Conference on Tackling Emerging Transnational Threats in the Mediterranean Region through Information Sharing and Co-operation
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Introduction

→ Vulnerability of undocumented migrants and violations of undocumented migrants' fundamental rights as a transnational threat.

→ One of the emerging transnational threat phenomenona in the Mediterranean region is the violation of undocumented migrants' fundamental rights as part of a migration process that, due to the lack of accessible regular migration channels, pushes migrants into irregularity and enhances their vulnerability in the process of migration.

- An example: smuggling -- The EU has had a common immigration policy for 15 years. Fighting irregular migration has been one of the key policy areas, and within that policy area, tackling the smuggling of migrants has been a main focus.
- What is the **main determinant** of human smuggling?
    - o Insufficient regular migration channels for migrants to seek protection, employment, family reunification, etc. Without these alternatives, some migrants and refugees must turn to smugglers.
- What is the **scope** of the smuggling phenomenon in the EU?
    - o DG Home of the European Commission states that in 2014, more than 276,000 migrants entered the EU irregularly, increase of 159% from 2013.
    - o Last year also saw an unprecedented number of deaths at sea: 3,500 people died in the Mediterranean Sea alone in 2014 trying to reach the EU.
    - o Yet we must also bear in mind the general context of irregularity in the EU
- DG Research "Clandestino" project found in 2009
    - o Most common way to become undocumented was to enter EU regularly; very small percentage of UDM arrive irregularly at sea and land borders.
    - o In 2009, estimated 2-4 million UDM in EU
    - o Project found that some irregularity in migration is inevitable, but more often the fault of inflexible laws and policies then the responsibility of migrants.
- Over the past 15 years in the EU's common migration policy, we can notice a gradual shift from the initial goal of "equality for all residents" to a *security approach* to migration is needed to protect the fundamental rights of EU citizens.
- Yet evidence from the ground clearly indicates that increasing securitisation and

discrimination against migrants has not reinforced or strengthened the freedom, security or well-being of EU citizens, nor curbed irregular migration.

- While the Smuggling Protocol aims to criminalize smugglers, not migrants, there is a growing trend of criminalization of migration in the EU, with wide implications:
  - Criminalising irregular <u>entry</u> means that more risks taken by migrants and smugglers;
    Criminalising irregular <u>stay:</u> means that migrants face arrest, detention and deportation because of immigration control mechanisms
  - Those providing humanitarian assistance to migrants at entry (e.g. rescue at sea) or in their stay (e.g. landlords; providing food, shelter, medical care, legal advice) can also be punished for facilitating irregular migration
- How can we shift the focus from criminalization to ensure a more human rights approach to migration management?

Three areas of improvement and concrete examples of ways forward:

> **1. Ensure a fundamental rights-based approach to border management, including transnational cooperation.**

- The issue that comes up repeatedly, and that is now repeatedly voiced by civil society actors both in Europe as well as on the global level – is how to ensure that the <u>rule of law</u> is upheld in border areas, and in border policies?

Fundamental RIGHTS at international borders are to be operationalized through (concrete examples of way forward):

ON BORDER MANAGEMENT:

A fundamental rights-based approach to border management, including cooperation with third countries The European Union and its Member States have committed themselves to upholding fundamental rights, and in particular the principle of non-refoulement, in the management of the EU's external borders. At the same time, over 3,400 people have died so far this year while trying to cross the Mediterranean.

• **An effective search and rescue mechanism** based on solidarity, which can respond to the current challenges in the Mediterranean, should be established to reduce the risk to people's lives at sea. A system to monitor the recording and identification of deaths at sea should be set up.

> Promising practice: example of Migrants Files https://www.detective.io/detective/the-migrants-files/

• **Legal clarity and transparency concerning the principle of accountability and responsibility** should be promoted;

- <u>**Lack of transparency**</u> regarding operations and activities and their human rights implications should be addressed

- <u>**Lack of democratic scrutiny**</u> - When Frontex was established, its role was seen primarily in terms of border control and migration management. Once it began to operate, it became clear that there were human rights implications attached to its work and that it was ill-equipped to tackle them. This led to the creation of the Fundamental Rights Officer, as well as the Consultative Forum, which includes inter-governmental agencies as well as a number of civil society organizations (PICUM sits on the forum).

