Provisional version

Countries of transit: meeting new migration and asylum challenges

Report[1]
Committee on Migration, Refugees and Displaced Persons
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[1] Reference to Committee: Doc. 13575, Reference 4081 of 3 October 2014.

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A. Draft resolution[2]

1.   Transit countries are countries that migrants cross on their way to their country of destination. Many migrants, however, do not have a clear destination when they start travelling. Once having left their country, whether they decide to travel onwards and to where often depends on several factors. Countries that experience transit migration, in whatever form, are rarely if ever only 'countries of transit'; many are also countries of destination and/ or asylum.

2.   The concept of 'country of transit' has nevertheless come to play a key role in European policy, generally referring to European Union (EU) neighbouring countries from which the final step across the EU's external border is taken. For present purposes, the focus is mainly on these countries, even if several EU member states located between the EU's external borders and migrants' preferred final countries of destination also experience significant levels of transit migration.

3.   Whilst there may be certain policy measures that apply specifically to countries of transit, migration policy should be seen in a global perspective: all of the countries from, through and to which a migrant may travel must co-operate and coordinate their actions, with the support and assistance of international actors such as the United Nations' High Commissioner for Refugees (UNHCR), International Organisation for Migration (IOM) and EU; and policies must focus on the situation of the individuals whose decisions and actions drive migration. The Assembly welcomes the fact that EU policy increasingly recognises this imperative, as reflected in the European Commission's 'European Agenda on Migration' and the European Council's conclusions of 26 June 2015. It considers that the Council of Europe, through its North-South Centre, could play a part in enhancing capacities for dialogue to this end.

4.   The EU's relations with countries of transit emphasise migration policy. This may be expressed in the form of 'mobility partnerships', which are part of the EU's 'Global Approach on Migration Management' (GAMM). The result is 'externalisation' of border control, shifting responsibility for preventing irregular migration into Europe onto the transit country. Transit countries are also asked to accept readmission agreements extending to third country nationals, even if such persons cannot be returned to their countries of origin. This approach creates problems for transit countries in their internal socio-economic situations, as well as in their relations with neighbouring countries and countries of origin.

5.   But most of all, 'externalisation' of EU border control has serious consequences for migrants and refugees. Large numbers may find their intended onward journey blocked and thus be stranded in the transit country. This may leave them in a situation of precarity and vulnerability, without legal status or protection or access to basic needs and therefore at risk of exploitation, abuse and violence. This is especially the case where domestic legal systems contain insufficient safeguards and do not effectively implement relevant international standards, including those of the 1951 Refugee Convention. Conditions may become so intolerable that even those who had not intended doing so are constrained to move on, often forced into the hands of migrant smugglers or traffickers.

6.   The EU's influential relationship with many countries of transit, however, could also provide a basis for co-operation on a more holistic, rights-based and effective approach to migration policy. The Assembly therefore considers that the EU should further reflect upon the aims and structure of its relations with countries of transit, assuring that this cooperation leads to the prevention of human rights violations and does not put human rights at risk.

7.   As examples of how the situation in countries experiencing significant levels of transit migration can improve, the Assembly welcomes recent developments in Turkey and Morocco. These countries are at different stages of introducing new migration policies, laws and institutions, and further developing their co-operation with international actors, notably the UNHCR and IOM. Much needs to be done, however, in order to effectively implement legislation and policies, in full compliance with the Refugee Convention and, in the case of Turkey, the European Convention on Human Rights. The Assembly encourages both countries to continue with their respective reforms until their completion and effective implementation, which would have the potential to make both countries regional models of good practice. It also urges the international community, in particular the Council of Europe and the EU, to reinforce their encouragement and support for this process. They should

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[2] Draft resolution adopted by the Committee on 9 September 2015.

refrain from agreements that could have counterproductive effects, such as a one-sided emphasis on strengthening the border controls.

8.   By contrast, the Assembly is profoundly alarmed at the situation in Libya. The absence of a functioning state has contributed significantly to transforming Libya from a country predominantly of labour migration destination into one of transit, especially for those seeking to reach Malta and Italy. Migrants in Libya now find themselves at risk of grave violations of their human rights and forced to confront mortal danger when attempting to cross the Mediterranean, as shown by the horrendous number of deaths in recent years. Strong political and technical support for peace-building in Libya and its subsequent transition to democracy, with full respect for human rights and the rule of law, whilst necessary in itself, would also serve the interests of European migration policy. Operations to prevent migrants and refugees from leaving Libya risk putting their lives and safety in danger and constitute a breach of their human rights. Instead, the EU should create legal channels and binding resettlement programmes for refugees.

9.   Once migrants or refugees have reached the border of a European country, the authorities need to assess their protection needs on an individual basis before access to territory can be denied. Even outside European territory, where a national authority or Frontex has control over migrants and refugees, there is an obligation to ensure access to protection if needed. Unfortunately, this obligation is not always complied with. The Assembly is deeply concerned at continuing, credible reports of unlawful 'push-backs' and related human rights violations, despite the European Court of Human Rights' judgment in the case of *Hirsi Jamaa v. Italy*. It is further concerned by recent legislative amendments in Spain, which the Council of Europe Commissioner for Human Rights has criticised as being "aimed at legalising push-backs of migrants arriving in Ceuta and Melilla [and] in clear breach of human rights law".

10.   The Assembly recommends that the European Union:

10.1   ensure coherency in overall migration policy, taking a 'triangular' approach involving both countries of origin and transit, promoting and respecting human rights and the rule of law and avoiding a narrow emphasis on border control and security. This should include measures such as:

10.1.1   significant, unconditional and sustainable support to improve the protection of migrants' rights in transit countries;

10.1.2   greater investment in reception and asylum-processing capacity in transit countries and promoting and supporting effective implementation of international standards such as the 1951 Refugee Convention;

10.1.3   reconsideration of its policy of encouraging transit countries to sign readmission agreements extending to third-country nationals;

10.1.4   increased and better targeted development aid, aimed at both economic development and good governance;

10.1.5   further development of initiatives such as the Rabat and Khartoum processes, ensuring that human rights compliance is at their core and a condition for any cooperation on border controls;

10.2   include adequate and effective resettlement and relocation policies in the Common European Asylum System, with a binding mechanism and meaningful numbers of refugees;

10.3   acknowledge responsibility for any breaches of human rights outside EU territory and at the external borders, including push-backs, where Frontex is involved and ensure that they come to an end.

11.   The Assembly calls upon all Council of Europe member states:

11.1   to ensure that they refrain from any unlawful push-backs of migrants, whether at land or sea borders or during operations outside their territory, as required by the European Convention on Human Rights;

11.2   to ensure that their bilateral cooperation with third countries on migration aims at promoting and ensuring compliance with human rights, and to refrain from agreements on border control if it cannot be guaranteed that the third country fully respects the human rights of migrants and refugees.

12.   The Assembly calls on the Executive Committee of the North-South Centre, which already has a co-operation agreement with the European Commission, to consider the feasibility of further developing its role in enhancing capacities for dialogue between countries of origin, transit and destination, building on the experience of the conference organised on 30-31 March 2015 in Lagos, Portugal in co-operation with the Assembly. It urges the Executive Committee to put human rights at the centre of this dialogue.

B. Draft recommendation[3]

1.   The Assembly refers to its resolution on Countries of transit: meeting new migration and asylum challenges. It recalls in particular that the Council of Europe cooperates with non-member states with a view to promote human rights and emphasises that compliance with the principle of *non-refoulement*, reflected in article 3 of the European Convention on Human Rights, by both member and non-member states is of crucial importance for migrants and refugees.

