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Directorate-General Internal Policies

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Citizens Rights and Constitutional Affairs

TRENDS IN THE DIFFERENT LEGISLATIONS OF THE MEMBER STATES CONCERNING ASYLUM IN THE EU: THE HUMAN COSTS OF BORDER CONTROL

BRIEFING PAPER

Summary:

Efforts to curb the number of migrants trying to reach Europe have not led to a decrease in the number of irregular migrants. Instead, such efforts have displaced migration from one place to another and have been accompanied by an increasing number of fatalities at the external borders of the European Union.

This paper argues that these human costs should play a role in the current debate about the tightening of the European Union's external borders. For this, information about fatalities at the external borders must be systematically collected.

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"TRENDS IN THE DIFFERENT LEGISLATION OF THE MEMBER STATES CONCERNING ASYLUM IN THE EU"

This paper addresses the human costs of controlling the external borders of the European Union. It focuses on sea borders, rather than land borders, because of the particular urgency of the problem at sea. First, it shows that intensifying the EU's external borders has not decreased the number of irregular migrants but, rather, has led irregular migrants to use alternative, and increasingly dangerous, routes. Second, this paper gives a very broad overview of the response to this of EU Member States and the EU itself. This overview shows that both Member States and the EU itself have increasingly adopted a technical, quasi-military approach to border control. The third part of this paper presents data on the human costs of external border control. There are strong reasons to believe that increased controls have led to the loss of more lives, and given this, it is foreseeable that further tightening of the external borders, as envisaged by the Member States and the EU, will intensify this trend. The final section of this paper examines the fundamental policy question whether the human costs are relevant to the current debate about the control of the EU's external borders.

1. IRREGULAR MARITIME MIGRATION: RECENT DEVELOPMENTS

The main arrival areas for maritime migration are the Canary Islands, the Straights of Gibraltar, Sicily, Malta, Cyprus and the Aegean Sea¹. Irregular migrants who choose to reach Europe by sea cannot afford to pay for the forged documents that are necessary for air travel and, in many cases, for travel by land².

Although it is difficult to find data on the number of people who arrive at the shores of Member States, the following data is presented, with the assistance of the European Commission and NGO's and on the basis of publications.

For Italy, the following data is available:

Table 1: Interceptions, Italy, 1998-2002

	1998	1999	2000	2001	2002	2003	2004
Apulia	39.065	46.481*	18.990	8.546	3.372		
Sicily	8.828	1.973	2.782	5.504	18.225	14.017	13.594
Calabria	848	1.545	5.045	6.093	2.122		
total	48.741	49.999	26.817	20.143	23.719		

*of whom 22,418 came from Kosovo and 7,448 came from Romania.

Source: Interior Ministry. Immigration Service and Border Police of the Police Department, from Monzini, n.d., p. 7. For 2003-2004, Paolo Cuttitta: *Delocalization of Migration Controls to North Africa*, 2005, conference paper on file with the author.

What this data shows is that irregular migration reflects, first of all, the causes of migration. The enormous influxes into Apulia in 1998 and 1999 consisted mainly of migrants from the Former Yugoslavia. The shift in numbers from Apulia to Sicily partly relates to other source areas of irregular migrants, namely the Horn of Africa, Liberia and North Africa, as well as to increased patrols at sea between Albania and Apulia.

The Maltese National Statistics Office gives the following data for irregular migrants arriving by boat:

¹ For further i, *Migron* this, see It ICMPD Newsletter, June 2005

² Paola Monzini *Smuggling via Maritime Routes*, Centro Studi di Politica Internazionale, n.d

Table 2: Interceptions, Malta, 2002-2006

2002	1.686
2003	502
2004	1.388
2005	1.822
2006 (until 14 June)	378

Source: Malta National Statistics Office, News Release, 19 June 2006

The following data is available for intercepted illegal migrants in Spain³:

Table 3: Interceptions, Spam, 1993-2005

	<i>Straits of Gibraltar</i>	<i>Canary Islands</i>
1993	4.952	
1994	4.189	
1995	5.287	
1996	7.741	
1997	7.348	
1998	7.031	
1999	7.178	875
2000	16.885	2.387
2001	?	4.112
2002	11.807	9.875
2003	9.794	9.382
2004	7.425	8.426
2005	7.066	4.715

Source: Lahlou, 2005, pp. 6 (1993-2000), 7-8 (2002-2004). Amnesty International, 2005, p. 50, for the Canary Islands 2001-2002. For 2005, Spanish Ministry of Labour and Welfare: *Balance de la Secretaria de Estado de Inmigracion y Emigration de las Embarcaciones Interceptadas en 2005*, Madrid, 2006.

According to the Spanish authorities, the number of attempted crossings into the enclaves of Ceuta and Melilla has decreased significantly, from 55.000 in 2004 to 12.000 in 2005⁴.

In May 2006, the international press reported large influxes of illegal migrants arriving in the Canary Islands. The International Herald Tribune (IHT), quoting Spanish government figures, noted that 8.500 migrants were detained while trying to reach the Canary Islands in 2004 and that this number was 4.700 in 2005 (IHT 16-5-2006, p. 3). In the week of 15 May 2006 alone, however, more than 1.500 migrants were reported to have reached the Canary Islands (IHT 25-5-2006, p. 8). At the end of May 2006, the total number of illegal migrants who had reached the Canary Islands was 8.000 (IHT 31-5-2006, p. 2). In late-July 2006, the Dutch newspaper NRC-Handelsblad reported that, according to Spanish officials, 11.000 illegal migrants had already crossed the Atlantic to the Canary Islands that year, twice as many as in all of 2005 (NRC-Handelsblad 24-7-2006, p. 5).

Developments in the Mahreb and African countries

According to Moroccan government sources, some 26.000 illegal migrants attempted to enter Europe but were prevented from doing so by Moroccan authorities in 2004, almost 5.000

³ Mehdi Lahlou, *Les Migrations Irregulieres Entre le Maghreb et L 'Union Europeenne: Evolutions Recentes*, European University Institute, Robert Schuman Centre for Advanced Studies, San Domenico di Fiesole, 2005

⁴ Migration (publication of IOM), December 2005, p. 17

migrants of which were headed towards the Canary Islands. According to the same source, this number was considerably less than in 2003⁵.

In October 2005, after the Melilla enclave had been stormed by thousands of black Africans, Morocco rounded up the migrants at issue and dumped them in the desert, without food or water, several hundred kilometres south of Melilla (Financial Times 1-2-2006, p. 8; Human Rights Watch, 13 October 2005). There have been other reported human rights violations by the Moroccan authorities as a result of European migration policy⁶. The Moroccan crackdown led migrants to move their departure points further and further south, first to Mauritania and now to Senegal. Spanish officials attribute the increased use of this long sea route to improved monitoring of other routes used by illegal migrants in the past, such as those across the Straights of Gibraltar or, more recently, across the land borders of the Spanish enclaves of Ceuta and Melilla on the northern coast of Morocco (IHT 16-5-2006, p. 3).

Against a backdrop of increased border controls elsewhere, such as at the Straights of Gibraltar and at European airports, two points should be noted. First, illegal migrants who travel long distances in small boats are not only people from the Mahreb countries or from sub-Saharan Africa but are increasingly migrants from Asia, particularly Pakistan, Bangladesh and India⁷.

Second, increasingly strict Moroccan border controls have forced migrants to use points of departure much further removed from the European mainland, such as Libya, Tunisia, Guinea Bissau and Ivory Coast⁸, as well as, more recently, Mauritania and Senegal.

