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Regional Office for Europe

European Added Value

The EU Multi-Annual Financial Framework Post-2020:

A Tool to Close Human Rights Gaps in Europe?



EUROPEAN ADDED VALUE

THE EU MULTI-ANNUAL FINANCIAL FRAMEWORK POST 2020: A TOOL TO CLOSE HUMAN RIGHTS GAPS IN EUROPE?

Position Paper

by the UN Human Rights Regional Office for Europe

in consultation with:

- COFACE – Families Europe
- European Federation of National Organisations Working with the Homeless (FEANTSA)
- European Network of Equality Bodies (EQUINET)
- European Network on Independent Living (ENIL)
- European Disability Forum (EDF)
- Validity
- European Roma Information Office (ERIO)
- Mental Health Europe (MHE)
- Platform for International Cooperation on Undocumented Migrants (PICUM)
- Hope and Homes for Children
- European Roma Grassroots Organisations Network (ERGO Network)
- LUMOS



VALIDITY



PICUM



List of Terms

Cohesion Policy: The cohesion policy of the European Union (EU) aims to strengthen economic and social cohesion by reducing disparities in the level of development between regions in the EU. It targets regions and cities to support job creation, business competitiveness, economic growth, sustainable development, and improve quality of life. The cohesion policy is the EU's main investment policy.

Directive: An EU Directive is a legislative act that sets out a goal that all EU countries must achieve. It is up to individual EU Member States to adopt national legislation to reach this goal.

European Added Value: European added value is a core principle of EU policy-making, used to identify areas in which the EU should act by legislating, policy-making or financing. The added value can consist of greater effectiveness, or complementarity, improved coordination, or enhanced legal certainty. An investment is considered value-added when it has relevance and significance for the EU as a whole and not just for the region or country concerned.

European Structural and Investment Funds (ESIF): The European Structural and Investment Funds (ESIF) consist of the European Fund for Regional Development, the European Social Fund, the Cohesion Fund, the European Agriculture Fund for Rural Development, and the European Maritime and Fisheries Fund.

Ex Ante Conditionality: Under EU rules, an *ex ante* conditionality is a concrete and precisely pre-defined critical factor, which is a prerequisite for and has a genuine link to and direct impact on the effective and efficient achievement of the specific objective for an investment priority or an EU priority.

Ex Post Evaluations: *Ex post* evaluations examine the effectiveness and efficiency of the use of EU funds. Currently, *ex post* evaluations do not examine EU funds contribution to the realization of human rights.

Human Rights Due Diligence: A risk management process to identify, prevent, mitigate and account for adverse human rights impacts. Human rights due diligence includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.

Multi-Annual Financial Framework (MFF): The Multiannual Financial Framework (MFF) of the EU sets the maximum amount of commitment appropriations in the EU budget each year for broad policy areas ("headings") and fixes an overall annual ceiling on payment and commitment appropriations. The MFF regulation is adopted unanimously. The current MFF covers the period from 2014 until 2020. The MFF which is currently open for discussion covers the period after 2020. It is referred to in this paper as "MFF post-2020".

Regulation: A Regulation in EU law is a binding legislative act. It must be applied in its entirety across the EU.

Executive Summary and General Recommendations

This paper explains how European Union (EU) funding is relevant for the realization of human rights in Europe. It then formulates recommendations to strengthen the human rights dimension in the EU Multi-Annual Financial Framework post-2020 (“MFF post-2020”), i.e. in budgeting and in the rules frameworks associated with the allocation of EU resources in the next period. The paper aims to contribute to the open discussion on the future of the MFF post-2020 and broader consultations on the future of Europe.

A core principle of EU policy-making is the concept of “European Added Value”. According to this concept, the EU should act – by legislating, policy-making, or financing – in those areas where it adds value to the actions of its Member States. Although sometimes framed negatively as limiting EU involvement to areas where individual States should act on their own, this paper makes the case that in light of the core ideal of the EU as a union of values, human rights are a primary area – perhaps *the* primary area – where the EU can and should add value to the actions of the Member States.

The international human rights treaties and the recommendations of the United Nations (UN) human rights mechanisms, the human rights bodies of the Council of Europe, as well as EU bodies such as the Court of Justice of the European Union, the EU Ombudsman and the EU Agency for Fundamental Rights, provide sufficient guidance to link EU funding directly to the implementation of human rights obligations. The EU can make a tangible contribution to the realisation of the human rights of the people in Europe by directly linking the MFF post-2020 to the protection and promotion of human rights, including through measures including the following:

1. Explicitly recognizing human rights imperatives in the MFF, as well as in its implementing rules;
2. Establishing legally binding rules and principles; and
3. Directing financial resources to areas where:
 - (a) there is a positive human rights obligation; and
 - (b) independent human rights mechanisms have identified gaps, and provided concrete recommendations for closing these gaps.

The first part of this paper examines the human rights risks and opportunities for the MFF post-2020 and proposes the following general recommendations:

1. The MFF post-2020 should explicitly state an intention to add value to the efforts of the Member States to implement their human rights obligations.
2. While the *ex ante* conditionalities set out in the regulations for various instruments for the current budgetary period are a good start, the human rights dimension of these conditionalities should be elaborated in detail, and complemented by *ex post* evaluations and monitoring measures.
3. Funding in the next cycle should be directly linked to international human rights treaty provisions, as well as the authoritative guidance and recommendations from the UN human rights mechanisms, Council of Europe monitoring bodies, as well as EU bodies.
4. EU funding for practices which in-and-of themselves are considered human rights violations by human rights treaties and/or bodies should be prohibited. This includes the use of European funding for long-stay residential institutions, as well as the use of European funding for any form of segregation.
5. An EU human rights accountability mechanism should be established to complement existing mechanisms combatting financial malfeasance.
6. The MFF post-2020 should impose a positive requirement of human rights due diligence on States and other entities applying for EU funding.
7. These positive obligations should be coupled with a commitment to elaborate specific safeguards for use in the context of particular financing and funding instruments, including specific human rights-based selection criteria.
8. Independent bodies at national level, including National Human Rights Institutions (NHRIs), Equality Bodies and non-governmental organisations should be given explicit roles in the next financial cycle with respect to the preparation, monitoring, review and assessment of programming and projects supported with European funds.
9. The EU should encourage and support human rights monitoring inside the EU and its Member States, including by civil society organisations.

10. The EU should fund, directly and independently from Member State intervention, academic institutions, media, and other civil society organisations that are essential for the functioning of democracy, in particular those working on the protection and promotion of human rights. Such funding should be readily available for a range of entities including for grassroots organisations and human rights defenders. Such funding should cover, as appropriate, the variety of activities of civil society organizations, such as service provision, watchdog activities, advocacy, litigation, campaigning, human rights and civic education and awareness-raising. In addition, the EU should review current funding criteria to remove rules barring the use of EU funding for human rights litigation.
11. Links should be established or strengthened between the human rights frameworks and standards on the one hand, and the European Social Pillar and European Semester processes on the other.

The second part of this paper provides specific background and recommendations for areas in which human rights mechanisms have found European countries to be lacking. The five areas selected for this paper appear regularly and consistently in human rights reviews across a range of EU Member States. They are at the same time illustrative, not exhaustive:

1. Reviving and invigorating civic space;
2. Strengthening diversity and inclusion and combating segregation in education, housing, health care and employment;
3. Enhancing the right to community living: persons with disabilities, children and older persons;
4. Combatting forced eviction and ending homelessness;
5. Providing human rights-based alternatives to detention in the context of migration.

Recommendations for each thematic area are set out in the respective chapters in Part 2 of this paper.

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Part 1

European Added Human Rights Value

On 1 March 2017, the European Commission presented a White Paper on “The Future of Europe”.¹ The White Paper identifies a series of challenges facing Europe, and launched a reflection process on the role of the EU. Subsequently, the European Commission published five reflection papers including on the future of EU finances² and on the social dimension of Europe.³ In January 2018, the European Commission opened public consultation on a range of themes linked to this discussion.⁴ It is in this context that a discussion process was opened about the MFF post-2020.

A core principle of EU policy-making is the concept of “European Added Value”.⁵ According to this concept, the EU should only act – by legislating, policy-making, or financing – in those areas where it adds value to the actions of its Member States. Applied to budgeting, European Added Value means that the EU should only invest where it adds value to actions by individual Member States. The added value can consist of greater effectiveness or complementarity, improved coordination, or enhanced legal certainty. An investment may also be considered value-added when it has relevance and significance for the EU as a whole and not just for the region or country concerned.⁶ The European Parliament has held that European Added Value “must not be limited to advanced cooperation between Members States but should also contain a visionary aspect”.⁷ Although sometimes framed negatively as limiting EU involvement to areas where individual States should act on their own, this paper makes the case that in light of the core ideal of the EU as a union of values, human rights⁸ are a primary area – perhaps *the* primary area – where the EU can and should add value to the actions of the Member States.

¹ European Commission, *White paper on the future of Europe*, (2017), available from: https://ec.europa.eu/commission/white-paper-future-europe/white-paper-future-europe-way-ahead_en.

² European Commission, *Reflection paper on the future of EU finances*, (2017), available from: https://ec.europa.eu/commission/publications/reflection-paper-future-eu-finances_en.

³ European Commission, *Reflection paper on the social dimension of Europe*, (2017), available from: https://ec.europa.eu/commission/publications/reflection-paper-social-dimension-europe_en. The five “reflection papers” concern (1) the social dimension of Europe; (2) harnessing globalisation; (3) deepening the economic and monetary union; (4) defence; and (5) EU finances. They are available on: https://ec.europa.eu/commission/white-paper-future-europe/white-paper-future-europe-way-ahead_en.

⁴ European Commission, *MFF post 2020*, available from: http://ec.europa.eu/budget/mff/index_en.cfm#RPF.

⁵ For a discussion of European Added Value in relation to the EU budget, see, European Commission, “The added value of the EU budget”, Commission staff working paper, SEC(2011) 867 final, (Brussels,2011).

⁶ European Commission, *Funding under the 3rd health programme 2014-2020. The European added value*, available from: http://ec.europa.eu/chafea/documents/health/hp-factsheets/added-value/factsheets-hp-av_en.pdf.

⁷ European Parliament, *Resolution on building our common future: policy challenges and budgetary means of the enlarged Union 2007-2013*, OJ, C104, (2004), p. 991.

⁸ In EU terminology, the term “fundamental rights” is generally used as the term of art in place of the term “human rights”, with human rights generally reserved for reference to countries which are not Member States. Consistent with international human rights law as well as with Council of Europe law, this paper treats the human rights framework as binding everywhere, including

This paper has been prepared to support efforts to prioritize human rights in the open discussion of the future of the EU MFF post-2020, as a component of wider consultations on the future of Europe. Intergovernmental and non-governmental organizations were consulted in the preparation of this paper. The names of the organizations that wished to affiliate are listed on the cover page.

The first part of this paper examines risks and opportunities for European funding with respect to human rights and formulates recommendations to ensure that the MFF serves as a vehicle to advance human rights. The paper focusses on human rights in the European Union (EU) and its Member States and does not address human rights in EU external action or development.

The second part of the paper provides specific recommendations for human rights areas in which human rights mechanisms have consistently found European countries to be lacking. The five areas selected for this paper appear regularly and repeatedly in human rights reviews of EU Member States. This does not mean that there are no other human rights gaps which also deserve to be addressed; the five areas presented in Part 2 are illustrative:

1. Reviving and invigorating civic space;
2. Strengthening diversity and inclusion and combating segregation in education, housing, health care and employment;
3. Enhancing the right to community living: persons with disabilities, children and older persons;
4. Combatting forced eviction and ending homelessness;
5. Providing human rights-based alternatives to detention in the context of migration.

For the purpose of this paper, the term human rights mechanisms includes UN human rights mechanisms, EU institutions with human rights competencies, Council of Europe mechanisms, National Human Rights Institutions (NHRIs), equality bodies and independent ombuds institutions.

in the EU Member States, and thus treats the terms “human rights” and “fundamental rights” as contiguous if not synonymous. This paper uses the term “human rights”, consistent with the agreed international normative human rights order. This approach is consistent also with the 2030 agenda and the Sustainable Development Goals (SDGs), which has removed the distinction between “developing” and “developed” countries, and similar to international human rights law, applies everywhere.