2.   The Council of Europe should play a role in ensuring that member States' externalisation of their migration policy and border control to third countries does not result in violations of the human rights of migrants and refugees when prevented from entering Europe or returned by a European country to a third country.

3.   The Assembly therefore invites the Committee of Ministers to:

    3.1   aim to further the human rights of migrants and refugees in its cooperation with third countries, and support these countries in promoting access to protection and basic needs and developing a comprehensive integration policy;

    3.2   monitor member States' compliance with the general principle underlying the *Hirsi Jamaa v. Italy* judgment, holding countries accountable where evidence of push backs emerges and promoting their compliance with that principle.

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[3] Draft recommendation adopted unanimously by the Committee on 9 September 2015.

C. Explanatory memorandum by Ms Strik, rapporteur

1. Introduction

1.   On 4 July 2014, I and 20 other members signed and tabled a motion, noting that "Europe has engaged more and more in co-operation with … transit countries, aiming to reduce the number of arrivals in Europe. As a result, some transit countries have increasingly fenced their borders, preventing migrants from entering Europe. This development does not always go hand in hand with an improved access to protection and basic rights for migrants and refugees." The motion then called on the Parliamentary Assembly to "share its experience on migration and asylum with those countries by examining the migration and asylum challenges they are facing and offering assistance in dealing with these challenges". On 23 March 2015, the Committee decided that the current report should also address the issues raised in the motion on 'the implementation of the Hirsi judgment: have push backs come to an end?'[4]

2.   On a superficial level, the concept of 'country of transit' indicates only that a migrant has passed through a particular country in the course of his/ her journey from country of origin to eventual country of destination. It ignores the reasons for leaving the country of origin, the length of time spent by or behaviour of the migrant in the 'country of transit' and the reasons for leaving it. Unless elaborated further and located in a broader conceptual framework, it is weak and unreliable as a basis for policy. To be effective, migration policy must be seen in a global perspective: all of the countries from, through and to which a migrant may travel must co-operate and co-ordinate their actions, with the support and assistance of the international community; and policies must focus on the situation of individuals who decide to migrate (further). Merely to designate a country as being 'of transit' and expect it unilaterally to block all irregular entry and exit whilst at the same time respecting international norms of respect for migrants' rights is an approach that is doomed to failure, as painful experience has shown.[5]

2. Definitions and scope of the report

   2.1. Description of the different phenomena potentially covered by the term 'transit migration'

3.   Transit migration, starting on an individual level, can be examined from four angles.

- **First**, the intentions of the migrant. Did he/ she, at the time of leaving country of origin *a*, intend to pass through country *b* before arriving at a predetermined country *c;* did the intention to continue to country *c* only arise after a period of time spent in country *b*; was an original intention to proceed to country *c* accompanied by concrete plans and directed efforts, or was it more vaguely aspirational, the principal aim being to leave country *a*?
- **Second**, the length of time spent in country *b*. The UN Population Division suggests that a stay of 3-12 months can be categorised as 'temporary immigration' and one of more than 12 months as 'immigration'. Anything more than a practical minimum stay of a few days but less than 3 months could thus be

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[4] See PACE doc. 13629 of 07 October 2014. On 03 October 2014, the Assembly referred the motion to the Committee on migration, refugees and displaced persons for report; on 27 November 2014, I was appointed rapporteur by the Committee. On 27 January 2015, the Committee took note of an outline report, on which the present memorandum is based. On 26-27 March 20154, I conducted a fact-finding visit to Turkey (Ankara and Istanbul) and on 10 June 2015, to Morocco (Rabat). On 21 April 2015, the Committee held an exchange of views with the participation of Mr Othman Belbesisi, Chief of Mission in Libya, IOM, Mr Samer Haddadin, Chief of Mission in Libya, UNHCR and Mr Franck Düvell, Senior Researcher & Associate Professor, Centre on Migration, Policy and Society (COMPAS), University of Oxford, whom I should like to thank for their invaluable contributions to the preparation of this report. I should also like to thank the delegations and authorities of Turkey and Morocco for their co-operation before and during my visits, and thank also all those others I met on those occasions.
[5] In this connection, I would recall the conclusions of the UN Special Rapporteur on the human rights of migrants: "The ability of migrants to reach European soil despite a huge investment in securing borders demonstrates beyond a doubt that sealing international borders is impossible… In addition to the human costs, the huge investment of resources by the European Union and its member States into ineffective and paradoxical border control mechanisms could be spent in many other ways." See "Report of the Special Rapporteur on the human rights of migrants – Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants", doc. A/HRC/29/36, 8 May 2015, paras. 85-86.

considered 'transit migration'. That said, these distinctions are somewhat arbitrary; a more useful definition would also take into account, for example, the migrant's actions during their stay in country *b*.[6]

- This leads to the **third** consideration, which is to ask to what extent a migrant interacts socially and economically or even integrates with country *b*. From this perspective, even a relatively longer time spent in country *b* could be viewed as transit migration if the migrant spends it in hiding or in activities directed solely at preparing for onwards movement; equally, a shorter time during which clear efforts are made towards integration, following which some change in circumstances forces a further move, could be seen as 'temporary immigration'.

- **Fourth**, one might also examine the 'push' and 'pull' factors that influence a migrant's passage through country *b*: it may be the only legal escape route from country *a*; the migrant may be obliged to work or otherwise raise funds in country *b* in order to pay for passage to country *c*; onward migration to country *c* may be motivated by the presence of family members there; the legal (especially the availability of protection), security or socio-economic situation may influence an intention to stay in country *b*; border controls at the intended country of destination lack of documentation; lack of financial resources in particular to pay smugglers.[7]

4.   For the purposes of this report, the above analysis implies that a superficial examination of a migrant's movements over time, without considering also his evolving circumstances and subjective state of mind, is not enough to permit his classification as a transit migrant or not. This in turn has consequences for categorisation of movement as 'transit migration' and of a particular country as being (primarily) a 'country of transit'. From a practical perspective, a destination country may see another as being a 'transit country' because migrants have passed through it, whereas in fact these form only a part, perhaps the minority, of migrants entering that country.

5.   Furthermore, the expression 'country of transit' can have a strong resonance in political discourse. On the one hand, it may be used in a pejorative sense in destination countries, implying that the country in question is failing properly to control its borders and is thus problematic, without properly recognising the geopolitical reasons for the migrants' presence there. On the other, a country may describe itself as a 'country of transit' as a signal that it does not welcome immigration and even as cover for policies and practices that make migrants' continued stay unviable and their onwards movement inevitable; if they are unable to leave, the country may attribute their presence to the prospective destination country's restrictive border controls and be reluctant to discharge fully its responsibilities towards them. Neither approach is helpful in finding constructive, sustainable solutions respectful of migrants' fundamental rights.

6.   One can also usefully distinguish between different types of 'transit countries': those that are 'stage posts' along the way, and those that are the final 'stepping stone' into the EU. Consistent with the original motion, which emphasises the aspect of 'externalisation' of the EU's border control to neighbouring states through which migrants pass on their way to Europe, the present report focuses on examples of the second category. Nevertheless, it is significant that the EU's efforts to control migration now look further afield, especially also to countries of origin.[8] I believe this 'triangular' approach, if human rights are to have a central position in this cooperation, to be fundamental to any long-term solution.