- Yet there remain a number of structural shortcomings in the way in which border management operates, with human rights implications:

  - *Transparency and public communication regarding the nature of the operations carried out in the field and their impact on human rights should be improved. Democratic scrutiny in relation to border management activities should be ensured, especially in the context of either technical or political cooperation with third countries.*

- **Independent monitoring at borders** should be established, this would enhance accountability and reduce the risk of fundamental rights violations. Transnational cooperation in the field of border management must respect fundamental rights, and practical guidance in this regard could be considered;

- **Practical guidance for border guards** to operationalise fundamental rights as part of border management should be developed, building on work carried out by OHCHR.

> Promising practice:
> - <u>OHCHR Principles and Recommendations on the Human Rights of Migrants at Borders</u>
>   - How to make the guidelines a living document? DG Home has analyzed them and they should be incorporated into the working of the Commission, Frontex.
>
> Civil society could also educate and train state actors concerned with protecting migrants at borders and judicial bodies.

- **Practical guidance for border guards to operationalise the best interests of the child** could be developed, building on work currently being carried out by Frontex.

> Promising practice: VEGA Children Operation

ON SMUGGLING
- Ensure A fundamental rights-based approach to combating smuggling

In line with the UN Smuggling of Migrants Protocol, legislation to fight smuggling at EU and Member State levels should always include financial and material benefit as a requirement for punishment, or explicitly **exclude punishment for humanitarian assistance for entry and stay**

> Promising practice: existing legislation already explicitly excluding criminalisation of humanitarian assistance for entry and stay – Research carried out by FRA

(CASES FROM FRA REPORT ON CRIMINALISATION SHOW THAT MORE NEEDS TO BE DONE IN THIS REGARD). Legislation punishing smuggling should remind all those concerned of the **duty to rescue and provide assistance**, as laid down in the law of the sea.

2. Ensure access to justice and protection for all migrants

National governments must remove all legal, administrative and practical obstacles for undocumented migrants to report abuse and seek protection and redress for violations of rights. Steps must be taken to ensure that justice is made safe, effective and accessible; protecting migrants when they report abuse, and facilitating prosecution of perpetrators regardless of the status of their victim. Suggested practical measures include:

● INTRODUCE CONCEPT OF FIREWALL

Police and labour authorities roles should be prioritized in upholding rights and justice over immigration enforcement: A protocol to the police could be issued and duly publicised, clarifying that law enforcement authorities should not inform immigration authorities when undocumented victims seek access to justice or victim protection.

> **EU Victims of Crime Directive – transposition deadline: 16 November 2015**
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> o   Article 1 of the directive states that the rights set out in the directive shall apply to victims in a non-discriminatory manner, including with respect to their residence status.
>
> o   This specificity allows for a basis for discussion on law and practice concerning access to justice for undocumented migrants, including when they encounter violence or abuse at EU borders. The directive is valid for all crimes committed on EU territory, thus including at EU borders.
>
> o   It may also lead to an emerging set of promising practices by member states on how they can ensure that by enabling migrants to access justice, regardless of status, they fulfil their human rights as well as meet other policy goals concerning law and order; social inclusion, etc.

FIREWALL: HOW DOES IT WORK IN PRACTICE?
● **The suspensive effect on removal orders** should be ensured and expulsion procedures against undocumented victims should be suspended until the resolution of criminal procedures and until any application for residence has been finally determined.

> CURRENT LEGISLATION ALLOWS THIS IN SOME COUNTRIES IN THE EU, BUT LIMITS IT TO CASES OF GENDER BASED VIOLENCE OR OTHER CRIMES – but the same rationale should be applied to ALL victims of crime in line with the EU Victims' Directive.