The EU can make a tangible contribution to the realisation of the human rights of the people in Europe by directly linking the post-2020 MFF to the protection and promotion of human rights, including through the following measures:

1. Explicitly recognizing human rights imperatives in the MFF, as well as in its implementing rules;
2. Establishing legally binding rules and principles; and
3. Directing financial resources to areas where:
 - (a) there is a positive human rights obligation; and
 - (b) independent human rights mechanisms have identified gaps, and provided concrete recommendations for closing these gaps.

1. Human Rights and Budgeting

The MFF is a regulatory framework – and as such first and foremost as series of rules and commitments. These rules are however directly related to the nature and substance of EU budgeting post-2020. As such, a short summary of the link between human rights and budgeting is relevant here.

While certain human rights obligations of States have limited or no financial implications, a vast range of human rights obligations bear costs.⁹ A human rights-compliant budget presupposes the following elements:

- Allocations and expenditure should be “appropriate”, i.e. well suited to realize a specific right (for example, to ensure the availability and accessibility of health services), responsive to the needs that people have articulated, and not unnecessary or wasteful.
- Budgeting should be “effective”, i.e. evidence based, designed and implemented to best realise a positive impact on human rights.

⁹ UN Human Rights Office (OHCHR) and International Budget Partnership, *Realizing Human Rights through Government Budgets*, (Geneva, 2017), available from: <http://www.ohchr.org/Documents/Publications/RealizingHRThroughGovernmentBudgets.pdf>, pp.19-22.

- The budget should be “adequate”, i.e. sufficient for the realization of the rights in question. The size of the budget should be such that ministries, departments and agencies have the necessary resources to implement the programme. This has a bearing not only on the budget of specific ministries, departments and agencies, but also on the budget as a whole, which must be adequate to allow for the realization of human rights.¹⁰

2. Human Rights Obligations and the EU Multi-Annual Financial Framework

European Union Member States are parties to most international human rights treaties. The EU has itself ratified the UN Convention on the Rights of Persons with Disabilities (CRPD), and moves are afoot for the EU to join the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention). All EU Member States are also party to the European Convention on Human Rights, and have ratified a number of other Council of Europe instruments. These treaties create legal obligations of a binding nature.

Article 2 of the Treaty on European Union stipulates that the EU is founded upon the “values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights”. The “Copenhagen Criteria” require that EU candidate countries have achieved, inter alia, stability of institutions guaranteeing democracy, the rule of law, human rights, respect for and protection of minorities.¹¹

The EU Charter of Fundamental Rights has anchored more deeply into law the human rights requirements of the EU and its Member States.¹² The EU institutions, bodies, offices and agencies have human rights obligations arising from international human rights law as well as the EU Charter of Fundamental Rights. Article 51 of the Charter obliges the EU institutions, bodies, offices and agencies to “respect the rights, observe the principles and promote the application” in accordance with their powers. The EU Charter of Fundamental Rights is of the highest legal value of EU law.¹³ The Court of Justice of the European Union (CJEU) held in the *Kadi* case that all acts of the EU must respect fundamental rights.¹⁴ Moreover, the CJEU ruled in the *Schmidberger* case that measures incompatible with

¹⁰ Ibid., p.24.

¹¹ European Council, *Presidency Conclusions*, 7.A.iii, (Copenhagen, 1993), available from: http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf.

¹² The Charter was first proclaimed on 7 December 2000. On 1 December 2009, with the entry into force of the Treaty of Lisbon, the Charter became legally binding on the EU institutions and on national governments. See: http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm.

¹³ As provided for in Article 6 (1) of the EU Treaty. Kokott, J. and Sobotta, C., “Charter of Fundamental Rights of the EU after Lisbon”, AEL 2010/6, EUI Working Papers.

¹⁴ Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] I-6351 para. 284-285.

observance of human rights are not acceptable in the EU.¹⁵ Therefore, respect and observance of human rights and fundamental freedoms are, and should be, embedded in all EU actions.

The European legislator has strengthened human rights requirements binding the EU and its Member States through the adoption of Regulations, Directives and other acts elaborating aspects of human rights requirements in EU law. These include Directives¹⁶ such as those elaborating various aspects of the ban on discrimination, as well as relevant provisions and *ex ante* conditionalities included in the Regulations of funding instruments¹⁷ under the current MFF.

The CJEU recently ruled, in the case of *Ledra Advertising et al.*, that, as the guardian of the treaties, the EU institutions “should refrain from signing a memorandum of understanding whose consistency with EU law it doubts.” The Charter, the Court noted, “is addressed to the EU institutions, including ... when they act outside the EU legal framework.”¹⁸ One commentary on this judgment concluded that “The *Ledra Advertising* decision sends a strong signal to EU institutions: whether they act in the framework of EU law or at its margins ... [they] should duly take fundamental rights into account, and they should be ready to be held liable if they fail to do so.”¹⁹ UN human rights mechanisms have explicitly recommended to EU Member States that they seek EU funding for the implementation of their international human rights treaty obligations.²⁰

In 2014-2015, the European Ombudsman undertook an inquiry on respecting the EU Charter of Fundamental Rights when implementing the Cohesion Policy, investigating how the European Commission ensures that the fundamental rights enshrined in the EU Charter are complied with when this policy is implemented by EU Member States.²¹ In her final assessment, the Ombudsman noted that:

¹⁵ C-112/00 *Schmidberger* [2003] I-5659, para. 73.

¹⁶ Most notably: European Council, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, available from: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32000L0043>; European Council, Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, available from: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:en:HTML>.

¹⁷ Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013, available from: <https://ec.europa.eu/digital-single-market/en/news/regulation-eu-no-13032013-european-parliament-and-council>; as well as the particular regulations for the individual funds.

¹⁸ C-8/15 P to C-10/15 P *Ledra Advertising Ltd, et al.*, EU:C:2016:701, para. 67.

¹⁹ DeSchutter, O. and Dermine, P., *The Two Constitutions of Europe: Integrating Social Rights in the New Economic Architecture of the Union*, European Journal of Human Rights, Vol. 2, (2017), p.134.

²⁰ For example, the UN Committee on the Rights of Persons with Disabilities recently recommended to Portugal that “the EU structural funds allocated to the State party until 2020 be used for the development of policies that contribute to the implementation of the Convention in the State party” (CRPD/C/PRT/CO/1, para. 12).

²¹ OI/8/2014/AN.

1. Most, if not all, Member State actions which arise in the context of programmes funded under the EU's cohesion policy involve the implementation of EU law.
2. The Commission is obliged to respect the Charter in its entirety, in all its activities, including in the distribution and monitoring of European Structural and Investment Funds (ESIF).
3. The Commission should not allow itself to finance, with EU money, actions which are not in line with the highest values of the Union, that is to say, the rights, freedoms and principles recognised by the Charter.²²

3. Human Rights Gaps and Roadmaps

Detailed analysis of human rights gaps is provided to States by the UN human rights mechanisms, the human rights bodies of the Council of Europe, as well as by the EU institutions themselves. Most of this information is publicly available. The following is a non-exhaustive list of these bodies:

United Nations

- Human Rights Committee
- Committee on Economic, Social and Cultural Rights
- Committee on the Elimination of Racial Discrimination
- Committee on the Elimination of Discrimination against Women
- Committee against Torture
- Sub-committee on the Prevention of Torture
- Committee on the Rights of the Child
- Committee on the Rights of Persons with Disabilities
- Committee on Enforced Disappearances
- Special Procedures Mandate-Holders of the Human Rights Council
- Universal Periodic Review

²² Ibid., para. 39-46.

Council of Europe

- The European Court of Human Rights
- The European Committee of Social Rights
- Commissioner for Human Rights
- Special Representative of the Secretary General on Migration and Refugees
- European Commission for Democracy through Law (Venice Commission)
- Parliamentary Assembly of the Council of Europe
- Advisory Committee to the Framework Convention for the Protection of National Minorities
- Committee for the Prevention of Torture
- European Commission against Racism and Intolerance (ECRI)

European Union

- Court of Justice
- Agency for Fundamental Rights
- European Ombudsman
- European Parliament Petitions Committee

The recommendations of these bodies provide a roadmap for implementation that EU funding should support. For any given Member State, as well as for Europe as a whole, an overview of the recommendations issued by the UN human rights mechanisms can be generated which would provide the concrete areas in need of European support. EU funding should be framed to support the implementation of recommendations from these mechanisms.

4. Human Rights and the Sustainable Development Goals (SDGs)

On 18 September 2015, the UN Member States unanimously adopted the 2030 Agenda for Sustainable Development. The 2030 Agenda is explicitly grounded in the international human rights treaties, and the SDGs are universally applicable in developing and developed countries.²³ The Agenda aims to tackle global issues such as poverty, inequality, health, education and climate through 17 Sustainable Development Goals (SDGs) and 169 targets. The central message of “leaving no one behind” and “reaching the furthest behind first” offers important opportunities to close the gaps for the most marginalized in society and those suffering discrimination. Importantly, States have committed to implement

²³ See A/RES/70/1, para. 18.

the 2030 Agenda “in a manner consistent with international law”. The implementation of the 2030 Agenda must therefore be human rights based to ensure that the SDGs buttress human rights obligations and vice-versa. In assessing the requirements of for advancement under the SDGs, conscious attention needs to be paid to the normative content of the relevant human rights.

Different from the previous development agenda, the SDGs are now to be implemented in all countries, including in middle and high income countries such as those of the European Union. The EU has recognized the relevance of the SDGs for both development policy as well as internal to the EU.²⁴ In May 2017, the EU Commission adopted its decision to create the SDG Multi-Stakeholder Platform under the Chairmanship of First Vice-President Timmermans. A post-2020 MFF framed and construed in terms of the EU’s commitment to human rights is thus now the highest order of business for human-rights-based development in Europe.

5. Human Rights Risks and Opportunities in the Allocation of European Funding

Certain risks arise in the interplay between human rights obligations and the implementation of EU funded programmes and projects. These include, for example, the following possible scenarios (a non-exhaustive list):

1. Direct investments into possible human rights violations: EU funds are allocated to a programme or project with aspects that are problematic from a human rights perspective. This might be the case, for example, where a Member State’s overall programme for social inclusion includes provisions to design and implement separate housing provisions or other segregating measures.²⁵
2. Indirect investments into possible human rights violations: EU funds are allocated to a programme or project which may have indirect human rights implications. For example, the improvement of a social care home for persons with disabilities (building a new kitchen, toilet, energy efficiency, etc.) may perpetuate

²⁴ European Commission, *EU’s implementation of the Sustainable Development Goals (SDGs)*, available from: http://ec.europa.eu/environment/sustainable-development/SDGs/implementation/index_en.htm.

²⁵ See for example “Programme Opérationnel Régional Feder-FSE 2014-2020”, Ile-de-France et Bassin de Seine, Version adoptée du 23 décembre 2014”, p. 45; Envisioning for Roma “the creation of structures of the type ‘Insertion Villages’: closed sites where the population is housed in bungalows or light dwellings ...”; In 2015, the European Commission stopped ERDF funding for a housing project in Naples that would have led to segregated living of the Roma community. For more background, see https://www.opensocietyfoundations.org/sites/default/files/briefing-ec-italy-roma-20150608_1.pdf.

institutionalisation, in violation of the Convention on the Rights of Persons with Disabilities (CRPD).

3. Support for measures which promote or entrench destructive stereotypes: EU funds support measures intended to improve treatment of stigmatized groups, but in fact heighten stereotypes.²⁶
4. Link between EU funded programmes and the geographical/social context: EU funding is allocated to programmes in localities where human rights violations are taking place, in disregard of these violations. This might arise, for example, in places where the trafficking of human beings has been overlooked or is tacitly tolerated, or where there are patterns and practices of forced eviction, and European funding is being used for local development work, to pave roads or refurbish a park or is applied to something entirely unrelated to ending these abusive practices.
5. Lack of investment in closing human rights gaps: Member States prioritize measures unconnected with human rights recommendations by competent human rights monitoring or review bodies, thus directing resources to areas unrelated to the improvement of human rights.