European countries, particularly Spain, are now trying to convince the authorities at points of departure to prevent migration, as well as to take back irregular migrants who have succeeded in reaching Europe. The Senegalese government is reported to intercept migrants who want to sail to the Canary Islands. In May 2006, Senegalese authorities announced their intention to arrest over 15.000 irregular migrants who were preparing to reach the Canary Islands by small wooden boats (Liberation 13-6-2006). At the end of that month, 642 Senegalese citizens were waiting in Mauritania to be returned home, while another 105 were being held by the police; 116 were given two-year prison sentences. In May 2006, the Senegalese government was reported to have stepped up sea surveillance to stem the outflow of illegal migrants. Several hundred of them were intercepted and returned. According to this report, this has failed to deter other migrants from leaving for Europe. It should also be noted that the local economy in northern Senegal partly relies on revenue generated by illegal migration (IHT 31-5-2006, p. 2).

An agreement reached between Senegal and Spain on 30 May 2006 was suspended by Senegal on June 1 after Senegalese officials alleged that a group of migrants who had been deported on 30 May had been handcuffed and misled into believing that they were being transferred to mainland Spain (IHT 2-6-2006, p. 3).

Conclusion

The available data does not suggest that the intensified border controls of the past few years have led to decreased numbers of irregular migrants. Rather than abandoning their plans to travel to Europe, these migrants have simply chosen more dangerous migration routes, routes that expose them to even greater risks.

2. THE EUROPEAN UNION'S RESPONSE

Member States have intensified their border controls over the past decade.

⁵ Lahlou, 2005, pp. 7-8.

⁶ Amnesty International, *Spain: The Southern Border*, June 2005

⁷ Lahlou, 2005, p. 12. The same phenomenon is noted for Italy by Monzini, n.d., p. 19

⁸ Lahlou, 2005, p. 12

Spanish authorities have tightened their sea borders by both symbolic means and quasi-military means. Two policy measures that Spain has implemented are particularly revealing. First, the Integrated System for External Patrols (SIVE), which started in 2002 and is to be completed in 2008, involves 25 detection stations, 71 patrol boats and 13 mobile radars along the coasts of Southern Spain and Fuerteventura. This should make these coasts impenetrable for irregular migrants. A marked decrease in the number of people who reach Ceuta, from 47.005 in 2000 to 6.790 in the first nine months of 2004, is attributed to SIVE by the Spanish authorities⁹. A second point worth noting is that there have been joint Spanish/Moroccan patrols in the Straights of Gibraltar and between Morocco and the Canary Islands since 2004¹⁰.

In May 2005, the Spanish government adopted its Africa Plan 2006-2008. This outlines a multi-faceted policy that focuses on cooperation with African countries to address the root causes of migration. Although this approach is obviously promising, its developmental potential will only materialise in the long run, if at all. The concrete and short term plans include strengthening border controls¹¹.

Italy refouled more than 1.500 irregular migrants from Lampedusa to Libya between October 2004 and March 2005 without examining the migrants' asylum applications¹².

According to press reports, the EU decided on 23 May 2006 to deploy planes, boats and rapid reaction aid teams from eight Member States to deal with new influxes of illegal migrants into the Canary Islands (IHT 25-5-2006, p. 8).

Frontex, the European agency in charge of cooperation in the field of external border control, has a very technical understanding of its role. In its action plan for 2005-2006, for example, it aims to facilitate practical assistance between Member States by providing technical equipment to make risk analyses in cooperation with police authorities¹³.

Following the events at Ceuta and Melilla in September 2005, the Hampton Court summit of Heads of State and Government expressed a need for more action on the issue of migration. The Commission then issued a *Communication concerning Priority actions for responding to the challenges of migration*¹⁴. The European Council on 16 December 2005 adopted the *Global Approach to Migration*¹⁵. Although the introduction to such policy proposals does refer to the human costs of border control, the concrete proposals fail to clearly follow-up on this point. The European Council proposes projects that reinforce surveillance and monitoring. This is said to have "the aim of saving lives at sea and tackling illegal immigration¹⁶", but the evidence suggests that measures aimed at tackling illegal immigration greatly increase the risks to migrants, including loss of life. The policy outlines do not address how they will protect migrants from the risks that they face. The proposals also contain an approach that combines development and migration, but the short term aim of the proposals is to combat migration, while development is clearly relegated to the distant future. Thus, while a development-focused approach may in the long term change migration patterns such that human costs decrease, in the short and medium term, the European Council's proposals will

