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## Introduction

- 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?
  - 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?
  - DG Home of the European Commission states that in 2014, more than 276,000 migrants entered the EU irregularly, increase of 159% from 2013.
  - 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.
  - Yet we must also bear in mind the general context of irregularity in the EU
- DG Research “Clandestino” project found in 2009
  - Most common way to become undocumented was to enter EU regularly; very small percentage of UDM arrive irregularly at sea and land borders.
  - In 2009, estimated 2-4 million UDM in EU
  - 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 entry means that more risks taken by migrants and smugglers;  
Criminalising irregular stay: 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? Two concrete examples of ways forward:

## 1. Firewall

- On several occasions yesterday, different speakers referred to irregular migration status is a barrier to accessing services and justice.
  - If a migrant is undocumented, what guarantees do they have that they won't be deported if they report exploitation or abuse to the authorities?
- Firewall: A clear separation in law and practice between migration law enforcement authorities and the powers and remit of those working in social services (e.g. health providers; shelters for victims of domestic violence) as well as in the justice system (e.g. labor inspectors, police).
- How does it work in practice? As an example:
  - Requirements for labor inspectors to report undocumented migrants to immigration authorities are eliminated.
  - Labor inspectors are prohibited from sharing personal information for immigration enforcement purposes.
- Labor inspection:
  - PICUM has done recent analysis of the new EU law on employers' sanctions, studying the implementation of the directive in 4 countries.
  - Article 6 establishes several safeguards to protect the labor rights of UDM, including a requirement for the employer to pay any outstanding wages to the worker, the possibility to issue residence permits of limited duration in cases of particularly exploitative employment conditions.
  - Main conclusion: no evidence that labor rights foreseen in the directive are being upheld for exploited undocumented workers.
    - In the directive, labor inspectors are tasked with being the responsible body to receive complaints of exploitation or abuse by undocumented workers.
    - Yet in the 4 countries studied, the police accompany labor inspectors, and nearly all contacts with undocumented workers resulted in apprehension on grounds of their migration status and deportation before the undocumented worker has a chance to defend their labor rights.
    - A firewall principle outlined both in policy and practice would ensure that undocumented workers could safely report exploitation to labor inspectors.

- Access to justice for undocumented victims of crime (e.g. gender-based violence, violence at the borders):
  - Firewall would also ensure that undocumented victims of crime could also safely access justice as well as integrated services (e.g. health care, women's shelters)
  - **Issue and publicize a protocol to the police** making clear that they should not inform immigration authorities when undocumented victims seek help, so they can enjoy their right to immediate protection without fear of deportation.
  - **Suspend expulsion for undocumented victims** until the resolution of criminal procedures and until any application for residence has been finally determined.
  - **Ensure burden of proof for undocumented victims of crime is realistic;** as police reports, medical reports, attestations of a shelter or psychiatrists are unattainable for many undocumented victims, statements from NGOs and migrant rights organisations should be accepted as credible evidence.
- 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.
- Good practices:
  - *EU Fundamental Rights Agency Guidelines on detection and reporting practices and upholding the fundamental rights of irregular migrants*
  - *OHCHR Guidelines on human rights of migrants at borders*
  - *Practices by local and regional authorities (e.g. cities, states, regions) in North America and increasingly in Europe on the firewall principle*

## 2. Ending detention of children

- The Committee on the Rights of the Child – with near universal ratification - 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*.

- An increasing body of research has found that:
  - Holding children and their families in detention does not deter either migrants or people smugglers.
  - Detention of children (as well as separation from parents if children are put in foster care while parents are detained) – even for limited periods of time – leads to serious negative impacts on their mental and emotional health and development.
- Most migration laws currently do not meet child rights standards as they do not prohibit the detention of children and families.
  - EU law governing detention of migrants (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.
- Within the past 9-month period, two regional human rights bodies – the Inter-American Court of Human Rights, and the Council of Europe Parliamentary Assembly – have both recommended to member states that they introduce and enforce laws barring detention of children for immigration purposes.
- A growing number of states are adopting alternative to detention – e.g. Austria, Ireland and Sweden – 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 can be further developed and implemented in order to end the immigration detention of children in the EU.
- As Bandana from GAATW mentioned yesterday, as we are commemorating 15 years of the Protocol on Trafficking and Smuggling, how can we build on this anniversary and do better in the next 15 years?
- What kind of objective could we give ourselves for ending the detention of children? The Ending Detention of Children campaign offers states the possibility of signing a pledge to commit to ending detention of children. UNODC could also join with other UN agencies that are already involved in this process.

## Conclusion

- Alongside efforts at political solutions and development that address root causes of migration, it is crucial to develop wider resettlement and humanitarian channels for migrants seeking protection.
- Policy makers must also go beyond an almost exclusive focus on highly skilled labor migrants, to develop other avenues for low-skilled labor migrants. Only recently has

the EU adopted new legislation on low-wage workers in seasonal employment but this does not apply to sectors such as domestic work and construction where migrant workers fill essential roles in an irregular way.

- Discourse/terminology – use of the term “illegal migrant” or “illegal migration”
  - Choice of correct terminology is crucial, as often language contributes to shape the reality which national authorities present to their population and the world.
  - In a context where the use of language associates the concepts of migration and criminality, irregular migration becomes, beyond language, intrinsically linked with security concerns and crime.
  - PICUM campaign to use accurate terminology – also directed at languages other than English