At present, Member States are not yet sufficiently prioritizing the use of EU funding to meet their human rights obligations. An EU Court of Auditors report noted that “since 2012, country-specific recommendations have been used to draw attention to various issues; for instance, that of segregation in education.... The goal of tackling the segregation of Roma children in the educational system was set out in the strategies, but the insufficient number of measures and targets which had been introduced made it difficult to achieve. Where such measures did exist, the timeframe for their implementation was unclear, as were the budgetary arrangements. These shortcomings have slowed down the implementation of the National Roma Integration Strategy”.²⁷

For the current programming period, the European Institutions have developed guidance which could be anchored in the overall framework for the coming period. For example, in 2015, the European Commission developed a Guidance note on the use of European Structural and Investment Funds in tackling educational and spatial segregation. This sets

²⁶ See: Life Long Learning Programme and Common Goals Ways, *How To Educate Roma Children? Steps in building a more efficient organization for the education of the Roma ethnic minority*, 2012-1-HU1-LEO05-05838, 12/0034-L/4838, available from: http://traindup.org/wp-content/uploads/2015/01/roma_manual_EN_final.pdf.

²⁷ Court of Auditors of the EU, *Special Report: EU policy initiatives and financial support for Roma integration: significant progress made over the last decade, but additional efforts needed on the ground*, (2016), para. 127; Country-specific recommendations are provided under the so-called European Semester process (see: https://ec.europa.eu/info/publications/2017-european-semester-country-specific-recommendations-commission-recommendations_en).

out in detail that, “investments in housing or education should not lead to increased concentration or further physical isolation of marginalised groups,” as well as that “in all housing and education operations the desegregation principle should be considered as a first option and non-segregation only as a second option.”²⁸ However, it has been noted that this and similar guidance provided by the European Commission is often not acted upon, because it is not explicitly included in the overall rules framework and rarely appears in calls for proposals or other programming documents.

As concerns the funding of infrastructure, the EU plays an important role in meeting financing gaps for the achievement of the SDGs: “The 2030 United Nations Agenda for Sustainable Development and the Sustainable Development Goals (SDGs) are an anchor of EU policy both internally and externally.”²⁹ However, absent rigorous due diligence, such funding may have negative human rights impacts at the project level as well as at the macro-level. Private sector participation, within an appropriate regulatory framework, can be vital, but an appropriate balance must be struck between investors’ rights on the one hand, and right and duty of governments to regulate in the public interest and give effect to their obligations under international human rights law on the other.³⁰

The MFF is an appropriate place to both recognize and mitigate risks such as those noted above, as well as to embed principles of human rights due diligence.³¹ As set out in the recommendations section of this position paper, safeguards against such risks would be embedded in both the overall structure and the content of the MFF post 2020. In addition, the MFF or related rules could specify roles for entities at regional, national and local levels to perform relevant control functions.

6. General Recommendations

On the basis of the analysis above, this paper proposes the following general recommendations:

²⁸ European Commission, *Guidance for Member States on the use of European Structural and Investment Funds in tackling educational and spatial segregation*, EGESIF_15-0024-01, (2015), available from:

http://ec.europa.eu/regional_policy/sources/docgener/informat/2014/thematic_guidance_fiche_segregation_en.pdf.

²⁹ European Commission, *Reflection Paper on the Future of EU Finances*, (2017), available from:

https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-eu-finances_en.pdf, p.13.

³⁰ UN Human Rights Office, *Baseline Study on the Human Rights Impacts and Implications of Mega-Infrastructure Investment*, (Geneva, 2017), available from:

http://www.ohchr.org/Documents/Issues/Development/DFI/MappingStudyontheHRRiskImplications_MegaInfrastructureInvestment.pdf.

³¹ On human rights due diligence, see inter alia UN Human Rights Office (OHCHR), *Guiding Principles on Human Rights and Business*, (Geneva, 2011), available from:

http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf, pp. 6-10.

Recommendations

1. The MFF post-2020 should explicitly state an intention to add value to the efforts of the Member States to implement their human rights obligations.
2. While the *ex ante* conditionalities set out in the regulations for various instruments for the current budgetary period are a good start, the human rights dimension of these conditionalities should be elaborated in detail, and complemented by *ex post* evaluations and monitoring measures.
3. Funding in the next cycle should be directly linked to international human rights treaty provisions, as well as the authoritative guidance and recommendations from the UN human rights mechanisms, Council of Europe monitoring bodies, as well as EU bodies.
4. EU funding for practices which in-and-of themselves are considered human rights violations by human rights treaties and/or bodies should be prohibited. This includes the use of European funding for long-stay residential institutions, as well as the use of European funding for any form of segregation.
5. An EU human rights accountability mechanism should be established to complement existing mechanisms combatting financial malfeasance.
6. The MFF post-2020 should impose a positive requirement of human rights due diligence on States and other entities applying for EU funding.
7. These positive obligations should be coupled with a commitment to elaborate specific safeguards for use in the context of particular financing and funding instruments, including specific human rights-based selection criteria.
8. Independent bodies at national level, including National Human Rights Institutions (NHRIs), Equality Bodies and non-governmental organisations should be given explicit roles in the next financial cycle with respect to the preparation, monitoring, review and assessment of programming and projects supported with European funds.
9. The EU should encourage and support human rights monitoring inside the EU and its Member States, including by civil society organisations.
10. The EU should fund, directly and independently from Member State intervention, academic institutions, media, and other civil society organisations that are essential for the functioning of democracy, in particular those working on the protection and promotion of human rights. Such funding should be readily available for a range of entities including for grassroots organisations and human rights defenders. Such funding should cover, as appropriate, the variety of activities of civil society organizations, such as service provision, watchdog activities, advocacy, litigation, campaigning, human rights and civic education and awareness-raising. In addition, the EU should review current funding criteria to remove rules barring the use of EU funding for human rights litigation.
11. Links should be established or strengthened between the human rights frameworks and standards and the European Social Pillar and European Semester processes.

Part 2

Human Rights Gaps Requiring Explicit Attention in the Multi-Annual Financial Framework

As noted above, the legal oversight and human rights monitoring mechanisms of the three normative systems of relevance for EU Member States – the UN, the Council of Europe and the EU itself – offer detailed roadmaps to advance human rights in Europe, both for Member States and for Europe as a whole. It is not possible to identify an exhaustive list of all human rights gaps which might benefit from or require the added value of the EU for their resolution. Five areas which, in our view, merit explicit attention in the MFF post 2020, based on their appearance regularly and repeatedly across a broad range of EU Member States in assessments by independent human rights mechanisms, are set out below.

1. Reviving and Invigorating Civic Space

Recommendations

The MFF post-2020 should anchor principles of accountability for erosions of civil rights and civic freedoms as guaranteed by international human rights law and by the EU Charter of Fundamental Rights. The EU should encourage and support independent monitoring of human rights inside the EU and its Member States, including by civil society organisations, by:

- Prioritizing support for civil society organizations working primarily in the field of human rights, including funding for work to support rights-holders in legal proceedings to claim rights, as well as through strategic policy work, monitoring and/or advocacy.
- Considering the establishment of an entity which would be tasked with proactive monitoring of civil society space, and threats thereto, within the EU.
- Adopting training processes to ensure that heads and senior staff of EU representations and staff in EU member States have the skills and knowledge required to act as spearheads in the promotion of human rights and European values, as well as adopting guidance regarding human/fundamental rights.
- Launching an initiative aimed at ensuring that all National Human Rights Institutions in EU Member States and candidate countries meet the requirements for A-status accreditation, as well as that equality bodies in all EU Member States and candidate countries meet the highest possible international and European standards of independence and effectiveness.

In addition, the EU should review current funding criteria to remove rules barring the use of EU funding for legal action. Similarly, funding for independent academic institutions, media, and organisations essential for the good functioning of democracy should be reinvigorated.

International human rights law devotes particular attention to what are frequently termed the “civic freedoms” or civil rights, set out in detail in Articles 17-22 of the International Covenant on Civil and Political Rights (ICCPR): the right to privacy, family, or correspondence; the right to freedom of thought, conscience and religion; the right to hold opinions without interference; and the rights to freedom of expression (deemed also to include media freedom), peaceful assembly and freedom of association. These rights at the international level are mirrored in European human rights law by the rights set out in the European Convention on Human Rights in Articles 8 to 11. The Charter of Fundamental Rights of the EU has even expanded on this basis: the “Freedoms” chapter of the Charter explicitly lists twelve rights – both recognizing the rights listed above, as well as adding explicit guarantees such as the right to protection of personal data (article 8) and freedom of arts and sciences (Article 13). These rights are often linked with the defence of democracy itself, and with right to genuine and equitable participation in public life, matters set out in Article 25 of the ICCPR.

Human rights, democracy and good governance are essential for the creation of an enabling environment in which civic space can flourish. These values also form the backbone of the 2030 Agenda for Sustainable Development, aiming to reduce inequalities through the guarantee of equal opportunities in social, economic and political spheres (SDG 5 and SDG 10), creating a widened civic space. SDG 16 points towards the responsibility of the State with regards to the establishment of just and inclusive institutions, listing targets that are essential to a human rights-based civic space, including public access to information, and the protection of fundamental freedoms in accordance with national legislation and international agreements (SDG 16.10). Participatory and representative decision-making at all levels and the strengthening of national institutions for building capacity are highlighted as part of this target (SDG 16.A), where progress is measured through the existence of independent national human rights institutions in compliance with the Paris Principles (indicator 16.A.1).

In Europe, concerns have been expressed by a broad range of interlocutors regarding backsliding in the rule of law, the erosion of democratic institutions and practices, limitations on the independence of the judiciary, constraints on freedom of expression and association (in particular on independent media), and pressure on non-governmental, academic institutions, National Human Rights Institutions (NHRIs), Ombuds institutions, equality bodies and other independent institutions.³²

³² See for example: HUN 2/2017; HUN 1/2017; HUN 1/2014; HUN 3/2013; HUN 2/2012; HUN 1/2012; CCPR/C/POL/CO/7; UN Special Rapporteur on the independence of judges and lawyers, *Preliminary observations on the official visit to Poland (23-27 October 2017)*, 2017, available from: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22321&LangID=E>.

Concerns have further been expressed over the revision of electoral codes to limit democratic participation rights, limitations on religious freedom as well as discriminatory preferences for majority or “traditional” religious communities, incitement to hatred of foreigners, physical and verbal abuse of migrants, as well as, in some places, a redoubling of segregation of Roma; threats to advances made in the independence, empowerment and equality of women; and new fears of discrimination and tolerance of violence. These developments have been noted as concerns both inside and outside the EU.³³ Such regressive measures dismantle human rights advances, and moreover have the potential to damage the European human rights architecture and weaken the EU’s overall commitment to the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.³⁴

In the run-up to the 2004 and 2007 accession waves, the EU paid extensive attention to the vibrance of civil society. The accessions of Greece, Portugal and Spain were done in large part with a view to overcoming authoritarian legacies. In the recent period, EU funding mechanisms have regressed in their ability to support independent, human rights-based civil society work in the Member States. Specifically, civil society organisations have reported that the EU Commission has recently begun rejecting legal action costs in support of people claiming fundamental rights as a legitimate cost under EU funding.³⁵ European funding for civil society inside the European Union goes primarily if not exclusively to service-provision, with limited if any attention to independent human rights monitoring. The EU Agency for Fundamental Rights has recently recommended that “EU institutions and Member States are encouraged to ensure that funding is made available for [civil society organizations] working on the protection and promotion of the EU’s foundational values of fundamental rights, democracy and the rule of law... Such funding should cover, as appropriate, the variety of activities of civil society organisations, such as service provision, watchdog activities, advocacy, litigation, campaigning, human rights and civic education and awareness raising.”³⁶ The MFF should embody these insights, with detailed recommendations set out above.