● **Build a firewall between service provision and immigration enforcement** A firewall between public service provision and justice and immigration enforcement should be erected, in law and in practice, in line with the guidelines provided by the Fundamental Rights Agency of the European Union in relation to detection and

apprehension of irregular migrants.[1] The sharing of personal data between service providers and immigration authorities should be prohibited, including in the context of access to justice and redress.

> o *EU Fundamental Rights Agency Guidelines on detection and reporting practices and upholding the fundamental rights of irregular migrants*

> o *Practices by local and regional authorities (e.g. cities, states, regions) in North America and increasingly in Europe on the firewall principle*

3. Promote regular channels for migration

National governments should develop, and make accessible, avenues for migrants to work in low-wage sectors, with an independent residence status and right to change employer. The UN Special rapporteur on the human rights of migrants, François Crépeau, in his report on management of the external borders of the European Union and its impact on the human rights of migrants presented to the UN Human Rights Council on 27 May 2013, stated: *"Within EU institutional and policy structures, migration and border control have been increasingly integrated into security frameworks that emphasize policing, defence and criminality over a rights-based approach. [...] Opening up more regular migration channels, including for low-skilled workers, thus reflecting the real labour needs of the EU, would lead to fewer irregular border crossings and less smuggling of migrants".[2]*

How to? Practical suggestions:

• Member States should generously and broadly apply rules on family reunification for people in need of protection, for example by extending the definition of 'family'.

• Increase possibilities of labour migration in low-wage sectors to meet economy and markets needs and avoid irregularity and forms of labour exploitation.

Promote evidence-based policies on migration

→ Improving research and data collection can have a double impact on the life of undocumented migrants: first, by bringing attention to the realities experienced by those with irregular migration status. Developing a solid evidence base and re-humanising these lived experiences helps identifying problematic policies and generate the support, alliances, and momentum to change them. In addition, data collection can help organisations improve their service provision to undocumented migrants and identify emerging or under-addressed trends to address in their future work.[3]

→ Although reliable statistical data is crucial for policy makers in developing migration policies, in most countries, quantitative and qualitative statistics on irregular migration are generally incomplete, out of

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[1] European Union Agency for Fundamental Rights (FRA), *"Apprehension of migrants in an irregular situation – fundamental rights considerations"*, available at: http://fra.europa.eu/sites/default/files/fra-2013-apprehension-migrants-irregular-situation_en.pdf.
[2] UN, Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *"Regional study: management of the external borders of the European Union and its impact on the human rights of migrants"*, p. 20, para. 84, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.46_en.pdf..
[3] PICUM, *"Strategies to End Double-Violence Against Undocumented Women. Protecting Rights and Ensuring Justice"*, PICUM 2012, available at: http://picum.org/picum/uploads/publication/Double%20Violence%20Against%20Undocumented%20Women%20-%20Protecting%20Rights%20and%20Ensuring%20Justice.pdf.

date or unreliable[4]. Easy access to well-documented and structured information is a necessary first step for creating more transparency concerning the size of irregular migration. In the absence of consistent statistics, policy decisions and public opinions may be based on erroneous information possibly provided by biased sources. Furthermore, when research is conducted in a participatory manner, and is based within migrant communities, it can have a direct impact on the target group participating.

> **Collecting Reliable Data on Migration: The Clandestino Project: "Undocumented migration: Counting the Uncountable – Data and Trends across Europe"**

A final, overarching recommendation to avoid criminalisation of migration: promoting the use of correct terminology.

> **Promoting the Use of Correct Terminology: PICUM's Terminology Leaflet[5]**

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[4] PICUM, Submission to the UN Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Day of General Discussion on the Role of Migration Statistics for Treaty Reporting and Migration Policies, 22 April 2013, Geneva, available at: http://www2.ohchr.org/english/bodies/cmw/docs/DGD/2013/DGDMigrationData_PICUM_2013.pdf.
[5] PICUM's Terminology Leaflet is available in English, Greek, Dutch and Italian at: http://picum.org/en/our-work/terminology/.