7.   It should also be recalled that transit migration is not synonymous with irregular migration. Most legs of a migrant's journey are regular; it is often only the final step into Europe that is irregular. Ever-stricter EU border controls also mean that what may initially have been intended as 'transit' migration in practice becomes

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[6] Another study concluded that "while over 60% of transits last less than a year, 40% of transits lasted for from more than a year to many years. This figure shows that for a number of individuals, transit movement often becomes a semi-permanent condition: a state of 'permanent transit' produced by a combination of institutional constraints and migration aspirations. Yet, despite the prolonged duration, they can still be considered as provisional settlement, oriented to onward migration." See "Transit migration: a piece of the complex mobility puzzle. The case of Senegalese migration", Eleonora Castagnone, Cahiers de l'Urmis 13 (2011), para. 52.

[7] This analysis is largely based on the presentation of Mr Düvell during the 21 April 2015 exchange of views. See also "Trapped in Transit: The Plight and Human Rights of Stranded Migrants", Rebecca Dowd, UNHCR Research Paper No. 156, 2008, pp. 12-18. Dowd defines 'stranded migrants' as "those who leave their own country … and become destitute and/ or in some cases vulnerable to human rights abuses in the course of their journey. With some possible exceptions, they are unable or unwilling to return to their country of origin, are unable to regularize their status in the country where they are … and do not have access to legal migration opportunities that would enable them to move on to another state", Rebecca Dowd, UNHCR Research Paper No. 156, 2008, p.4.

[8] See e.g. the European Commission's factsheet "The European Union's cooperation with Africa on migration", 22 April 2015.

extended, even semi-permanent immigration.[9] During this time, the migrants' clandestine status and resulting lack of protection leaves him in a situation of socio-economic exclusion, lacking legal protections and vulnerable to discrimination, exploitation, he will be forced into the hands of migrant smugglers, exposing him to further risks of violence and abuse, as well as often extremely perilous means of transport.

2.2. Implications for the scope of the report

8.   All this is not to say that the concepts of 'transit migration' and 'country of transit' have no validity or usefulness, but rather that the more nuanced approach outlined above allows for a better understanding of the circumstances of individual migrants, the nature of specific migration flows and the situation in particular countries. I will therefore take this approach in examining two 'countries of transit' in particular, namely Turkey (a member State of the Council of Europe) and Morocco (a 'partner for democracy' of the Parliamentary Assembly);[10] and, more briefly, Libya as the most extreme illustration of the consequences of complete failure of migration management.

9.   Both Turkey and Morocco, although often labelled as countries of emigration and transit, have been confronted with large numbers of migrants and refugees entering their countries in order to reach the European Union. The Syrian crisis and severe hardship and persecution in other neighbouring countries especially have increased these numbers. The European Union intensified its cooperation with these countries aiming to control this immigration to the EU. Partly due to this cooperation, Turkey and Morocco have increasingly become countries of destination themselves. Especially In the case of Turkey, a large part of the refugees initially do not intend to travel onward, and its economic development also attracts increasing levels of migrant labour. It would be reductive to conceive either as only a country of transit, and delusional to pretend that more-or-less permanent immigration is not a significant reality for both. Nevertheless, persistent human rights concerns towards migrants and refugees in these countries need to be addressed and tackled. Libya, on the other hand, has unfortunately experienced change in entirely the opposite direction: from a country of (mainly labour) immigration to one also experiencing very high levels of effectively uncontrolled transit migration.

3. Routes and countries of transit for migrants to Europe

10.   Frontex defines the main migratory routes into the European Union in 2014 as follows:

    i. Central Mediterranean route – a total of 170,664 illegal border crossings;
   ii. Eastern Mediterranean route – 50,834;
  iii. Western Balkans route – 43,357;
   iv. The 'circular route' from Albania to Greece (almost entirely irregular labour migration) – 8,841;
    v. Western Mediterranean route (by land to Ceuta and Melilla and by sea to mainland Spain) – 7,842;
   vi. Eastern borders route – 1,275 (Frontex notes that abuse of legal channels is more common than illegal border crossing);
  vii. The Black Sea route – 433;
 viii. Western African route (to the Canary Islands) – 276.[11]

11.   Bearing in mind the broad definition of 'transit country' in paragraph 6 above, one can conclude that a large number of Council of Europe and neighbouring states experience transit migration; the most notable would seem to be:

    - Morocco, Libya, Serbia, Kosovo*, Albania, the "former Yugoslav Republic of Macedonia", Turkey and Ukraine, as 'stepping stones' (from an EU perspective);

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[9] See e.g. "The Myth of Transit: Sub-Saharan Migration in Morocco", Myriam Cherti and Peter Grant, Institute for Public Policy Research, June 2013.
[10] The focus on Turkey and Morocco should not be taken to imply that the situation there is worse than in other 'stepping stone' transit countries, including their neighbours. Apart from the fact that the formal statuses with the Parliamentary Assembly allowed me privileged access to key decision-makers and other interlocutors, there is ample third-party material available on both thanks to their relative openness to scrutiny by international monitors and domestic and international civil society organisations. That said, I must record my concern at the fact that two members of a recent Amnesty International fact-finding delegation were arrested and detained in, and subsequently expelled from and barred from re-entering Morocco.
[11] See "Annual Risk Analysis 2015", Frontex, 2015.
* Any references to Kosovo in this text, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

- Spain, Italy, Malta, Greece, Bulgaria, Hungary and Poland, as countries of entry to and transit within the EU;
- One could also mention EU countries such as France, through which migrants travel en route to the United Kingdom, and Austria, in a similar situation with respect to Germany.

It is worth observing that there are countries of transit both inside and outside the EU, a point that is often overlooked in the EU-centric policy debate: for family, cultural and economic reasons, the intended destination is often not 'the EU' as a monolithic whole but a particular member State. Two factors in particular distinguish the two situations: the relevant legal framework in most EU countries is strongly harmonised under the Common European Asylum System; and there is little if any control of the EU's internal borders, at least so far as the Schengen countries are concerned, whereas control of the EU's external borders is extremely strict. As noted above, the present report will focus on the situation in 'stepping stone' countries of transit, in particular Turkey, Morocco and Libya. Besides the large numbers of migrants and refugees they deal with, the first two countries are interesting because of their far-reaching cooperation with the EU on migration. Assessing the impact of this cooperation enables me to make recommendations to the EU. Libya is one of the main countries of departure to the EU and struggles with a vacuum of state authority, which requires a different approach by the EU. In both cases however, the human rights of migrants and refugees should be the central concern.

4. Challenges faced by 'countries of transit'

4.1. Domestic challenges

12.   It has been said that "by containing rather than resolving migration pressures, Morocco has been transformed from a place of transit *en route* to Europe to a 'reluctant host' of a grounded [irregular] migrant population."[12] The political attitudes and public perceptions that reflect such reluctance go hand-in-hand. It is therefore important that opinion-shapers, especially amongst politicians and the media, act responsibly by presenting an accurate, fair and balanced view of migration and migrant communities and above all by not indulging in scare-mongering, stigmatisation or hate speech. Such attitudes should be reflected in a positive, realistic legal and policy framework that ensures legal status, protection and access to basic rights such as health-care, employment, education and training and family reunification, and thereby provides stability, dignity and a basis for integration. In this respect, I would like to compare the situations in Turkey and Morocco.