³³ See inter alia EU Agency for Fundamental Rights (FRA), *Challenges for Civil Society Organisations Working in the EU*, (2018), available from: <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu>; Centre for Peace Studies, Helsinki Foundation for Human Rights Poland, Hungarian Civil Liberties Union, Hungarian Helsinki Committee, *Resisting Ill Democracies in Europe*, (2017), available from: humanrightshouse.org/noop/file.php?id=22908.

³⁴ On possible European responses, see Waelbroeck, M. and Oliver, P., *La crise de l'état de droit dans l'Union Européenne: Que faire ?*, (Bruylant, 2018), pp.299-342 ; Waelbroeck, M. and Oliver, P., *Enforcing the rule of law in the EU : What can be done about Hungary and Poland ?*, available from : <https://blogdroiteuropeen.com/2018/01/31/enforcing-the-rule-of-law-in-the-eu-what-can-be-done-about-hungary-and-poland-par-michel-waelbroeck-et-peter-oliver/>.

³⁵ European Commission, DG Employment and Social Affairs, *EU Programme for Employment and Social Innovation (“EaSI”)*, VP/2017/015, Call for Proposals, (updated 22 September 2017), p.3.

³⁶ EU Agency for Fundamental Rights (FRA), *Challenges for Civil Society Organisations Working in the EU*, (2018), available from: <http://fra.europa.eu/en/publication/2018/challenges-facing-civil-society-orgs-human-rights-eu>, p.9.

2. Strengthening Diversity and Inclusion and Combating Segregation in Education, Housing, Health Care and Employment

Recommendations

The MFF should explicitly recognize the ban on discrimination and set out equality and non-discrimination as core goals for the coming financial period. The MFF should anchor the principle that items supported by the EU budget must contribute to equal treatment and non-discrimination. This principle should apply across all areas of EU policy. Where relevant, the MFF should additionally stipulate that items supported by the EU budget must contribute to the celebration of diversity.

The MFF should bar usage of EU funds for actions which would result in segregation. Specific items within the MFF should be directed toward desegregation and inclusion measures.

The MFF should fund the advancement of education on the basis of the principles of the UN Charter and the Universal Declaration of Human Rights, as well as initiatives to enhance human rights education.

The MFF should prioritize the funding of inclusive delivery of services including health care, water and sanitation.

The MFF should recognize and embed the principle of “nothing about us without us”.

The ban on discrimination is included in all nine core international human rights treaties. Article 21 of the EU Charter of Fundamental Rights prescribes that “Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.” Article 21(2) of the Charter further bans discrimination on grounds of nationality with an exception provided for “application of the Treaties and without prejudice to any of their specific provisions”. The ban on discrimination has seen a particularly vigorous ferment of law-making by the EU, with multiple directives in force in this area, and infringement proceedings initiated pursuant to their entry-into-force.

The overarching goal of the 2030 Agenda for Sustainable Development is to ensure that “no one is left behind.” SDGs 5 and 10 highlight particular measures to close gaps on social and economic inequalities, to end discriminatory policies and practices, and to empower populations for the inclusion of all irrespective of age, sex, disability, race, ethnicity, origin, religion or economic or other status (the corresponding indicators for

SDGs 5, 10 and 17 require that States provide disaggregated data in this regard). SDG 1 aims to combat poverty, including through national social protection systems that ensure adequate living standards for all sectors of the population, citing coverage for older persons, persons with disabilities, pregnant women, newborns, work injury victims, and the poor and the vulnerable by 2030 (SDG 1.3). More specifically, the SDG Agenda pushes for disparities to be eliminated in the fields of education (SDG 4), housing (SDG 11), healthcare (SDG 3) and employment (SDG 8), citing particular protection for women, youth, migrants, and persons with disabilities, and requesting parity indices and disaggregated data as part of the follow up mechanisms.

Segregation is an extreme form of discrimination which is generally deemed to arise in the context of forced or coerced separation or the “maintenance of an entirely separate set of rights or access to separate facilities or services for different groups of people.”³⁷ Article 3 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) states that “States Parties particularly condemn racial segregation ... and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.” In its General Recommendation no. 19, the UN Committee on the Elimination of Racial Discrimination (CERD) set out that there is a positive obligation to end racial segregation having arisen during previous governments.³⁸ Segregation can arise in a range of areas, but it is most frequently documented in the fields of education, employment, health care and housing (or spatial or urban planning). Segregation usually occurs in contexts of strong stigma against particular groups, and where the positive value of diversity is inadequately anchored.³⁹

In practice, segregation remains a reality throughout Europe in sectors including education, housing, health care and employment, in particular as concerns migrants and persons of migrant origin, persons with disabilities and -very extensively- Roma.

In a 2015 comprehensive study of the human rights situation of Roma worldwide, with a particular focus on the phenomenon of anti-Gypsyism,⁴⁰ the UN Special Rapporteur on Minority Issues noted segregation in hospital facilities, as well as ghettoization and segregation in the field of housing.⁴¹ The UN Committee on the Elimination of Racial Discrimination has regularly expressed concern at segregation practices in EU Member

³⁷ Interights, *Non-Discrimination in International Law: A Handbook for Practitioners*, (2011), p.165. Under EU law, some forms of gender-based segregation, such as single-sex sports events, have been deemed allowable as long as these measures pursue a legitimate aim and the means used to achieve that aim are “appropriate and necessary” (European Commission, Directive 2004/113/EC on Gender Equal Access to Goods and Services, Preamble, Para. 16).

³⁸ UN Committee on the Elimination of Racial Discrimination, *General recommendation No. 19 on article 3 of the Convention on Elimination of Racial Discrimination*, 18 August 1995.

³⁹ In recent years, the UN human rights system has begun deeper assessments of the role played by stigma in creating pariah treatment, resulting in severe human rights abuses such as segregation (See A/HRC/22/33; A/HRC/21/42.; A/HRC/26/28/Add.2).

⁴⁰ The Alliance against Antigypsyism uses the spelling “antigypsyism”.

⁴¹ A/HRC/29/24.

States.⁴² In a series of cases concerning Roma, the European Court of Human Rights has deemed EU Member States in violation of anti-discrimination provisions in the European Convention on Human Rights (ECHR).⁴³ The Court has adopted a zero-tolerance stance for forced separation measures, rejecting as illegal even temporary separation based on different language ability.⁴⁴ The European Committee of Social Rights has ruled that countries have undertaken systemic discrimination acts against Roma in the field of housing, giving rise to segregation concerns.⁴⁵

Similar concerns exist as concerns the field of health.⁴⁶ Different electrical provisions in stigmatized Roma neighbourhoods have been deemed by the Court of Justice of the European Union to violate EU law banning discrimination based on racial or ethnic origin.⁴⁷ According to comparative data recently published by the EU Agency for Fundamental Rights, based on data in 9 EU Member States, segregation of Romani children worsened considerably during the period between 2011 and 2016: the number of Romani children who reported that they attended classes where all of their peers were Romani rose from 10% to 15% over the five-year period.⁴⁸

As concerns children of migrant origin, the Council of Europe Commissioner for Human Rights recently noted with concern that “Refugee children and children with a migrant background also experience school segregation in many European countries, as they are often taught in schools with a disproportionately high presence of other migrant children. Moreover, schools and teachers are often left alone, with wide powers of discretion and few resources or requirements, to address the specific learning needs of migrant pupils. The Commissioner has noted with concern that children with a migrant background have also at times tended to be overrepresented in special education. The recent increase in the number refugees arriving in Europe is making the issue of school segregation more acute,

⁴² See for example: CERD/C/BGR/CO/20-22; CERD/C/SVK/CO/11-12.

⁴³ Application No. 7973/10 *Lavida and others v Greece*, 30 May 2013 [2013] ECHR488; Application No. *Horvath And Kiss v. Hungary*, 29 January 2013 [2013] ECHR 92; Application No. 32526/05 *Sampanis v. Greece*, 8 August 2011 [2011] ECHR 1637; Application No. 15766/03 *Orsus And Others v Croatia*, 16 March 2010 [2010] ECHR 337; Application No. 57325/00 *D.H. and Others v. Czech Republic*, 13 November 2007; Application No. 15766/03 *Orsus And Others v Croatia*, 16 March 2010 [2010] ECHR 337.

⁴⁴ See: Application No. 15766/03 *Orsus and Others v Croatia*, 16 March 2010 [2010] ECHR 337.

⁴⁵ Application No. 63/2010 *Centre on Housing Rights and Evictions (COHRE) v. France*; Application No. 61/2010 *European Roma Rights Centre (ERRC) v. Portugal*; Application No. 58/2009 *Centre on Housing Rights and Evictions (COHRE) v. Italy*; Application No. 51/2008 *European Roma Rights Centre (ERRC) v. France*; Application No. 49/2008 *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece* Application No. 27/2004 *European Roma Rights Center (ERRC) v. Italy*.

⁴⁶ European Public Health Alliance, *EPHA's Response to EU Evaluation of the National Roma Integration Strategies*, available from: <https://epha.org/ephas-response-to-eu-evaluation-of-the-national-roma-integration-strategies/>.

⁴⁷ C-303/06 *CHEZ Razpredelenie Bulgaria AD v. Komisia za zashtita ot diskriminatsia*, EU:C:2008:415.

⁴⁸ European Commission, *Press release*, available from: http://europa.eu/rapid/press-release_IP-17-2961_en.htm.

as many Member States have yet to develop comprehensive integration policies that effectively secure the right of migrant and refugee children to mainstream education."⁴⁹

As concerns children and adults with disabilities, the UN Committee on the Rights of Persons with Disabilities (CRPD) has repeatedly expressed concern about segregation practices in the EU Member States in fields including education, employment and health.⁵⁰ During a recent mission to a country in the region, the UN Special Rapporteur on the Rights of Persons with Disabilities expressed concern that "current efforts to address the needs of persons with disabilities are highly specialized, segregated and compartmentalized, with a strong focus on addressing the individuals' impairment rather than on transforming the society and its environment to ensure accessible and inclusive services as well as community-based support. This type of segregated responses not only perpetuates the wrong depiction of persons with disabilities as 'objects of care' instead of 'subjects of rights', but also contributes to their isolation from mainstream society, and prevents and/or delays Government efforts to implement the systematic and profound environmental changes that are necessary in order to remove attitudinal, physical and communication barriers."⁵¹ The Special Rapporteur also expressed concern about "the situation of children with disabilities who are placed in segregated residential medico-social institutions".⁵² She urged a replacement of "segregated and paternalistic solutions with responses that promote active citizenship, social inclusion and community participation."⁵³

Recent efforts by the human rights community have stressed the commonalities in segregating forces, drawing links between the treatment of Roma, persons with disabilities and children of migrant origin in Europe, due to the stigma facing these groups. For example, in a recent paper focussed on segregation in education as affecting multiple groups, the Council of Europe Commissioner for Human Rights has stated that: "School segregation is one of the worst forms of discrimination and a serious violation of the rights of the children concerned, as their learning opportunities are seriously harmed by isolation and lack of inclusion in mainstream schools. It is a clear manifestation of injustice against minority and other vulnerable groups, which also perpetuates the marginalisation of entire population groups in Europe."⁵⁴ Extending examination of the harms of segregation to all

⁴⁹ Council of Europe Human Commissioner for Human Rights, *Op.Cit.*, p.9. See also recent FRA data related to xenophobia and hate crime and integration measures for refugees and migrants: <http://fra.europa.eu/en/publication/2017/eumidis-ii-main-results>.

⁵⁰ See: CRPD/C/CYP/CO/1; CRPD/C/LUX/CO/1; CRPD/C/GBR/CO/1.

