**HUMAN RIGHTS AT INTERNATIONAL BORDERS:**

**A focus on OHCHR’s Recommended Principles and Guidelines**

**Side event on the margins of the 28th session of the Human Rights Council**

**23 March, 13:00-15:00, Palais des Nations, Room XXI**

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**Starting point:**

* 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 rule of law is upheld in border areas, and in border policies?

Human rights at international borders cannot be upheld and operationalised in the absence of:

1. **Clear rules on accountability and responsibility** (See Guideline 4: Ensuring human rights in rescue and interception – particular focus in guideline 4.16: Monitoring and accountability);
2. **Transparency and public scrutiny regarding border control and border management** (See Guideline 1: Promotion and protection of human rights – particular focus in guideline 1.2: Promotion of human rights, the role of the media);
3. **Improved policy coherence in relation with other policy areas** (See Guideline 2: Legal and policy framework);

Focus on the three areas:

1. **Clear rules on accountability and responsibility for human rights violations at EU borders**

* Some recent examples of human rights violations at the borders highlight the challenges in upholding the rule of law :
  + Farmakonisi, Greece:
    - In January 2014, in a “push back” operation, the Greek coast guard towed a small boat with migrants back towards Turkey, and the rope was cut which caused the boat to sink and led to the death of 11 Afghans, including 8 children.
    - The survivors are now filing a complaint before the European Court of Human Rights claiming violation by the Greek authorities of the right to life, freedom from torture, and the right to an effective remedy.
  + Ceuta and Melilla, Spain:
    - A group of nearly 200 migrants tried to swim towards the coast of Ceuta on 6 February 2014.
    - Members of the Spanish Civil Guard shot at them with rubber bullets and to stop them from arriving, resulting in the death of 15 people.
    - 16 police officers who were involved in the case have been accused of reckless homicide and will have to testify in court 3-11 March 2015.
    - In separate developments – in December 2014, the Spanish Congress of Deputies adopted [amendments to the immigration law](https://www.fidh.org/International-Federation-for-Human-Rights/europe/spain/16969-spain-basic-law-for-the-protection-of-public-security-is-a-threat-to-the), currently awaiting final approval in the Senate. This law would allow the automatic and collective expulsion of people at the Spanish borders in Ceuta and Melilla without any procedural safeguards.
    - The Commissioner for Human Rights, Mr. Muiznieks, visited Melilla in January 2015 and reminded Spain that no other European country has legalized unlawful practices and that in doing so, it could set an “extremely bad precedent” for the EU.
  + CPT monitoring of a Frontex JRO:
    - The Council of Europe’s Committee for the Prevention of Torture (CPT) has conducted its first monitoring mission of a Frontex Joint Return Operation by air on a charter flight from Rotterdam, Netherlands, to Lagos, Nigeria. The countries participating in the joint operation were: Bulgaria, Germany, the Netherlands, Slovenia and Spain. The monitoring mission took place from 16 to 18 October 2013. In its final report on the monitoring mission, issued on 5 February 2015, the CPT stresses that the removal of migrants by air is becoming a widespread practice across Europe and highlights that these operations “entail a manifest risk of inhuman and degrading treatment (during preparation for the removal, the actual flight or when the removal is aborted)”. The CPT noted at some stages of the removal procedure an excessive use of physical constraints and highlights that one of the returnees was body-cuffed from 6.10am to 3.45pm, despite being under constant and close surveillance by escorts. Among its recommendations, the CPT stressed that an individual risk assessment should be carried out to justify the use of physical constraints and recommended that healthcare professionals on return flights should be equipped with emergency tools. The CPT also stressed that the returnees should always be prepared and informed about the removal procedure well in advance.
* In all of incidents, the question remains:
  + Who is accountable? Spanish border guards? Greek border guards? The Spanish legislator?
  + Who should be accountable? Frontex? The EU? What role for the European Commission and European Parliament?