13.   The Turkish government's attitude to migration and international protection has evolved significantly in recent years, this being typified by two developments: the 2014 introduction of a new "Law on Foreigners and International Protection" (LFIP); and the response to the arrival of huge numbers of Syrian refugees. Although not yet fully implemented, including in important areas like capacity-building and regulation of issues such as access to education and the labour market, the LFIP effectively satisfies international protection standards and for the first time establishes a modern, comprehensive legal framework, accompanied by a new, dedicated administrative body, the Directorate-General for Migration Management. Developed in close co-operation with international organisations such as the UNHCR and IOM and national civil society organisations, the new law reflects Turkey's acknowledgement that migration policy is not an unwelcome imposition by a purely self-interested European Union seeking only to externalise its border control, but a matter of national self-interest; furthermore, it expresses recognition that effective, sustainable migration policies must involve respect and protection of migrants' basic human rights. As a result, Turkey and the EU are now acting as partners in a win-win situation, regardless of outstanding issues in other areas such as EU visa liberalisation, readmission agreements or the wider accession negotiations. What is more, Turkey hosts almost 2 million refugees; without the LFIP's protection and the huge expenditure by public authorities, many of these would undoubtedly have sought to enter the EU.[13]

14.   As for Morocco, the King's September 2013 announcement, following a report by the *Conseil national des droits de l'Homme* (CNDH),[14] shows acceptance at the highest levels of the need for a comprehensive, coherent and 'humanist' migration and asylum policy. Incorporation of international norms on migrants' rights into

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[12] See "The Myth of Transit", p.24.

[13] In fact, recent weeks have seen increasing numbers of refugees seeking to enter the EU from Turkey, both overland to Bulgaria and by sea to Greece. See e.g. "The next frontier in Europe's migrant crisis? Bulgaria", www.politico.com, 7 June 2015 and "Migrants turn to Greece-Turkey route to Europe", BBC News, 5 June 2015.

[14] See "Foreigners and human rights in Morocco: for a radically new asylum and migration policy – Executive summary", CNDH, September 2013.

an expected raft of new legislation, along with measures such as regularisation of refugees and irregular migrants, have the potential to produce significant improvements in the situation of migrants and popular and official attitudes towards them, and to make Morocco an example of good practice for other countries in the region. Many steps still need to be taken, however, in order to effectively implement a migration and integration policy which ensures the right to protection, freedom of movement, access to basic needs and the labour market and education. On the other hand, my meetings with Moroccan officials revealed a continuing tendency to blame Europe's strict border controls for the presence of (especially irregular) migrants in Morocco. Whilst from a practical perspective it is true that these controls prevent certain migrants from leaving Morocco, this attitude overlooks the push factors that lead them to leave their countries of origin and seems to imply that migrants in Morocco whose stay there was intended to be transitory should be granted entry into Europe. Whilst European countries do have certain moral and legal duties towards migrants, such an approach ignores concrete realities, distracts attention from the plight of individual migrants and complicates the search for political agreement on co-operative solutions. If Morocco can come to appreciate that immigration is now a fact of its national life, reflecting its geographical, economic and political situation, even greater progress could be made to the benefit of all concerned.[15]

15.   It is also worth recalling the size of the migrant populations in these two countries. Turkey (2012 population: 74 million[16]) currently hosts almost 2 million refugees and asylum seekers, of whom around 1.7 million are Syrian;[17] in 2011, it hosted over 240,000 foreign nationals with residence permits, with almost 17,000 work permits issued that year, and reported over 42,000 irregular migrants (illegal entrants and overstayers).[18] Morocco (2012 population: 32.5 million) hosts some 4,000 refugees and asylum seekers, of whom almost 1,300 are Syrian,[19] along with almost 78,000 foreign residence-permit holders;[20] in 2014, the government estimated that there were up to 30,000 irregular migrants, of whom over 27,000 applied for regularisation under the exceptional procedure, with almost 18,000 being accepted.[21]

16.   At the other end of the spectrum, the situation of Libya (2012 population: 6.2 million) illustrates the consequences of a lack of effective institutional and legal frameworks. "Before the crisis, the most quoted figure was that of 600,000 regular *plus* between 750,000 and 1.2 million irregular foreign workers living in Libya… As of 28 March 2011, IOM estimated the total number of foreign nationals living in Libya before the crisis at 2.5 million… According to IOM estimates, during the 2011 crisis, 768,372 migrants fled violence in Libya... Despite Libya being, first and foremost, a country of immigration, the deterioration of immigrants' conditions in the country has also made it an important country for transit migration and particularly for the many migrants trying to reach Malta and the Italian Isle of Lampedusa."[22] UNSMIL notes that even "Members of well-established communities living permanently in Libya, such as Palestinians and Iraqis, are increasingly considering leaving the country given the dire security situation and ongoing abuses."[23]

17.   Recent events have underlined the need for Europe and the EU to maintain and where necessary enhance their political and material support to countries of transit. In 2014, the Central Mediterranean Route was by far the most frequented passage for irregular migration to Europe (see paragraph 10 above). By mid- 2015, despite record numbers of arrivals as compared to the same period in 2014, it has been massively overtaken by the Eastern Mediterranean Route: as of 14 August, there had been 158,456 arrivals in Greece from Turkey, as compared to approximately 104,000 to Italy and 94 to Malta.[24] Around two-thirds of the arrivals in Greece are Syrians.[25] Most do not intend to stay in Greece, which, as refugees and migrants continue their journeys north, has placed strain also on countries such as the "former Yugoslav Republic of Macedonia", Serbia, Hungary and

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[15] As the CNDH said in its 2013 report (p.5), "Morocco, like all other countries of the world, will sustainably accommodate groups of irregular migrants."
[16] National population figures for Turkey, Morocco and Libya from data.un.org
[17] See "2015 UNHCR country operation profile : Turkey"
[18] See "Migration Profile: Turkey", Migration Policy Institute, June 2013
[19] See "Statistical report on UNHCR population of concern", UNHCR Morocco, 31 May 2015
[20] See "Migration Profile: Morocco", Migration Policy Institute, June 2013
[21] See "Opération exceptionnelle de régularisation des étrangers au Maroc : environ 18,000 migrants régularisés en 2014", 9 February 2015, at www.maroc.ma
22 See "MPC – Migration Profile: Libya", Migration Policy Centre, June 2013
[23] See "The situation of migrants in transit through Libya en route to Europe – Briefing Note", UN Support Mission in Libya, 8 May 2015
[24] See "Numbers of refugee arrivals to Greece increase dramatically", UNHCR, 18 August 2015
[25] See "UNHCR warns of deepening refugee crisis in Greece and calls for urgent and bold action", 7 August 2015

Austria.[26] I therefore strongly support the Assembly's initiatives to encourage other European countries to furnish far greater assistance and support to Turkey and other third countries in their efforts to provide protection and assistance to Syrian refugees.

4.2. Regional challenges: co-operation on migration management with neighbouring countries, including countries of origin

18.　Implementation of policies intended to 'externalise' EU border control has consequences for relations between transit countries and countries of origin. Turkey, for instance, has long had a liberal visa regime with a wide range of countries, but this is now being put in question by the EU's requirement that Turkey harmonise its visa policy with that of the EU as a precondition for EU visa-liberalisation. This may in turn have consequences for Turkey's relations with those countries whose citizens had enjoyed visa-free travel to Turkey. As for Morocco, it has been suggested that its "relationship with the EU has helped weaken potential cooperation with sending countries."[27]

19.　For countries of transit, effective migration policies require co-operation not only with countries of destination, in particular the EU, but also regional co-operation with both other countries of transit – in the case of Morocco, around 90% of irregular migrants, including Syrian refugees, enter from Algeria, sub-Saharans having crossed the Sahara via Niger[28] – and countries of origin (in the case of Morocco, notably those in sub-Saharan Africa).