⁵¹ UN Human Rights Office, *End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to France*, available from: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22245&LangID=E>.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Council of Europe Commissioner for Human Rights, *Fighting School Segregation in Europe through Inclusive Education: A Position Paper*, (2017), available from: <https://rm.coe.int/fighting-school-segregationin-europe-throughinclusive-education-a-posi/168073fb65>, p.5.

of society, a recent joint statement by OHCHR, European Network of National Human Rights Institutions (ENNHRI), European Network of Equality Bodies (Equinet), the OSCE Office for Democratic Institutions and Human Rights and the EU Agency for Fundamental Rights notes also that segregation denies to “children from majority communities the benefits of inclusive education and the positive value of diversity for vibrant democracies and, above all, for people.”⁵⁵ The Durban Declaration and Programme of Action, adopted at the 2001 World Conference Against Racism (WCAR) “urges States to ensure equal access to education for all in law and in practice, and to refrain from any legal or any other measures leading to imposed racial segregation in any form in access to schooling”.⁵⁶ The UN Special Rapporteur on the right to education has recently undertaken a comprehensive report on equity, inclusion and non-discrimination in education, focussing on a broad range of groups including Roma, migrant children and children with disabilities.⁵⁷

There is increasing attention to the role of EU funding in driving segregation or reversing it. In 2017, the European Parliament adopted by Resolution the Report of its Committee on Civil Liberties, Justice and Home Affairs on fundamental rights aspects in Roma integration in the EU: fighting anti-Gypsyism.⁵⁸ The Report makes extensive reference to the need to improve the human rights impact of funding relevant to Roma inclusion, recommending *inter alia* that the Commission and the Member States ensure that the relevant interventions financed by the EU with possible implications for the Roma community are inclusive and fight segregation; ensure that segregation practices are clearly described and explicitly excluded from funding; extend the Europe for Citizens and the Rights, Equality and Citizenship funding programmes recognising the important role of civil society watchdog organisations and other relevant stakeholders in monitoring anti-Gypsyism and ensuring respect for fundamental rights; as well as that funding be suspended in cases of misuse, including in human rights terms.⁵⁹ The European Commission has recognised that, without both mainstreaming measures and explicit targeting of Roma, funding does not tend to reach particularly excluded Romani groups.⁶⁰

⁵⁵ UN Human Rights Office (OHCHR) Regional Office for Europe, ENNHRI, Equinet, OSCE ODIHR, EU Agency for Fundamental Rights, *Call to Action: Bring Children Together for Diversity*, (2017), available from: <http://fra.europa.eu/en/press-release/2017/call-action-bring-children-together-diversity>.

⁵⁶ Durban Declaration on the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, South Africa, 8 September 2001, available from: http://www.un.org/en/durbanreview2009/pdf/DDPA_full_text.pdf, p. 122.

⁵⁷ A/72/496.

⁵⁸ Committee on Civil Liberties, Justice and Home Affairs, *Draft report on fundamental rights aspects in Roma integration in the EU: fighting anti-Gypsyism*, 2017/2038(INI).

⁵⁹ *Ibid.*, paras 6-8.

⁶⁰ Communication from the Commission to the European Parliament and the Council, *Midterm review of the EU framework for national Roma integration strategies*, COM(2017) 458 final, (Brussels, 2017).

The UN human rights treaties set out strong, visionary provisions as concerns the nature of segregation's opposite. For example, as concerns education, the Convention on the Rights of Persons with Disabilities sets out that "States Parties shall ensure an inclusive education system at all levels and life-long learning directed to ... the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity".⁶¹ Similar provisions in other human rights treaties elaborate the commitment in the Universal Declaration of Human Rights (UDHR) that "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace."⁶² These and similar provisions illuminate the types of measures, actions, policies and programming which should be supported.

Finally, a range of other people and groups throughout Europe, such as LGBTI, religious minorities, older persons, Afro-descendants and others continue to face various forms of discrimination. Many of the forces described above have particular gendered aspects, with women and girls disproportionately affected. The European Ombudsman has held that EU Member States and the European Commission are jointly obliged to prevent any discrimination when preparing and implementing programmes. The Ombudsman report also pointed out as a result from the consultation "that specific categories of the population, such as LGBTI people, persons with disabilities and Roma communities ... are often ignored in the drafting of partnership agreements or operational programmes."⁶³ The MFF post-2020 should embed the priority of contributing to advancing genuine and effective equality in Europe.

⁶¹ Convention on the Rights of Persons with Disabilities, Article 24(1).

⁶² Universal Declaration of Human Rights, Article 26(2).

⁶³ European Ombudsman, *Decision concerning the European Commission*, OI/8/2014/AN, available from: <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/59836/html.bookmark>; See also: Open Society Foundations: Main risks of misusing EU funding in the field of Roma inclusion, available from: <https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/59844/html.bookmark>.

3. Enhancing the Right to Community Living: Persons with Disabilities, Children and Older Persons

Recommendations

The MFF should explicitly recognize the right to independent living and community inclusion for persons with disabilities, children and older persons. A ban on investing resources into maintaining, renovating, establishing, building new institutions should be established.

The MFF should explicitly provide a framework to support the transition from institutional to community-based care.

The MFF should explicitly state that EU investments in the transition from institutional to community-based care must be guided by human rights standards and by comprehensive strategies that include all groups of rights-holders at risk of institutionalisation (persons with disabilities, and in particular persons with psychosocial and intellectual disabilities, children, homeless persons and older persons).⁶⁴

The implementation of EU investments in the transition from institutional to community-based care must be monitored to ensure compliance with the UN Convention on the Rights of Persons with Disabilities (CRPD) and the EU Charter on Fundamental Rights. In this regard, the MFF should explicitly recognise the respective roles of the European Commission, civil society organisations, social services providers, National Human Rights Institutions, equality bodies, rights holders and national CRPD monitoring frameworks to monitor and support implementation of these rights.

In the context of the MFF, the EU should prioritize updating quantitative and qualitative data on institutionalisation in Europe.

The 2030 Agenda for Sustainable Development reflects the fundamental principles of non-discrimination and equality throughout. The focus of the SDG Follow-up and Review processes is therefore placed on those who are furthest behind, requiring countries to collect and disaggregate data. SDG 10 calls on States to empower and promote the social, economic and political inclusion of all, including older persons and persons with disabilities. The promotion of inclusive societies for sustainable development and the provision of access to justice for all is highlighted in SDG 16, the indicators for which require data on the proportion of positions occupied by persons with disabilities in public institutions, as well as the proportion of population who believe decision-making is inclusive

⁶⁴ CRPD/C/18/1; A/RES/64/142; European Expert Group on the Transition from Institutional to Family Based Care, *Common European Guidelines on the Transition from Institutional to Community Based Care*, available from: <http://www.deinstitutionalisationguide.eu/?p=5>.

and responsive, by disability group. SDG 11 on sustainable cities and communities has direct implications for independent living, outlining access to “adequate, safe and affordable housing and basic services for all.” Specific reference to persons with disabilities and older persons is made with regards to social protection systems (SDG 1), and in facilitating access to public spaces and affordable transport (SDG 11), while SDG 1 underlines the important role of social protection systems for all as a key measure in the prevention and reduction of poverty and inequality.

There is a positive obligation to ensure that individuals can effectively exercise the right to live independently with community inclusion. The most notable standard in this regard is Article 19 of the Convention on the Rights of Persons with Disabilities (CRPD). Central features of Article 19 are that:

- a) persons with disabilities have the opportunity to choose their place of residence and where and with whom to live on an equal basis with others;
- b) they have access to a range of services that support living independently in the community;
- c) they have access to services and facilities for the general population.

The CRPD Committee has provided detailed guidance on the right to living independently and being part of the community.⁶⁵ Article 19 is key to the realization of other rights under the CRPD, and the CRPD Committee holds that it “plays a distinct role as one of the widest ranging and most intersectional articles of the Convention and has to be considered as integral for the implementation of the Convention across articles”.⁶⁶ Denial of the right to live independently and to be part of the community, as established under CRPD Article 19, also leads to violations of other rights protected under the CRPD, most notably the rights to liberty and security of the person, equality and non-discrimination, respect for home and the family, respect for privacy, access to education, the right to work, the right to health equal recognition before the law, access to justice.

Closely linked to the problem of institutionalization is the denial of equal legal capacity of persons with disabilities, guaranteed by Article 12 of the CRPD. International law requires full recognition of the right to legal capacity of persons with disabilities. Persons under guardianship or other legal forms denying equal legal capacity are de facto deprived of other rights as well, including the right to have and manage their own finances, the right to marry and divorce, the right to choose their living place, the right to vote and be elected, a range of rights related to family and privacy, the right to own property, the right to accept

⁶⁵ CRPD/C/18/1.

⁶⁶ CRPD/C/18/1, para. 6.

or refuse medication or other health measures. For this reason, Article 12 has been called “the roots from which all of the other rights of the CRPD grow.”⁶⁷ Throughout Europe, hundreds of thousands of persons are under plenary guardianship and therefore exercise no rights whatsoever.⁶⁸ When reviewing the EU, the CRPD Committee recommended that EU “step up efforts to foster research, data collection and exchange of good practices on supported decision-making, in consultation with representative organizations of persons with disabilities.”⁶⁹ Members of the European Parliament have recently tabled formal questions as to why there is limited progress in this area in Europe.⁷⁰

Institutionalization of children also violates their right to grow up in a family environment, as stipulated in the Convention on the Rights of the Child (CRC). The UN Committee on the Rights of the Child has systematically raised concern over the significant numbers of children placed in institutional care in European countries,⁷¹ noting that children with disabilities and children from disadvantaged background are particularly at risk of family separation and institutionalisation. Recalling the UN Guidelines for the Alternative Care of Children,⁷² the CRC Committee has systematically emphasised that poverty “should never be the only justification for the removal of a child from parental care, for receiving a child into alternative care, or for preventing his or her reintegration, but should be seen as a signal for the need to provide appropriate support to the family.”⁷³

As concerns older persons, Article 23 of the Revised European Social Charter sets out *inter alia* an obligation to enable older persons to remain full members of society for as long as possible. The United Nations Independent Expert on the enjoyment of all human rights by older persons has noted that “Autonomy is a core principle of the Convention on the Rights of Persons with Disabilities. Even though ageing should not be associated with disability, this legal framework could be applied to older persons with disabilities and could provide guidance on the scope of the concept of autonomy. The Convention, in its preamble, recognizes the importance for persons with disabilities to have their individual autonomy and independence, including the freedom to make their own choices. Article 3 (a) refers to respect for inherent dignity and individual autonomy, including the freedom to make one’s own choices, and the independence of persons. Article 19 provides ... guidance on

⁶⁷ Presentation by Mr. Gabor Gombos, Member, Committee on the Rights of Persons with Disabilities, Chisinau, Republic of Moldova, September 2012.

⁶⁸ UN Human Rights Office, *End of Mission Statement by the United Nations Special Rapporteur on the rights of persons with disabilities, Ms. Catalina Devandas-Aguilar, on her visit to France*, available from: <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22245&LangID=E>.

⁶⁹ CRPD/C/EU/CO/1, para. 37

⁷⁰ European Parliament, *Parliamentary questions*, available from: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2018-000011+0+DOC+XML+V0//EN&language=en>.

⁷¹ CRC/C/SVK/CO/3-5; CRC/C/BGR/CO/3-5; CRC/C/EST/CO/2-4; CRC/C/ROU/CO/5; CRC/C/POL/CO/3-4; CRC/C/NLD/CO/4; CRC/C/HUN/CO/3-5; CRC/C/HRV/CO/3-4; CRC/C/PRT/CO/3-4; CRC/C/LTU/CO/3-4, 2013; CRC/C/LVA/CO/3-5.

⁷² A/RES/64/142, 2010, para. 23.