1. **Transparency and public scrutiny regarding border control and border management**

* **Lack of transparency** regarding operations and activities and their human rights implications.
  + Lampedusa, Italy
    - After 300 migrants drowned off the coast of Lampedusa in October 2013, Italy rescued 160,000 migrants in 12 months with the Mare Nostrum policy, with its own funding.
    - When it stopped this policy last fall, the EU responded with the underfunded Triton operation, which is not a replacement for Mare Nostrum:
      * Search and rescue is not in Triton’s mandate
      * The primary role of Frontex is border management and control.
      * Thus, with the launch of Triton, it was clear that border control was being prioritized over search and rescue.
      * Claiming that the decision of the European Commission to prolong the Joint Operation Triton until the end of 2015 does not constitute a sufficient response to the situation in the Mediterranean, the Italian Minister for Foreign Affairs, Paolo Gentiloni, in an interview with the Italian newspaper “Il Messaggero” stated that he will present -at the next meeting of EU Ministers of Foreign Affairs on 16 March- a formal request for Triton to be further strengthened – yet the main distinction between Mare Nostrum (as SAR operation) and Triton (as border control operation) remains.
* **Lack of democratic scrutiny** - 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 the agency operates and is managed, with human rights implications:
* **Lack of clarity over Frontex’s responsibility** in co-ordinating and implementing joint land, air, sea operations and return operations with member States concerning liabilities for human rights violations or other breaches of international law resulting from the agency’s actions.
  + *Frontex must recognise its responsibility as owner or co-owner of the operations it co-ordinates and implements.*
  + i.e. Farmakonisi happened in the operational area of the Frontex Joint Operation Poseidon
* When Frontex negotiates agreements with third countries concerning border controls, interceptions and returns.
  + As the agreements signed by Frontex with representatives from third-country authorities are technically “working arrangements”, these are not subject to the scrutiny and approval of the European Parliament.
    - As of April 2013, Frontex had concluded working arrangements with the authorities of **17 countries**: the Russian Federation, Ukraine, Moldova, Georgia, the former Yugoslav Republic of Macedonia, Serbia, Albania, Bosnia and Herzegovina, the United States, Montenegro, Belarus, Canada, Cape Verde, Nigeria, Armenia, Turkey and Azerbaijan as well as with the CIS Border Troop Commanders Council and the MARRI Regional Centre in the Western Balkans.
  + *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 the agency’s activities should be ensured, especially in the context of either technical or political cooperation with third countries.*

1. **Improved policy coherence in relation with other policy areas to ensure human rights in border control policies**

* To be more effective in addressing the human rights of migrants at EU borders, and in EU border policies, it is necessary to develop and implement relevant tools in the area of migration policies, as well as have more coordination and more linkages in other relevant policies.

**Migration policies**

* Regular channels of entry to the EU:
  + EU2020 employment target includes the setting up of an EU labour migration policy which responds flexibly to the priorities and needs of labour markets on one hand and address undeclared work and labour exploitation on the other, in particular through providing more work permits in low-income sectors.

**Child rights policies**

* Ending detention of children
  + *Child rights* are enshrined within:
    - Treaty on the European Union.
    - Charter on Fundamental Rights: children shall have the right to such protection and care as is necessary for their well-being and that the best interests of the child must be a primary consideration in all actions relating to children.
  + The Committee on the Rights of the Child has clarified that:
    - Detention of children for immigration purposes always is a child rights violation and *can never be justified as in their best interests*.
  + *Migration law:* European Union law governing detention of migrants (the ‘Returns Directive’):
    - Does not currently meet child rights standards as it does not prohibit the detention of children and families.
    - However, the Returns’ Directive states that it must only be used a last resort and for the shortest appropriate period of time.
    - Nonetheless, 17 European countries detain unaccompanied children and 19 European countries detain families with children - thus the practice is widespread.
  + Some governments – e.g. Austria, Ireland and Sweden – are implementing alternatives to detention that limit the family’s mobility as little as is necessary, when any restriction is legally found to be necessary at all.
  + Practical, effective, inexpensive measures that respect children’s rights can be further developed and implemented in order to end the immigration detention of children in the EU.

**Access to justice policies**

* EU Victims of Crime Directive – transposition deadline: 16 November 2015
  + 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*.
  + 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.
  + 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.

**The way forward:**

* OHCHR Principles and Recommendations on the Human Rights of Migrants at Borders
  + 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.