20.　In this connection, the 'Euro-African dialogue on migration and development' ('Rabat Process'), which brings together the EU, its member States and a swathe of states across north, west and central Africa, is of interest. Established in 2006, the Rabat Process has involved a number of ministerial conferences, thematic meetings and meetings of high-level officials. Whilst it may so far have produced few concrete results, its importance lies above all in its being an established, recognised forum and a foundation for future regional co-operation, something that did not previously exist.[29] Morocco's willingness to engage also in bilateral co-operation is shown, for example, in the recent announcement by the Secretary General of the official *Conseil de la communauté marocaine à l'étranger* that Morocco was ready to extend to African states the benefits of its experience in migration policies.[30] Morocco is also developing its trade and diplomatic links with its southern neighbours: for example, during my visit King Mohammed VI was concluding a 'tour' of Senegal, Guinea-Bissau, Ivory Coast and Gabon; whilst the focus was on trade and development agreements, it must be recalled that progress in these fields would address many of the most significant push factors generating migration to (and through) Morocco.

21.　The Parliamentary Assembly has been active in promoting inter-parliamentary dialogue, notably through the AS/Mig sub-committee on co-operation with non-European countries of origin. In March 2015, this sub-committee held a conference on 'North-South Migration Dialogue' in Lagos, Portugal, with participation of parliamentarians from *inter alia* Algeria, Jordan, Morocco and Tunisia. In October 2014, it held a seminar on 'the new migration policy of Morocco and European experience: new challenges in the integration policies and practices', intended "to discuss how parliamentarians, experts, NGO activists, from Africa and Europe can work together to transform the various and complex challenges posed by migration, regular or irregular, into positive economic and social opportunities that would ultimately benefit both the country of residence and the country of origin".[31]

4.3. Compliance with international protection standards, including 1951 UN Refugee Convention

22.　The EU's agreements with transit countries on border control or readmission require high levels of human rights protection in the latter. After all, if migrants are confronted with human rights violations in these

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[26] See e.g. "UNHCR warns of growing refugee crisis in Greece and the Western Balkans amid arrivals of refugees from war", UNHCR, 10 July 2015
[27] See "The Myth of Transit", p. 65
[28] See e.g. "Morocco: Setting the Stage for Becoming a Migration Transit Country", Hein de Haas, Migration Policy Institute, 19 March 2014
[29] There is also a 'Khartoum Process' ('EU-Horn of Africa Migration Route Initiative'), established in November 2014, involving the EU, its member States, the African Union and a chain of African states from Tunisia to Kenya.
[30] See "Le Maroc disposé à faire profiter les pays africains de son expérience", Le Matin, 7 May 2015
[31] See doc. AS/Mig/NM (2014) PV 03.

transit countries or are prevented from access to protection as a result of these agreements, the EU is responsible as well. In practice, however, even where international instruments such as the 1951 refugee convention have been ratified, they are not always implemented. For example, until the expected new legislation is adopted and implemented, Morocco will still have "yet to adopt national refugee legislation and establish asylum procedures consistent with international standards", and only since the establishment of an ad hoc commission in September 2013 have refugees whose status was determined by the UNHCR been recognised and protected by the authorities.[32] Elsewhere the situation is worse: for example, Algeria has no asylum law or refugee status determination authority[33] and Libya has not ratified the 1951 convention.

23. Turkey has a 'geographical limitation' to its application of the 1951 Refugee Convention, such that only refugees originating from 'Europe' (in practice, other member States of the Council of Europe) are recognised as Convention refugees. The LFIP in principle provides analogous protection to refugees from other countries, with separate statuses for Syrians and all other non-European nationalities.[34] In practice, however, due to the enormous number of Syrian refugees on Turkish territory, which exerts great pressure on the Turkish system, asylum seekers of other nationalities are left in a situation of precarity and uncertainty that may influence their decision either to remain in Turkey or to attempt to enter the EU.

24. Similar concerns also relate to non-ratification or ineffective implementation of other international instruments.

25. In such cases, conclusion of readmission agreements between the EU and these countries would create the possibility of migrants with protection needs being sent from the EU to countries that do not provide adequate legal guarantees that those needs will effectively be met. Readmission agreements can also lead to measures taken by transit countries in order to prevent refugees from entering their country from another member State, which in the end may result in refugees from being prevented to flee their country of persecution. Readmission agreements also result in measures taken by transit countries to prevent migrants from entering the European Union. Strengthened border controls by EU member States and transit countries can thus lead to migrants becoming stranded there, without have access to an effective asylum procedure.[35]

5. Co-operation between European countries and countries of transit

5.1. Instruments of co-operation on border control, readmission, visas

26. The EU's relations with many of its neighbouring states now include agreements on enhancing those states' own border controls as a means of reducing subsequent pressure on the EU's external borders. This is apparent in the prominent references to migration management and border control in the European Commission's progress reports on implementation of the European Neighbourhood Policy in relevant states, including, for example, Morocco, Tunisia, Egypt and Jordan.[36]

27. In the case of Morocco, relations with the EU are since June 2013 governed by a 'Mobility Partnership', amongst the objectives of which are to "to combat illegal immigration, networks involved in the trafficking and smuggling of human beings, and to promote an effective return and readmission policy while respecting fundamental rights, the relevant legislation and ensuring the dignity of the people concerned".[37] These should be seen in the context of wider EU negotiations with Morocco, including those towards a 'Deep and Comprehensive Free Trade Area' launched in March 2013.

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[32] See "Submission by the United Nations High Commissioner for Refugees to the Office of the High Commissioner for Human Rights' Compilation Report – Universal Periodic Review: Morocco", November 2011

[33] See "2015 UNHCR country operations profile – Algeria"

[34] Morocco's ad hoc commission also processes Syrian and non-Syrian refugees separately, although the Moroccan authorities have yet to decide on the status to be given to Syrians. See "Morocco Update; Regularisation of Refugees by National Authorities", UNHCR, 1 April 2015

[35] See my report and the Assembly's resolution on 'Readmission agreements: a mechanism for returning irregular migrants', Resolution 1741 (2010).

[36] See e.g. "Implementation of the European Neighbourhood Policy Partnership for Democracy and Shared Prosperity with the Southern Mediterranean Partners Report", European Commission, doc. SWD(2015) 75 final, 25/03/15

[37] See "Joint Declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States", Council of the European Union, 3 June 2013, doc. 6139/13 ADD 1 REV 3

28.   This and the various other Mobility Partnerships form part of the EU's 'Global Approach on Migration and Mobility' (GAMM), which consists of 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; and maximising the development impact of migration and mobility.

29.   The UN Special Rapporteur on the human rights of migrants has criticised the GAMM for "lacking transparency and clarity in the substantive contents of its multiple and complex elements". Additionally, many agreements reached in the framework of the Approach have weak standing within international law and generally lack monitoring and accountability measures, which allow for power imbalances between countries and for the politics of the day to determine implementation. Nonetheless, the European Union has continued to use the Approach to promote greater 'security'. There are few signs that mobility partnerships have resulted in additional human rights or development benefits, as projects have unclear specifications and outcomes. The overall focus on security and the lack of policy coherence within the Approach as a whole creates a risk that any benefits arising from human rights and development projects will be overshadowed by the secondary effects of more security-focused policies."[38] The attention given to improvement of human rights seems to be on a more ad hoc basis, whilst cooperation on border controls is more structural and receives significantly more funding.

30.   The European Commission's recent 'European Agenda on Migration'[39] proposes "immediate action to intervene upstream in regions of origin and transit". This includes increasing support to countries bearing the brunt of displaced refugees; setting up a centre in Niger (which is on the main migratory route from West to North Africa) to provide information, local protection and resettlement opportunities for those in need; and making migration part of existing Common Defence and Security Policy missions in countries such as Niger and Mali. Other measures proposed in the Agenda would also concern countries of transit, including the proposed actions against criminal migrant-smuggling networks and trafficking, and resettlement of refugees from outside the EU. Whilst maintaining an emphasis on securing the EU's external borders, the Agenda also recognises the need for a better EU policy on legal migration and to promote development in countries of origin.