⁷³ A/RES/64/142, 2010, para. 55.

measures that should be adopted to facilitate independent living and the full inclusion and participation of older persons with disabilities in the community. ... Autonomy refers to the principle or right of individuals or groups of individuals to determine their own rules and preferences. It includes the freedom and capacity to make one's own decisions and the legal capacity to exercise those decisions. Autonomy encompasses three main elements: an individual aspect, which includes the capacity to make decisions; an economic and financial aspect, understood as self-sufficiency and the ability to generate and receive income; and a societal aspect, which means the existence of communities and environments that are age-sensitive and age-friendly in order to ensure that older persons are able to decide or act for themselves."⁷⁴

Although the logic of institutionalisation is protection, evidence indicates that persons in institutional care are at significantly heightened risk of torture, cruel, inhuman or degrading treatment or punishment, exploitation, violence or abuse.⁷⁵ Human rights mechanisms have, for example, noted with concern that netted cage beds were used in institutions for persons with disabilities in some European countries⁷⁶ and that sterilisation and castration of persons with disabilities who are deprived of legal capacity were used in others.⁷⁷ Various human rights mechanisms also noted with great concern allegations of violence, psychological or sexual abuse, trafficking and even deaths occurring in institutions in countries in the region, including where victims were children.⁷⁸ In 2017, the European Court of Human Rights issued a landmark judgment in advancing the right to living independently and being included in the community, for the first time explicitly ordering deinstitutionalisation and support services to support transition to the community.⁷⁹

No data exists on the number of people in Europe who reside in institutional care today, segregated from community life and denied access to a broad spectrum of human rights established under international law. A study commissioned by the European Commission estimated that 1.2 million persons with disabilities were living in institutions in 2007.⁸⁰ There are no indications that this figure has decreased significantly in the recent period.⁸¹ Adding to this the number of children, older persons and homeless persons who are

⁷⁴ A/HRC/30/43, paras. 19-21 and 44.

⁷⁵ European Expert Group on Transition from Institutional to Community-based Care, *Common European Guidelines on the Transition from Institutional to Community Based Care*, (2012), pp .43-45.

⁷⁶ CRPD/C/AUT/CO/1; CCPR/C/SVK/CO/4; CCPR/C/GRC/CO/2; CCPR/C/HRV/CO/3; CCPR/C/CZE/CO/3; Urgent Appeal by several Special Procedures Mandate Holders to the Government of Greece, (GRC 1/2016).

⁷⁷ CRPD/C/CZE/CO/1; CRPD/C/PRT/CO/1; CRPD/C/SVK/CO/1; CRPD/C/LTU/CO/1; CCPR/C/ESP/CO/6; CRPD/C/DEU/CO/1; CEDAW/C/FIN/CO/7; CEDAW/C/LTU/CO/5; CEDAW/C/HUN/CO/7-8.

⁷⁸ See for example: CRPD/C/LVA/CO/1; CAT/C/ROU/CO/2; CCPR/C/ROU/CO/5; Council of Europe Commissioner for Human Rights, *Letter to the Prime Minister of Romania*, 16 March 2017; CRC/C/LTU/CO/3-4; CRC/C/BGR/CO/3-5; CRC/C/ROU/CO/5.

⁷⁹ Requête no 59152/08 *N. c. Roumanie*, 28 November 2017.

⁸⁰ University of Kent, *Deinstitutionalisation and Community Living: Outcomes and Costs: A Report of a European Study*, (2007).

⁸¹ See FRA country studies: <http://fra.europa.eu/en/project/2014/rights-persons-disabilities-right-independent-living/country-data>.

institutionalized, the total number of institutionalized persons in Europe is likely much higher.

The 2014-2020 rules framework of the European Structural and Investments Funds (ESIF) has offered an opportunity for EU Member States to invest in community and human rights-compliant family-based services, and to promote transition from institutional to community-based care. This has given impetus to States to take measures to foster deinstitutionalization reform, an opportunity which some countries have indeed seized.⁸² Attention to the transition from institutional to community-based care has increased at EU and national levels, resulting in two EU Presidency conferences on the topic (the Latvian Presidency 2015 and the Estonian Presidency 2017) *EU Council Conclusions on Enhancing Community-Based Support and Care for Independent Living* to which all EU Member States subscribed in 2017.⁸³

However, the CRPD Committee, having reviewed the EU and the majority of EU Member States – (17 as at the date of this position paper) has found that most countries continue to violate Article 19, because of continued institutionalization of persons with disabilities and a persistent lack of person-centred services in the community. When reviewing the EU's implementation of the CRPD in 2015, the CRPD Committee expressed concern that “across the EU, persons with disabilities, especially persons with intellectual and/or psychosocial disabilities still live in institutions rather than in their local communities.” It notes that, “despite changes in regulations, the European Structural and Investment Funds continue to be used in different member States for the maintenance of residential institutions rather than for the development of support services for persons with disabilities in local communities.”⁸⁴ The CRPD Committee has also called on EU Member States to halt investments of ESIF and national resources into institutional care and recommended these countries to ensure that all investments dedicated to support services and community living centres for persons with disabilities comply with the provisions of article 19 of the CRPD.⁸⁵

⁸² The 17 countries are: Bulgaria, Croatia, Czech Republic, Estonia, Greece, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Denmark, Ireland, Malta, Portugal and Spain (see European Union Agency for Fundamental Rights, *From institutions to community living - Part I: commitments and structures*, (2017), available from: <http://fra.europa.eu/en/publication/2017/independent-living-structures>).

⁸³ Council of the European Union, *Enhancing Community-Based Support and Care for Independent Living - Council Conclusions*, ST 15563 2017 INIT, available from: http://www.consilium.europa.eu/register/en/content/out/?&typ=ENTRY&i=LD&DOC_ID=ST-15563-2017-INIT.

⁸⁴ CRPD/C/EU/CO/1, para. 50.

⁸⁵ CRPD/C/HUN/CO/1; CRPD/C/LTU/CO/1; CRPD/C/SVK/CO/1.

Similar concerns have been raised by the European Parliament⁸⁶, the European Ombudsman⁸⁷, the European Union Agency for Fundamental Rights,⁸⁸ Equinet,⁸⁹ and civil society organisations. There are indications that ESIF investments presented by Member States under the heading of “transition from institutional to community-based care” lead to the emergence of smaller institutions such as “small group homes” or “family-type institutions” under the misleading label of “community-based” services, and where rights holders continue to be excluded and segregated.⁹⁰ Also, there are indications that persons with psycho-social disabilities are frequently excluded in practice from EU-supported deinstitutionalisation reforms.⁹¹

The CRPD offers opportunities for Europe as it moves to design the MFF post-2020. First of all, both the EU and all but one of the Member States have ratified the CRPD. Secondly, in contrast to the current MFF’s budgetary cycle, at the start of the 2020 budgetary period, the CRPD Committee will have reviewed all EU Member States which are party to the Convention, and will have offered detailed recommendations to both States and the EU itself. As such, detailed blueprints exist for nearly all European countries, setting out measures to be undertaken to implement the human rights requirements in this area. As noted by the UN Independent Expert on the enjoyment of all human rights by older persons and the UN Committee on the Rights of the Child, the principles of autonomy and community inclusion established most clearly in the CRPD are clearly applicable also for children and older persons, with extensive implications for the MFF post-2020.

⁸⁶ European Parliament Committee on Petitions, *Fact-finding visit to Slovakia: 22 – 23 September 2016*, available from: <http://www.europarl.europa.eu/committees/en/peti/events-missions.html?id=20160922CHE00221>.

⁸⁷ European Ombudsman, Comments of the Commission on the European Ombudsman’s Own-initiative inquiry, OI/8/2014/AN, available from: <https://www.ombudsman.europa.eu/en/cases/correspondence.faces/en/58451/html.bookmark>.

⁸⁸ European Union Agency for Fundamental Rights, *From institutions to community living - Part I: commitments and structures*, (2017), available from: <http://fra.europa.eu/en/publication/2017/independent-living-structures>.

⁸⁹ Equinet, *Realising Rights: Equality Bodies and People with Disabilities. Supporting the Review of the European Disability Strategy 2010-2020*, (2014), available from: http://www.equineteurope.org/IMG/pdf/disabiliby_perspective_with_cover.pdf, p.25.

⁹⁰ See for example: Community Living for Europe, Structural Funds Watch, *Opening up communities, closing down institutions: Harnessing the European Structural and Investment Funds*, (2017), available from:

https://eustructuralfundswatchdotcom.files.wordpress.com/2017/11/cle-sfw_opening-up-communities-november-2017_final.pdf;

See also briefings including: European network on Independent Living, *Disability Watchdog: Estonia’s Care Villages*, available from: <http://enil.eu/news/disability-watchdog-estonias-care-villages/>; European network on Independent Living, European Union

Structural and Investment Funds and the Transition from Institutional Care to Community Living: Towards a More Effective Monitoring and Complaints System, available from: http://enil.eu/wp-content/uploads/2017/07/OurRightsCampaign-Briefing_FINAL.pdf;

Directorate-General for internal policies, *European Structural and Investment Funds and People with Disabilities in the EU*, available from: http://enil.eu/wp-content/uploads/2016/06/COMMITTEES_PETI_2016_11-09_Study-EUFunds-Disabilities.pdf;

Directorate-General for internal policies, *European Structural and Investment Funds and People with Disabilities in the EU: Focus on the situation in Slovakia*, available from: http://enil.eu/wp-content/uploads/2016/06/IPOL_IDA2016571371_EN.pdf;

European network on Independent Living, *Working together to close the gap*, available from: <http://enil.eu/wp-content/uploads/2016/06/Working-Together-to-Close-the-Gap.pdf>.

⁹¹ Mental Health Europe and University of Kent, *Mapping and Understanding Exclusion in Europe*, (2017).

4. Combatting Forced Eviction and Ending Homelessness

Recommendations

The MFF should explicitly recognize the principle that the EU budget must contribute to the advancement of security of tenure and the right to adequate housing more broadly.

The MFF should support the use of EU funds for actions that advance the implementation of policies for realizing the right to adequate housing.

The MFF should fund the advancement of alternative accommodation to ensure that evictions do not result in households being rendered homeless or vulnerable to the violation of other human rights.

The MFF should fund initiatives aimed at overcoming shortages of social housing and advance affordable housing, as well as ending homelessness.

The right to adequate housing is set out in the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁹² and in the European Social Charter of the Council of Europe,⁹³ which have both been ratified by all EU Member States. Article 11(1) of the ICESCR obliges States Parties “to recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions”, and stipulates that “States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent”. States have a positive obligation to end homelessness.⁹⁴

As concerns evictions, States are required to ensure that evictions do not result in households being rendered homeless or vulnerable to the violation of other human rights. Where those evicted are unable to provide for themselves, Member States must take the maximum appropriate measures allowed by their available resources to ensure that adequate alternative housing is available.⁹⁵ The UN Committee on Economic, Social and

⁹² A/6316 (1966) International Covenant on Economic, Social and Cultural Rights, Art 11.

⁹³ Council of Europe, *European Social Charter (Revised)*, European Treaty Series - No 35, (Strasbourg, 1996), Articles 16, 30 and 31.

⁹⁴ A primary core obligation of States Parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR) is “to take steps” to implement effectively the rights of the ICESCR using “all appropriate means, including particularly the adoption of legislative measures” (see E/1991/23, General Comment No.3, The nature of States parties’ obligations, (1990). See also E/1992/23, General Comment No. 4: The Right to Adequate Housing; A/CONF.157/24, Fact Sheet No.16 (Rev.1).

⁹⁵ See E/1991/23 General Comment No. 3: The Nature of States Parties’ Obligations.

Cultural Rights (CESCR) has recently highlighted State obligations to ensure the accessibility of legal remedies for persons facing mortgage enforcement procedures for failure to repay loans.⁹⁶

Council of Europe human rights instruments set out similar guarantees. The European Social Charter and Revised Charter⁹⁷ set out housing rights including access to adequate and affordable housing; a reduction of homelessness; housing policy targeted at all disadvantaged categories; procedures against forced eviction; equal access for non-nationals to social housing and housing benefits; and housing construction and housing benefits related to family needs.⁹⁸ The European Court of Human Rights (ECHR) has repeatedly ruled on cases concerning housing rights, including as concerns forced eviction from housing,⁹⁹ failure to deliver social housing,¹⁰⁰ discriminatory rental¹⁰¹ and inheritance¹⁰² practices, degrading housing conditions, environmental threats to life and health,¹⁰³ as well as other matters.¹⁰⁴ The Court has also paid particular attention to certain groups, including Roma,¹⁰⁵ persons with disabilities¹⁰⁶, and slum-dwellers.¹⁰⁷

Article 34 of the EU Charter of Fundamental Rights establishes that “in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.” In cases concerning mortgage contracts, the Court of Justice of the European Union (CJEU) has held that a person’s fundamental right to a home under Article

⁹⁶ See E/C.12/55/D/2/2014. Views of the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (fifty-fifth session) – Spain. As concerns the positive obligation to provide shelter, see: <http://www.housingrightswatch.org/news/housing-related-binding-obligations-states-european-and-international-law>.

