned that art. 6 ECHR, relating to the right to a fair trial, doesn’t apply to administrative law. The European Charter of Fundamental Rights adopted a better protection criterion in its art. 47, which applies to any proceedings where someone’s rights are threatened. This reflects the progress over fifty years of human rights developments, as well as the need to upgrade outdated standards.

At the same time, although what is happening in Brussels, Strasbourg and Luxemburg is important, practices at ground level must also change: they are mostly unseen and difficult to transform into principled behaviour. I’ve seen much to be changed in my country visits and several participants called for a better harmonisation of practices, which would request establishing a catalogue of good practices.

For example, a call was made to apply the recently adopted E.U. standards for operations at sea to both Frontex-coordinated operations as well as to national operations, in order to avoid a situation of double standards.

In that sense, I’m not surprised that European Court of Justice and European Court of Human Rights feel the pressure of numbers: even though they are not a supreme immigration appeal tribunal (as was mentioned by some participants), until proper remedies and proper guarantees are offered to migrants at national level, considering the grave consequences of such decisions, migrants will try every legal avenue, if they can, just as we would do in similar circumstances.

6. The powerful externalisation trend

State authorities have understood that trying to get rid of “undesirable” migrants once they are on the territory is difficult since migrants are then able to access NGOs, churches, lawyers, judges, media, politicians, etc.

It’s much “simpler” if migrants don’t even reach the border. NGOs, churches, lawyers, judges, media, politicians cannot be mobilised and the citizens couldn’t be bothered to care: it doesn’t even make a bump on the radar screen of the media, unless there’s a dramatic event that can be filmed.

Several examples can be given. Any country that produces asylum-seekers or refugees is on the visa list, including the transit visa list: in recent years, Syria was added to such list, at the same time as most European countries were congratulating Turkey on its open border policy in favour of Syrian refugees. The practice of push-backs remain rampant, at the Italy-Libya border, at the Italy-Greece border, as well as at the Greece-Turkey border. Secret agreements between Russia and Central Asian republics for the quick transfer of migrants have been denounced by some participants, as well as the migrant transfers operated in the implementation of the Shanghai anti-terrorism convention between the same countries. There are also discreet practices such as the return of Tunisians intercepted at sea by Italian authorities who are returned to Tunisia on pre-chartered flights, after less than 72 hours of detention: while Frontex intelligence officers have access to them, the institutions of the Praesidium Project (UNHCR, IOM, Italian Red Cross, Save the Children) normally responsible for identifying protection needs in immigration detention centres do not, and hence no assessment of protection needs is made for these detainees before their return.

The regional consultative processes and the EU mobility partnerships on migration policies are interesting consultation and cooperation fora. They are perfectly legitimate mechanisms through which States cooperate on implementing territorial sovereignty. However, the *quid pro quo* is often that the neighbouring state will stop all irregular migration through its territory in exchange for visa facilitation or liberalisation for their own citizens. The migrants are simply a pawn in the transaction. These fora provide little accountability mechanisms, and they are not accompanied by a cooperation that would aim at the enhancement of such countries' national human rights institutions' independence and budgets, in order to be in a position to better protect migrants (as well as the citizens).

Finally, participants noted the absence of responsibility-sharing between EU member states in providing for and protecting individuals. The EU provides funds and technical cooperation. But, as I was repeatedly told while on mission in Greece, as long as irregular migrants remain in Greece, they are not considered an Italian, or French, or German, or British problem. The Dublin system is embedded in this externalisation trend. One participant asked whether Greece would be "punished" for improving its reception and asylum systems by the reinstatement of the Dublin mechanism which has proven to be an unsustainable burden for Greece.

Conclusion

I confess my profound admiration for European human rights law and its extraordinary developments which I've personally studied over the past thirty-five years, in both the Council of Europe and the European Union. The Handbook we celebrate today is a remarkable testimony to this achievement.

At the same time, we need to go further in favour of migrants' rights, as migrants are still generally considered as outsiders, who should not benefit from the same treatment as citizens.

I'm calling for the progressive reduction of the State's margin of appreciation in the way migrants are treated.

States certainly have the power to decide who can enter and stay on their territory. But this discretionary decision cannot be taken without proper respect for the human rights of migrants as well.

We need to come to understand that the migration decision should be utterly distinguished from other decisions relating to the same migrants: labour rights, social rights, access to justice, etc. On such issues, where migrants should not necessarily be treated differently from anyone else, State decisions should be utterly justified. This is expressed in the idea of establishing firewalls between public services and immigration enforcement.

As for all other rights-holders, in spite of the political resistance, migrants should be empowered to fight for their rights. Thus the importance of access to remedies, legal assistance, proper information...

All in all, the question boils down to trying to learn to place ourselves in the shoes of the migrant, which we collectively seem to have difficulty doing: shouldn't we treat the migrant just as we would like our sons and daughters to be treated in similar circumstances?