31.   Readmission agreements, extending also to third-country nationals, are an important goal in the EU's relations with transit countries. The European Commission, in its 2011 evaluation of readmission agreements, recommended reconsidering the policy of including third countries in the (negotiations on) readmission agreements with transit countries, partly because of human rights concerns.[40] Nevertheless, in June 2014, Commissioner Malmström, welcomed ratification by the Turkish parliament of the EU-Turkey readmission agreement, stating that it "reflects our shared interest for a more effective migration and border management". The press release accompanying the statement explained the importance of the agreement to the EU-Turkey visa liberalisation dialogue.[41] Visa liberalisation is seen as politically important also by Turkey, especially as its economic development leads to increasing numbers of Turkish citizens travelling (as opposed to migrating) to Europe. Readmission and visa facilitation agreements are also linked in on-going negotiations under the 'Mobility Partnership' between the EU and Morocco,[42] although the Moroccan authorities appear averse to concluding any readmission agreements extending to third-country nationals and in any case, do not seem to attach the same importance to visa liberalisation.

5.2. Financial and technical assistance to 'countries of transit'

32.   The EU's co-operation and assistance activities with third countries are complex and multiple. It is beyond the scope of the present report, and in any case unnecessary to its conclusions, to conduct an exhaustive review of these activities, so what follows are selected examples.

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[38] See "Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants"

[39] See "Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Agenda on Migration", doc. COM (2015) 240 final, 13 May 2015.

[40] 'Evaluation of EU Readmission Agreements', COM (2011) 76, 23 February 2011.

[41] See "Statement by Cecilia Malmström on the ratification of the EU-Turkey readmission agreement by the Turkish parliament", European Commission, 26 June 2014

[42] See "Nouvelles discussions pour facilitation de visas et accord de réadmission", EU Delegation to Morocco press release, 16/01/15

33.   The European Asylum Support Office (EASO) is currently responsible for an 18-month, €1m project with Jordan, Morocco and Tunisia that aims to promote the participation of the three countries in its work and that of Frontex. It does this by familiarising the competent authorities with the mandate, tools and instruments of the agencies, including cooperation models developed with EU member States. Frontex promotes the concept of 'integrated border management' and the comprehensive approaches to the management of mixed migratory flows and in particular on the inter-agency cooperation aspects to Tunisia and Morocco, while EASO promotes the Common European Asylum System (CEAS) and shares EU Member States' best practices, including on reception facilities.

34.   Frontex also plays other roles in the process. For example, it has signed a 'working arrangement' (or memorandum of understanding) with the competent authorities of Turkey by which they agree to co-operate in a number of areas. These include, amongst other things, exchange of experience and best practice in the field of border control; border management related activities; joint projects to enhance collective capacity to fight against illegal/ irregular migration; promoting improvement of the technical and organisational co-operation between competent border management authorities; and developing co-operation in the field of Frontex co-ordinated joint return activities, including the active facilitation and participation of the competent Turkish authorities, which may be financed by Frontex on a case-by-case basis.[43]

35.   Such activities take place in the context of very large financial commitments by the EU. For instance, the European Neighbourhood and Partnership Instrument (ENPI) (which amongst other things finances the aforementioned EASO project with Jordan, Morocco and Tunisia) over the years 2007-2013 involved average annual commitments of €204 million in the case of Morocco, €110 million in the case of Tunisia, €52 million in the case of Algeria and almost €12 million in the case of Libya.[44] Such levels of support have continued: in the case of Morocco, for example, the 'Single Support Framework' for Morocco covering the period 2014-2017 includes an indicative allocation of up to €890 million.[45]

36.   The EU is, of course, not the only international organisation whose co-operation with transit countries can improve the situation of migrants there. The UNHCR, in Morocco, for example, in addition to its role in refugee status determination (see above) and protection and humanitarian assistance activities, also engages in capacity-building, technical assistance and expertise activities with the Moroccan authorities and contributes to the social integration of refugees.[46] It is also involved in capacity-building activities in Turkey connected to implementation of the LFIP.[47] The IOM is similarly active in both countries.

5.3. Consequences for transit countries

37.   The EU's aim of 'externalising' border control, set in the political context of the importance to transit countries of trade relations with and financial transfers from the EU, is highly influential on their migration policies. Morocco has even been described "as merely a servant of policies that are imposed from external actors. Through the measures implemented in Europe that either slightly or severely limit the freedom of movement of people, Morocco is almost regarded as the *gendarme* of Europe's borders in the southern Mediterranean." Thus "through a combination of political pressure and financial assistance, the EU has effectively outsourced much of its border management to Morocco."[48] Another example might be Ukraine: following the EU's 2004 eastern enlargement, Human Rights Watch argued that "given the strategic, political and

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[43] See "Memorandum of Understanding on establishing cooperation between the European Agency for the Management of Operation Cooperation at the External Borders of the Member States of the European Union and the Ministry of Foreign Affairs of the Republic of Turkey", 28 May 2012. As of April 203, Frontex also had 'working arrangements' with inter alia the Russian Federation, Ukraine, Georgia, the 'former Yugoslav Republic of Macedonia', Serbia, Albania, Bosnia and Herzegovina, Montenegro, Armenia and Azerbaijan, as well as Belarus, Cape Verde and Nigeria, and was in negotiation with Morocco, Libya, Egypt, Tunisia, Senegal and Mauritania.

[44] See "European Neighbourhood and Partnership Instrument 2007-2013: Overview of Activities and Results", European Union, 2014. Altogether, programmes in Southern Mediterranean countries accounted for two-thirds of ENIP commitments.

[45] See "Programmation de l'Instrument Européen de Voisinage : Cadre Unique d'Appui pour l'appui de l'UE au Maroc (2014-2017)", EEAS/ European Commission (French only)

[46] See "UNHCR Assistance Program in Morocco in a Context of Transition towards a National Asylum System: Note on UNHCR Strategy for 2015"

[47] See "2015 UNHCR country operations profile – Turkey"

[48] See "The Myth of Transit", p. 4

economic importance … of its relationship with the EU, the government in Kyiv has a clear interest in cooperating with the EU on the management of migration and asylum flows on the EU's terms."[49]

38.　　The situation is not, however, always straightforward, and transit countries, as independent sovereign states, ultimately retain freedom of action. For example, in 2012, Moroccan Foreign Minister Saâdeddine El Othmani stated that Morocco would not be the "*gendarme* of the European Union."[50] "Morocco's increasingly independent policy course became evident in the major immigration policy reform that was announced in 2013".[51] It has been argued that "previous Moroccan migration policy has been interpreted as a reactive response to European Union pressure to control migration to Europe. It is difficult to interpret the regularisation in the same way. Given the majority [of migrants interviewed] declared an interest in reaching Europe, regular status may facilitate that. The regularisation is not therefore in the obvious interests of European states wishing to reduce immigration from Morocco." According to this argument, the policy instead reflects recent changes in Morocco's geopolitical orientation, including strengthening relations with sub-Saharan African countries, and as being much more proactive than in previous years."[52]

39.　　Nevertheless, given the EU's formal institutional commitment to human rights protection including in its external relations, co-operation between the EU and countries of transit has great potential to ensure enhanced protection of migrants' rights. In Morocco, for example, I was told by the EU delegation of its willingness and the availability of resources to support implementation of the expected new legislation on migration, asylum and the fight against human trafficking; the EU recognises the importance of the human rights aspects and hopes to see the new legislation become an example of best practice for the region. I can only welcome and encourage this attitude.