⁹⁷ Council of Europe, *European Social Charter (Revised)*, European Treaty Series - No 35, (Strasbourg, 1996).

⁹⁸ See: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/AboutCharter_en.asp.

⁹⁹ Application No. 25446/06, *Yordanova and Others v Bulgaria*, 24 April 2012, [2012] ECHR 180.

¹⁰⁰ Application No. 19841/06 *Bagdonavicius and Others v. Russia*, 11 October 2016, [2016] ECHR 871.

¹⁰¹ Application No. 29515/95 *Larkos v. Cyprus*, 18 February 1999, [1999] ECHR 11.

¹⁰² Application No. 13102/02 *Kozak v. Poland*, 2 March 2010 [2010] ECHR 280.

¹⁰³ Application No. 48939/99, *Öneryıldız v. Turkey*, 30 November 2004 [2004] ECHR 657; Application No. 16798/90 *López Ostra v. Spain*, 9 December 1994 [1994] ECHR 46.

¹⁰⁴ Application No. 25446/06, *Yordanova and Others v Bulgaria*, 24 April 2012, [2012] ECHR 180; Application No. 36760/06 *Stanev v. Bulgaria*, 17 January 2012 [2012] ECHR 46; Application No. 48939/99, *Öneryıldız v. Turkey*, 30 November 2004, [2004] ECHR 657.

¹⁰⁵ Application No. 41138/98 and 64320/01 *Moldovan v Romania (No. 2)*, 12 July 2005 [2005] ECHR 11; See also: *Gergely v. Romania*; *Kalanyos and Others v. Romania*, *Tănase and Others v. Romania*; *Sulejmanovic and Sultanovic and Sejdovic and Sulejmanovic v. Italy*; *Buckley v. the United Kingdom*; *Connors v. the United Kingdom*; *Winterstein and Others v. France*; *Ceesay and Others v. Spain*; *Öneryıldız v. Turkey*; *Patrama v. Ukraine*; *Burlyta and Others v. Ukraine* and *Bagdonavicius and Others v. Russia*.

¹⁰⁶ Application No. 36760/06 *Stanev v. Bulgaria*, 17 January 2012 [2012] ECHR 46; Applications no. 47848/08 *Centre for Legal Resources on Behalf of Valentin Câmpeanu v. Romania*, 21 December 2014, [2014] Eur J Health Law. 524-8.

¹⁰⁷ Application No. 48939/99, *Öneryıldız v. Turkey*, 30 November 2004, [2004] ECHR 657.

7 of the Charter must be taken into consideration before possession orders are enforced.¹⁰⁸

The recently adopted European Pillar of Social Rights goes a step further: Article 19 of the Social Pillar states that either social housing or housing assistance should be provided for all those in need and requires universal access to adequate shelters for everyone in a homeless situation.¹⁰⁹ Adequate housing is a binding legal obligation understood in terms of security of tenure, affordability, habitability, accessibility, location and cultural adequacy.¹¹⁰ The EU's '2020 Strategy' acknowledges homelessness as one of the worst forms of poverty and deprivation.¹¹¹

In practice, many Member States are, however, failing to fulfill these obligations and there is a particular concern regarding vulnerable groups in society. The European Federation of National Organizations Working with the Homeless (FEANTSA) reports that in the EU as a whole, one person in six lives in overcrowded housing, and that homelessness is on the rise in most European countries.¹¹² A number of European States have expelled rough-sleepers and homeless persons.¹¹³ The European Committee of Social Rights has identified violations of the right to housing in several EU Member States.¹¹⁴ The UN Human Rights Committee has similarly found that the forced eviction and demolition of housing of a Roma community was both an arbitrary and unlawful interference with one's home and family and a form of discrimination on the ground of ethnic origin.¹¹⁵ In the first decision of the UN Committee on Economic, Social and Cultural Rights (CESCR) under the Optional Protocol to the ICESCR, the Committee considered that the eviction, without assurances that alternative accommodation would be available, amounted to a violation of the right of the persons concerned to adequate housing.¹¹⁶

¹⁰⁸ Case C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa [Catalunyacaixa]* (March 2013); Case C-169/14 *Sanchez Morcillo* (July 2014); Case C-34/13 *Kusionova* (September 2014).

¹⁰⁹ European Commission, *A deeper and fairer economic and monetary Union*, available at: https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en.

¹¹⁰ Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, *Establishing a European Pillar of Social Rights*, 26 April 2017, available from: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1494929441507&uri=CELEX:52017SC0201>.

¹¹¹ European Commission, available from: <http://ec.europa.eu/eurostat/documents/3217494/7566774/KS-EZ-16-001-EN-N.pdf/ac04885c-cfff-4f9c-9f30-c9337ba929aa>, p.157.

¹¹² FEANTSA, *Second overview of housing exclusion in Europe*, (2017), p.129.

¹¹³ *Ibid.*

¹¹⁴ Application No. 86/2012 *European Federation of National Organisations working with the Homeless (FEANTSA) v. the Netherlands*; Application No. 63/2010 *Centre on Housing Rights and Evictions (COHRE) v. France*; Application No. 61/2010 *European Roma Rights Centre (ERRC) v. Portugal*; Application No. 58/2009 *Centre on Housing Rights and Evictions (COHRE) v. Italy*; Application No. 51/2008 *European Roma Rights Centre (ERRC) v. France*; Application No. 49/2008 *International Centre for the Legal Protection of Human Rights (INTERIGHTS) v. Greece*; Application No. 27/2004 *European Roma Rights Center (ERRC) v. Italy*.

¹¹⁵ CCPR/C/GRC/CO/2.

¹¹⁶ E/C.12/61/D/5/2015.

In recent Concluding Observations on EU countries, the CESCR Committee has expressed concern over the fact that State authorities were underinvesting in the implementation of policies for realizing the right to adequate housing. The Committee expressed concern over housing shortages, including of social housing, affordable housing and emergency shelters. It noted that many people still have no fixed abode and that, as a result, new informal settlements were appearing.¹¹⁷ In another review, the CESCR Committee was also concerned about: (a) the shortage of vacant municipal premises and lack of funding for the construction of new houses; (b) the significant proportion of the population living in overcrowded apartments; (c) the waiting list for social housing, which could extend to seven years; and (d) the fact that evicted persons were not offered alternative accommodation but relocated to shelters for the homeless.¹¹⁸

In the report on his mission to a country in the region, the Special Rapporteur on extreme poverty and human rights highlighted the absence of a national plan to address the chronic shortage of affordable housing. He noted the criteria that were being used in practice to allocate available housing clearly disfavored the worst off. Numerous persons living in poverty interviewed by the Special Rapporteur indicated that they would never qualify for social housing because of the restrictive criteria applied.¹¹⁹ The Special Rapporteur on adequate housing, in examining issues in another country in the region, has concluded that “many people still face serious long-term challenges: unemployment, wage cuts (particularly in the public sector) and an overall high risk of poverty, with direct consequences for their access to affordable housing.”¹²⁰

Access for all to adequate, safe and affordable housing and basic services is included in the 2030 Agenda for Sustainable Development, which conveys the fundamental principles of equality and non-discrimination throughout. SDG 11 provides targets for building sustainable cities and communities, and corresponding indicators require the provision of data on the proportion of urban populations “living in slums, informal settlements or inadequate housing” (11.1.1). The important role of social protection systems in preventing and reducing poverty and inequality is underlined in SDG 1 on the eradication of poverty, aiming to ensure that by 2030 all men and women, in particular the poor and the vulnerable, have equal rights to economic resources, “as well as access to basic services, ownership and control over land and other forms of property, inheritance, natural resources, appropriate new technology and financial services, including microfinance”.

¹¹⁷ E/C.12/FRA/CO/4.

¹¹⁸ E/C.12/POL/6.

¹¹⁹ A/HRC/32/31/Add.2.

¹²⁰ A/HRC/34/51/Add.2.

The EU has a cycle of economic, fiscal and social policy coordination in place called the European Semester. This serves to align Member States' budgetary and economic policies with the objectives and rules agreed at EU level, such as the targets of Europe 2020 strategy. The targets of this strategy are related to a range of economic and social rights in respect to employment, education, poverty and social exclusion. The European Pillar of Social Rights will be mainstreamed in this policy cycle starting from the European Semester in 2018. This presents a unique opportunity for introducing in this process, which results in annual country specific recommendations for budgetary and structural reforms, modalities for effective checks on human rights compliance.

5. Providing Human Rights-Based Alternatives to Detention in the Context of Migration

Recommendations

The MFF should be grounded in international human rights law, including the right to liberty of person, which assumes that detention is an exceptional measure and should be carefully constrained by due process safeguards, independent monitoring and regular judicial review.

The MFF should prohibit any usage of EU funds for measures that would encourage or result in unlawful or arbitrary deprivation of liberty.

The MFF should encourage the usage of EU funds for measures that would limit or mitigate the need for detention, especially for those who are particularly vulnerable to human rights abuses.

The MFF should fully respect the rights of the child, including the paramount principle of the best interest of the child, by prohibiting the usage of EU funds for the deprivation of liberty of children and families for reasons related to their migration status.

The MFF should ensure that EU funds prioritize the development and implementation of human rights-based alternatives to detention that are in line with international human rights law and standards. Human rights-based alternatives to detention should:

- be non-custodial;
- uphold the dignity and humanity of the person at all times;
- respect the principle of non-discrimination;
- respect the prohibition of torture, inhuman or degrading treatment;
- respect the right to private and family life;
- ensure individuals can exercise fundamental economic, social and cultural rights, including the rights to health, housing and education;
- take full account of individual circumstances and those with particular vulnerabilities, including pregnant women, children, victims of trafficking, victims of torture, older persons and persons with disabilities;
- be subject to human rights oversight, including regular judicial review, independent monitoring, and the right to an effective remedy.

The MFF should ensure that EU funds prioritize alternatives to detention based on best practices, such as community-based engagement, independent and impartial case management, and tailored individual support working towards case resolution.

The right to liberty of the person, set out in Article 3 of the Universal Declaration of Human Rights (UDHR), is elaborated in Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 5(1) of the European Convention on Human Rights. The right to liberty is guaranteed to everyone within the jurisdiction or effective control of the State without distinction or exception, and it extends to nationals and non-nationals alike, including in the course of migration management.¹²¹ Deprivation of the right to liberty of person is also directly linked to the impairment of other human rights.¹²² Illegal or arbitrary deprivations of liberty constitute a serious human rights violation, and for this reason the ability to detain¹²³ is carefully circumscribed by a number of important substantive and procedural protections, not least of which is the obligation of States to explore and implement alternatives to detention.¹²⁴

Arrest or detention that lacks any legal basis is clearly arbitrary,¹²⁵ as is the detention of persons beyond the strict time limits established by law,¹²⁶ or the continued confinement of a person in defiance of a judicial order.¹²⁷ But beyond mere legality, the prohibition of arbitrary detention requires a further analysis of whether the detention is fundamentally inappropriate, unjust, or lacks predictability or due process of law.¹²⁸ So, while not all detention in the context of migration is *per se* arbitrary, migration-related detention will become arbitrary where it is not justified as strictly reasonable, necessary and proportionate in light of the individual circumstances.¹²⁹

Any detention that is mandatory or indefinite is *per se* arbitrary as it cannot reasonably be considered necessary or proportionate, as will any detention that is discriminatory, because it will be inherently unjust. This includes when detention is based on a person's citizenship, nationality or immigration status.¹³⁰ Detention will also be arbitrary if the conditions of

¹²¹ UN Human Rights Committee, *General Comment No. 31 on the nature of the general legal obligation imposed on States parties to the Covenant*, (CCPR/C/21/Rev.1/Add.13), para. 10.