40.　　If cooperation focuses mainly on border controls, however, it creates the risk that it actually provokes further human rights breaches, since refugees cannot flee the transit country, even when unable to find protection and safety there. In order to avoid this effect, a certain standard of human rights for migrants and refugees should be a precondition for starting or intensifying the cooperation on border controls. The European Convention on Human Rights and the Refugee Convention should be the framework of reference in this regard.

5.4. Consequences for migrants

41.　　In the negotiations between the EU and transit countries, the negotiating parties look after their own interests but the migrant's interests are not properly considered or taken care of. Concerns have been expressed in relation to the human rights consequences of the various agreements and co-operation activities between the EU and its member States on the one hand and non-EU transit countries on the other. For example, in 2014, the FIDH and other NGOs, having "repeatedly expressed their concerns about the 'mobility partnership' signed by the EU and Tunisia", argued that "implementation of such agreement is particularly worrying in the current Tunisian transitional context where key institutions and legislative instruments needed to guarantee the respect of the rights of migrants, refugees and asylum seekers are still lacking. The wording of the joint declaration … makes it clear that these rights are not a priority in the 'partnership'."[53]

42.　　Similarly, in its analysis of the EU-Morocco mobility partnership, the Euro-Mediterranean Human Rights Network expressed its "fears that actions to combat irregular migration immigration will be prioritised and implemented at the expense of other themes included in the Partnership and, more worryingly, at the expense of the rights of migrants and refugees."[54] (The EMHRN also expressed disapproval of the "donor/ beneficiary logic governing the Partnership and the EU's use of a 'bargaining chip', by which European economic aid and visa facilitation are conditioned on Morocco's ability to effectively control migration flows.")

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[49] See "European Union: Managing Migration Means Potential EU Complicity in Neighbouring States' Abuse of Migrants and Refugees", Human Rights Watch, October 2008, p.12

[50] See "Political agreement on Mobility Partnership: Towards the first readmission agreement with an African country?", statewatch.org, 07 March 2013

[51] See "Morocco: Setting the Stage for Becoming a Migration Transition Country?", Hein de Haas, Migration Policy Institute, 18 March 2014

[52] See "Immigration and pensée d'Etat: changes in Moroccan migration policy as transformation of 'geopolitical culture'", Myriam Cherti and Michael Collyer, 2014, pp. 12-14

[53] Joint Statement by FIDH and a number of other NGOs, "Tunisia-EU Mobility Partnership: marching towards the externalisation of borders", 17 March 2014

[54] See "Analysis of the Mobility Partnership signed between the Kingdom of Morocco, the European Union and nine Member States on 7 June 2013", EMHRN, February 2014

43.   Stricter control of the EU's external borders forces migrants to spend longer in the transit country. "As border controls have tightened and as hostility towards migrants has risen in both transit and destination countries, irregular migrants stuck indefinitely in Saharan migration hubs have experienced difficult living and working conditions."[55] This can be compounded by administrative complications, notably the lack of documentation. For example, "the *carte de sejour*, which is a residency permit required from all foreigners living in Morocco, serves as the basis of regularisation for employment, residency and access to services such as healthcare; without it, a migrant is marginalised in virtually every aspect of their daily lives. This results in acute invisibility and vulnerability for the majority of sub-Saharan migrants", with no possibility of recourse to police protection against theft or physical violence, no access to official channels of complaint concerning abuse, exploitation or discrimination in relation to accommodation or employment, and restrictions on freedom of movement.[56] It is to be hoped that the new policy and legislation will change all this.

44.   As Moroccan migration policy has evolved, in particular since 2013, so has the use of violence by public officials against irregular migrants become less recurrent, especially when compared with the situation 10 years ago;[57] this was confirmed to me by the UNHCR. There remains room for improvement, however, as shown by the events of February-March 2015, when some 1,200 migrants, including 14 identified as asylum-seekers by UNHCR, were arrested in the vicinity of Melilla and subsequently transferred to and arbitrarily detained in southern cities, purportedly in order to protect women and children against traffickers (the NGOs I met felt that the real reason was to maintain the 'buffer zone' around Melilla). By 6 March all detainees appeared to have been released with no reported refoulements or deportations.[58] Nevertheless, these arrests and detentions were in clear violation of the migrants' fundamental rights to liberty and security and of access to justice, and there have been detailed accounts of threats and use of violence by officials.[59] A key element in the implementation of the new migration policy, therefore, will be training and awareness-raising to ensure a complete end to the use by public officials of excessive force against migrants and the possibility for NGO's to monitor the acts and behaviour of public officials towards migrants.

45.   One can see in the case of Libya how the absence of a functioning legal framework or effective institutions with which external actors could co-operate makes migration management impossible and exposes migrants to great danger. UNSMIL has reported that "Against the backdrop of political crisis, armed hostilities, the absence of national asylum legislation and the breakdown of law and order, migrants, asylum-seekers and refugees in Libya are at risk of abuses including detention in horrific conditions; torture; abduction for ransom; exploitation; and killings. Smugglers and traffickers, who are thriving in the context of lawlessness, are responsible for many such abuses. Women migrants are especially vulnerable to sexual violence and sexual exploitation… The deteriorating security situation, coupled with limited access to neighbouring countries by land, has compelled unprecedented numbers of migrants, asylum-seekers and refugees to undertake dangerous and frequently deadly journeys across the Mediterranean Sea in unseaworthy boats."[60] Despite these enormous problems, efforts are being made to address the situation, with the UNHCR and IOM having recently set up a forum to improve Libya's response to boats in distress off its coast, intended to boost capacity in search and rescue, collection of bodies at sea and humanitarian care for rescued persons on disembarkation.[61] I welcome the EU's financial support to this initiative. On the other hand, I am very worried that intended actions to combat smuggling by destroying boats in the Libyan waters, can lead to the situation that refugees are not able to leave Libya, despite their desperate circumstances. It would be more appropriate to support refugees in finding a place a safety in Europe by legal means.

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[55] See "The Myth of Transit", p. 32
[56] Idem. Dowd cites both the impact of border controls and lack of documentation, followed by lack of financial resources and unwillingness to return, as main reasons why migrants find themselves stranded in transit countries: see "Trapped in Transit", pp. 12-13. It should be recalled that Morocco's recent regularisation programme has significantly reduced the number of undocumented migrants in the country.
[57] See e.g. Médecins Sans Frontières, "Violence and Immigration: Report on illegal sub-Saharan immigrants (ISS) in Morocco", 30 September 2005.
[58] See "Morocco: UNHCR Operational Update – January-March 2015"
[59] See "Note d'information conjointe CCSM – GADEM sur les déplacements et les détentions arbitraires de migrants au Maroc à la suite des rafles du 10 février 2015", February 2015
[60] See "The situation of migrants in transit through Libya en route to Europe"
[61] See "UNHCR and partners to help Libyans save lives at sea and improve corpse collection" UNHCR, 18 August 2015

6. Push-backs following the *Hirsi* judgment of the European Court of Human Rights

6.1. The Hirsi judgment

46.   In the case of *Hirsi Jamaa v. Italy*,[62] the applicants, migrants attempting to cross the Mediterranean from Libya to Italy, were intercepted in international waters by and brought on board vessels of the Italian navy. The European Court of Human Rights (the Court) found that since the applicants had been under the continuous and exclusive control of the Italian authorities, they fell within Italy's jurisdiction under the European Convention on Human Rights (the Convention). Italy's return of the migrants to Libya without any assessment of individual protection needs thus amounted to collective expulsion in violation of Article 4 of Protocol no. 4 to the Convention; given reception conditions in Libya and the insufficiency of guarantees protecting the migrants against the risk of arbitrary *refoulement* to their countries of origin, return also amounted to a violation of Article 3 of the Convention; and the lack of an effective remedy against these violations in turn violated Article 13.

6.2. Developments since Hirsi

47.   By the time that the Grand Chamber delivered its judgment in *Hirsi*, the Italian authorities had already ceased the practice of direct return to Libya of migrants intercepted in the Mediterranean. This was apparent in the *Mare Nostrum* operation, which involved search and rescue by Italian naval ships and aeroplanes in coastal waters and international waters up to the coastal waters of Libya, with rescued migrants being brought back to Italian territory.

48.   That said, on 8 October 2012, the UN Special Rapporteur on the rights of migrants expressed concern about on-going bilateral co-operation based on a 2012 *processo verbale* between Italy and Libya, stating that "there appears to be a strong focus on strengthening the capacities of the Libyan authorities to intercept migrants hoping to reach Europe, on both their territory and in their territorial waters, and return them to Libya. In this context, I warn EU member states against a progressive 'externalisation' of border control. In particular, considering the on-going difficulties of the Libyan authorities and the reports of human rights abuses against migrants on Libyan territory, this migration cooperation with Libya should not lead to any migrant being returned to Libyan shores against their will, either by Italian coast guards or *Guardia di Finanza*, or by Libyan coast guards with the technical or logistical support of their Italian counterparts." The Special Rapporteur, recalling the Court's judgment in *M.S.S. v. Belgium and Greece*, was also critical of the Italian authorities' practice of preventing irregular migrants from disembarking from vessels arriving from Greece, thus forcing them to return to Greece with no formal processing during which migrants could have the opportunity to raise protection issues including claims for asylum. "Italy should formally prohibit the practice of informal automatic "push-backs" to Greece."[63]

49.   Despite the *Hirsi* judgment, reports suggest that the practice of push-backs continued in other Council of Europe member States. For example:

- Concerning Bulgaria, in 2014 Human Rights Watch reported having "heard detailed accounts of 44 pushback incidents from 41 people. The pushback incidents involved at least 519 people in which Bulgarian border police apprehended people on Bulgarian soil and summarily returned them to Turkey without proper procedures and with no opportunity to lodge asylum claims, often using excessive force. Many of those interviewed about being summarily returned said that Bulgarian guards beat or otherwise mistreated them." These incidents had occurred following the Bulgarian authorities' implementation of a 'containment plan' in response to an increase in the number of asylum applicants, many fleeing the conflict in Syria; Human Rights Watch noted that the operation was "supplemented by a contingent of guest guards from other EU member states through the EU's external border control agency, Frontex".[64] During my visit to Turkey, however, I heard conflicting accounts of whether or not such push-backs occurred.

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[62] Grand Chamber judgment of 23 February 2012

[63] See "UN Special Rapporteur on the human rights of migrants concludes his third country visit in his regional study on the human rights of migrants at the borders of the European Union: Italy"

[64] See "'Containment plan': Bulgaria's Pushbacks and Detention of Syrian and Other Asylum Seekers and Migrants", Human Rights Watch, 2014, pp. 2-3

- Concerning Greece, in 2014 Amnesty International reported that "the sheer volume of credible allegations of push-backs that Amnesty International was able to record in a few short weeks of research in Greece and Turkey over the last months strongly suggests that they are routine across both the land and sea borders", adding that "the persistent denial of the scale of this dangerous and rights-violating practice by the Greek authorities is allowing it to continue."[65] These allegations were echoed during my visit to Turkey. There have again been suggestions of a possible Frontex dimension to this situation.[66]
- Concerning the "former Yugoslav Republic of Macedonia", in 2015 Amnesty International reported that "rather than make a formal application for their return to Greece, Border Police appear to be routinely pushing refugees and migrants back over the border, without any safeguards. They rarely provide any opportunity for refugees to apply for asylum… Refugees and migrants who succeed in crossing Macedonia undetected may be pushed back to Greece even when they reach the border with Serbia."[67]
- Concerning Serbia, in 2015 Amnesty International reported that "Statements from refugees and migrants contain a level of detail and consistency which suggests that push-backs by Serbian Border Police are routine, and that border officials consistently fail to examine the individual situation of each person arriving on their territory or offer the opportunity to register their intent to claim asylum. In some cases, push-backs are accompanied by ill-treatment".[68]
- Concerning Spain (Melilla), the Council of Europe Commissioner for Human Rights, Nils Muiznieks, earlier this year reported receiving "consistent information on push-backs, in some cases accompanied by excessive use of force, carried out by the Spanish border police (Guardia Civil)."[69] The Commissioner has also expressed concern at an amendment to the Spanish Aliens Act "aimed at legalising push-backs of migrants arriving in Ceuta and Melilla", which "falls short of providing clear guarantees against *refoulement* and collective expulsions."[70]

50.   The references to the possibility of push-backs taking place in the context of Frontex operations is a source of concern. The Parliamentary Assembly has already observed that there were "many human rights implications attached to [Frontex's] work and that it was ill-equipped to tackle them. This was particularly the case when intercepting irregular migrants, asylum seekers and refugees at borders or at sea, and also during return operations involving irregular migrants and rejected asylum seekers."[71] Whilst the Assembly's report had also referred to an EU Fundamental Rights Agency finding that "the risk of informal push backs of third country nationals to Turkey decreased with the deployment of Frontex operations in Greece",[72] the more recent reports concerning Bulgaria and Greece may imply a need for further scrutiny. Furthermore, the actions that Frontex undertakes in non-EU third countries require extra attention to their human rights impact, especially the risk that refugees do not reach the EU territory without being granted effective protection in that third country.

51.   Finally, I would note that I was unable to proceed with a planned fact-finding visit to Melilla and Madrid (Spain), as it proved impossible, over the course of several months, to obtain the agreement of the Spanish delegation to the proposed dates. As a result, I have been unable to conduct a more detailed assessment of the issues of push-backs in and around Melilla, co-operation with the Moroccan authorities, and the above-mentioned Spanish legislation, which merited more extensive exploration in this report. I would call upon the Spanish delegation, as any other, to ensure that it cooperates effectively in the organisation of working visits by Assembly members, in order to ensure the transparency necessary to making progress on human rights in our member States.

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[65] See "Greece: Frontier of Hope and Fear – Migrants and Refugees Pushed Back at Europe's Border", Amnesty International, 2014, p. 29

[66] See "Turkish Coast Guard Reports Intercepting 12,872 Migrants In Aegean Sea In 2014; Some Migrants Pushed-Back into Turkish Territorial Waters", www.migrantsatsea.org, 05 January 2015

[67] See "Europe's Borderlands: Violations against refugees and migrants in Macedonia, Serbia and Hungary", Amnesty International, 2015, pp. 16-17

[68] Op. cit., p. 32

[69] See "Spain: Legislation and practice in immigration and asylum must adhere to human rights standards", 16 January 2015. Human Rights Watch has made similar observations: see "Abused and Expelled: Ill-Treatment of Sub-Saharan African Migrants in Morocco", 2014, p.43.

[70] See "Spain: Commissioner concerned about adoption of amendment to the Aliens Act", 13 March 2015

[71] See PACE Resolution 1932 (2013) on 'Frontex: human rights responsibilities', para. 2

[72] See PACE doc. 12704, para. 22