¹²² Human Rights Committee, *General Comment No. 35 on Article 9, Liberty and security of person*, (CCPR/C/GC/35), para. 3.

¹²³ International instruments do not always use the same terminology to refer to the various forms of deprivation of liberty—compare, e.g. “arrest”, “detention”, “retention”, “incarceration”, “imprisonment”, “custody”, etc. For this reason, the UN Working Group on Arbitrary Detention has made clear that all forms of detention are deprivation of liberty for the purposes of determining whether someone has been arbitrarily detained in violation of the right to liberty. UN Working Group on Arbitrary Detention (WGAD): *Report to the 22nd session of the UN Human Rights Council*, (A/HRC/22/44), para 57.

¹²⁴ A/HRC/22/44, para. 75; Others include genocide, piracy, slavery, and wars of aggression; See: Cherif Bassiouni M., *International Crimes: 'Jus Cogens' and 'Obligatio Erga Omnes. Law and Contemporary Problems*. Vol. 59, No. 4, (1996), p. 68.

¹²⁵ Case C-414/1990, *Mika Miha v. Equatorial Guinea*, para. 6.5.

¹²⁶ See UN Human Rights Concluding Observations: Brazil CCPR/C/BRA/CO/2, 2005, para. 16.

¹²⁷ Case C-856/1999, *Chambala v. Zambia*, para. 7.3.

¹²⁸ Case C-1134/2002, *Gorji-Dinka v. Cameroon*, para. 5.1; Case C- 305/1988, *Van Alphen v. Netherlands*, para. 5.8.

¹²⁹ UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of the person)*, CCPR/C/GC/35, para. 18; See Case C-560/1993, *A. v. Australia*, paras. 9.3–9.4; Case C-794/1998, *Jalloh v. Netherlands*, para. 8.2; Case C-1557/2007, *Nystrom v. Australia*, paras. 7.2–7.3.

¹³⁰ Prohibited grounds of discrimination include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, nationality, migration status, age, disability, statelessness, marital and family status, sexual orientation or gender identity, health status, and economic and social situation. OHCHR, *Recommended Principles and Guidelines on Human Rights at International Borders*, 2014, Principle B.8.

detention or the manner in which detainees are treated do “not relate to the purpose for which they are ostensibly being detained.”¹³¹ For example, the ‘co-mingling’ of immigration and criminal detainees, or the use of criminal-like detention facilities.

The use of detention in the context of immigration enforcement has routinely been linked with arbitrariness and should generally be viewed as a disproportionate and prohibited measure given that migration management is an administrative, not a criminal, matter and considering the availability of alternative measures to detention. In the rare instances when such detention is used, it must be an exceptional measure of last resort and carefully constrained by appropriate legal safeguards, monitoring and regular review.

The use of detention is particularly concerning when applied to those who are at a heightened risk of marginalisation, discrimination, and violations of their human rights. Recently, the Committee on the Rights of the Child has adopted a General Comment, together with the UN Committee on the Rights of Migrant Workers and Members of Their Families, in which it states that migration-related detention of children and families is incompatible with State obligations under the United Nations Convention on the Rights of the Child.¹³² Similarly, the United Nations High Commissioner for Refugees (UNHCR) has stated that refugees and asylum seekers, as a general rule, should not be detained in the course of migration management.¹³³ Other international experts and bodies have made similar recommendations regarding, inter alia, victims of trafficking, stateless persons, women and girls, and persons with disabilities.¹³⁴

¹³¹ UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of the person)*, CCPR/C/GC/35, para. 14.

¹³² Joint General Comment nos. 22 and 23 of the Committee on the Rights of the Child and nos. 3 and 4 of the Committee on Migrant Workers; See also, Summary of normative standards on ending the immigration detention of children, available at www.iawgendchilddetention.org.

¹³³ UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, available at: <http://www.unhcr.org/publications/legal/505b10ee9/unhcr-detention-guidelines.html>.

¹³⁴ CEDAW, *General Recommendation No. 32 on the Gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, CEDAW/C/GC/32, 14 November 2014, para. 34; CRPD, *Concluding observations on the initial report of the European Union*, CRPD/C/EU/CO/1, 2 October 2015, paras. 34 and 35; Human Rights Commission, *Report of the Special Rapporteur on migrant workers*, E/CN.4/2003/85, 30 December 2002, paras. 41-51; Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants*, A/HRC/20/24, 2 April 2012, paras. 36-47; Human Rights Council, *Working Group on Arbitrary Detention*, A/HRC/13/30, 18 January 2010, para. 56; Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68, 5 March 2015, paras. 48 and 86(g); UNHCR, *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), Guideline 9; International Detention Coalition, *Legal framework and standards relating to the detention of refugees, asylum seekers and migrants: A guide* (2011), Standard No. 2; OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, E/2002/68/Add.1, 20 May 2002, Principle 7, Guidelines 2(6) and 6(1). Guideline 5(5) also calls on States to ensure “that law enforcement efforts do not place trafficked persons at risk of being punished for offences committed as a consequence of their situation”.

The UN Human Rights Committee has noted that a decision to detain must take into account less invasive means of achieving the same ends, such as reporting obligations, sureties or other conditions to prevent absconding. In this regard, deprivation of liberty must be a measure of last resort in all circumstances and not allowed if other, less coercive measures would be sufficient to achieve the legitimate aim pursued.¹³⁵ Similarly, the UN Working Group on Arbitrary Detention has recommended that “alternative and non-custodial measures, such as reporting requirements, should always be considered before resorting to detention.”¹³⁶ A UN General Assembly resolution adopted on 20 December 2012, also called on States to put an end to arbitrary arrest and detention, to review detention periods in order to avoid excessive detention of irregular migrants, and to adopt alternative measures to detention.¹³⁷

In European law, deprivation of liberty in the context of immigration can only be used as a measure of last resort and after an individual assessment, pursuant to Article 5 of the European Convention on Human Rights and Article 6 of the Charter of Fundamental Rights of the EU. Under Article 8 of the Reception Conditions Directive (2013/33/EU), Article 28 of the Dublin Regulation (604/2013), as well as Article 15 and recital 16 of the Return Directive (2008/115/EC), detention must not be used when less coercive measures are sufficient to achieve the legitimate objective pursued. Article 5 of the Regulation establishing the Asylum, Migration and Integration Fund (516/2014) provides that the Fund shall support the establishment, development and improvement of alternative measures to detention. In finding violations of Article 5 of the ECHR, the European Court of Human Rights has highlighted that the authorities should have examined whether less coercive measures could have been imposed in order to meet the aims pursued by the Government.¹³⁸ The Court of Justice of the EU has also ruled that in applying the Returns Directive, the EU Member States must use the least coercive measures possible.¹³⁹

While there is no single legal definition of ‘alternative to detention’, alternatives to detention should be non-custodial and “should be established in law and subject to human rights oversight, including periodic review in individual cases, as well as independent monitoring and evaluation.”¹⁴⁰ There is a wide range of possible alternatives to detention, including registration requirements, deposit of documents, bond/bail or surety/guarantor, reporting

¹³⁵ Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of the person)*, CCPR/C/GC/35. See also Case C-900/1999, *Mr. C v. Australia*, para. 8.2.

¹³⁶ E/CN.4/1999/63/Add.3, para.33.

¹³⁷ A/RES/67/172.

¹³⁸ *Louled Massoud v. Malta*, No. 24340/08, 27 July 2010 and *Yoh-Ekale Mwanje v. Belgium*, No. 10486/10, 20 December 2011

¹³⁹ *Hassen El Dridi, alias Soufi Karim* (C-61/11 PPU, 28 April 2011); *Bashir Mohamed Ali Mahdi* (C-146/14 PPU, 5 June 2014).

¹⁴⁰ Summary Conclusions of the Global Roundtable on Alternatives to Detention of Asylum-Seekers, Refugees, Migrants and Stateless Persons, Geneva, Switzerland, 11-12 May 2011, available at:

<http://www.ohchr.org/EN/Issues/Migration/Pages/Roundtable.aspx>; see also International Detention Coalition, ‘There are Alternatives’, A handbook for preventing unnecessary immigration detention, available at <http://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>.

requirements, case management/supervised release, designated residence, electronic monitoring, home curfew/house arrest and voluntary return. States are free to set up different schemes, provided that the legal requirements mentioned above are respected.¹⁴¹

Currently, all EU countries use detention as a means of managing migration -- principally in the context of returns. There is only limited use of alternatives to detention.¹⁴² This has given rise to a number of concerns by UN experts about both the legitimacy and efficacy of the practice.¹⁴³ As the UN Special Rapporteur on the human rights of migrants observed in 2013, despite the fact that the Return Directive stipulates that detention should be a measure of last resort, in practice, alternatives to detention have not been sufficiently explored by the EU institutionally or by its member States individually, leading to “an almost complete absence of readily implementable, wide-scale alternatives to detention” in the EU.¹⁴⁴

Currently, the majority of EU Member States have legislation providing for alternatives to detention such as reporting duties, residence restrictions, financial guarantees and requisition of documents.¹⁴⁵ Recent research has concluded that some of the most effective alternatives use screening, assessment and case management to provide tailored support to individuals while their migration status is being resolved.¹⁴⁶ There is evidence that alternatives based on case management achieve higher levels of compliance and successful case resolution.¹⁴⁷ The recently established “European Alternatives to Detention (ATD) Network” brings together NGOs in the UK, Cyprus, Bulgaria, Poland and Belgium – each running or exploring pilot alternatives to detention. The aim is to help and encourage NGOs, governments and the EU to start developing alternatives that can build systems which do not assume a need to detain.

The MFF post-2020 should embed the priority of developing and implementing human rights-based alternatives to detention that are in line with international human rights law and standards.

¹⁴¹ <http://odysseus-network.eu/wp-content/uploads/2015/02/FINAL-REPORT-Alternatives-to-detention-in-the-EU.pdf>, p. 63.

¹⁴² See, e.g. European Migration Network, *The Return of Rejected Asylum Seekers: Challenges and Good Practices*, 4 November 2016.

¹⁴³ Bulgaria: CERD/C/BGR/CO/20-22 (2017); Denmark: CCPR/C/DNK/CO/6 (2016); France: CRC/C/FRA/CO/5 (2016); Greece: CERD/C/GRC/CO/20-22 (2016); Poland: CCPR/C/POL/CO/7 (2016); Sweden: CCPR/C/SWE/CO/7 (CCPR, 2016); Netherlands: CERD/C/NL/CO/19-21 (2015).

¹⁴⁴ A/HRC/23/46, para. 48.

¹⁴⁵ Over 90% of EU countries make provision for reporting duties, over 70% have provisions for residence restrictions, close to 50% may resort to financial guarantees and 37% have adopted the requisition of documents as an option”. See Marie Walter-Frank, *Asylum Detention in Europe: State of Play and Ways Forward*, Policy Paper 195 18 May 2017, Jacques Delors Institut Berlin. Available at <http://www.delorsinstitut.de/2015/wp-content/uploads/2017/05/AsylumDetentioninEurope-Walter-JDIB-May2017.pdf>

¹⁴⁶ International Detention Coalition, “There are Alternatives: A handbook for preventing unnecessary immigration detention”, available at <http://www.ohchr.org/Documents/Issues/Migration/Events/IDC.pdf>.

¹⁴⁷ *Ibid.*

Conclusion

The MFF post 2020 is a unique opportunity to make progress on human rights implementation, to recognize and mitigate human rights risks, as well as to embed principles of human rights due diligence. Safeguards against such risks should be incorporated both in the overall structure and content of the MFF. In addition, the MFF or related rules should specify roles for entities at regional, national and local level to perform relevant control functions.

The MFF post 2020 should embed human rights explicitly into both the overall framework and in implementing rules for the use of EU funds. EU funding should be linked to the implementation of human rights obligations and recommendations from international, regional and national human rights mechanisms. The MFF should advance, on a human rights basis, the implementation of the 2030 Agenda for Sustainable Development in the European Union.

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