⁹ Amnesty International, 2005, p. 14

¹⁰ Lahlou 2005, pp. 14-15

¹¹ Spanish Ministry of Foreign Affairs, Africa Plan 2006-2008. The Executive Summary is available at http://www.mae.es/es/Home/20060605_planafricaingles.htm (last accessed 2 August 2006)

¹² Human Rights Watch, World Report 2005, pp. 372-273; Rutvica Andrijasevic, *How to Balance Rights and Responsibilities on Asylum at the EU's Southern Border of Italy and Libya*, Centre on Migration, Policy and Society, Oxford, 2006, pp. 11-15

¹³ Doc. nr. 6941/06, 11 July 2006

¹⁴ COM (2005) 621, 30 November 2005

¹⁵ The only public version of this is Doc. nr. 15744/05, 13 December 2005

¹⁶ Doc. nr. 15744/05, 13 December 2005, p. 4

probably *increase* human costs because of the intensified security and surveillance orientation.

Based on a proposal by the Commission of 3 May 2005¹⁷, the EU is now close to a Decision establishing the External Borders Fund. Its most recent version is that of 11 July 2006¹⁸. It creates a framework for burden sharing and intensified cooperation between Member States when it comes to external border control. Its objectives, as detailed in Article 3 of the draft Decision, consist of an intensification of border control functions:

- the efficient organisation of control and surveillance tasks relating to external borders;
- ensuring, on the one hand, a high level of protection at external borders and, on the other, facilities for the efficient crossing of external borders by regular migrants;
- the uniform application of the Schengen Borders Code; and
- improvement of consular services.

More specifically, Article 4 contains a range of more concrete objectives, which include:

- the improvement of surveillance systems between border crossing points (Article 4(1)(b));
- the methodical gathering of information on the evolving situation on the ground before, at and behind external borders (Article 4(1)(c));
- developing new working methods, logistical measures and state of the art technology for systematic controls at border crossing points (Article 4(2)(a));
- the increased use of technology (Article 4(2)(b)); and
- building and upgrading detention centres (Article 4(3)(e)).

As concrete actions that would be fundable, Article 5 lists, *inter alia*:

- borders crossing infrastructure at border crossing points (Article 5(1)(a));
- infrastructure, buildings and systems required for surveillance between border crossing points and for the protection against illegal crossings at external borders (Article 5(1)(b));
- operating equipment, such as sensors, video surveillance and other detection tools (Article 5(1)(c));
- means of transport for the control of external borders, such as vehicles, vessels, helicopters and light aircraft that are specially equipped with electronic equipment for the surveillance of the border and the detection of migrants (Article 5(1)(d)); and
- investment in the development, testing and installation of state of the art technology (Article 5(1)(j)).

Article 15, which concerns the distribution of resources among Member States, makes clear that a significant amount of funds will be spent on external borders, both land borders and sea borders.

On 19 July 2006, the Commission issued two documents that reflect a similar focus on short term, surveillance orientated policies¹⁹. The July 2006 Rabat Conference on Development and Migration equally combined securitisation and development when dealing with the migration issue. What is truly remarkable is that policies that control migration in the short term are much more operational than policies that aim at development²⁰.

To summarise, a development focused approach to migration, although to be welcomed, will only be effective in the long term. A surveillance approach to migration is much more operational and in place, and the past year has seen a considerable increase in the EU's cooperation efforts in this field. It is to be expected that increased controls, which in the

¹⁷ Doc. nr. 8690/05, 2005/0047(COD)

¹⁸ Doc. nr. 11361/06

¹⁹ A Communication on Policy Priorities on the Fight Against Illegal Immigration of Third-Country Nationals, COMM (2006)402; A Proposal for a Regulation Creating Rapid Border Intervention Teams, COM (2006) 401

²⁰ Rabat Declaration and Rabat Action Plan, available at <http://maec.gov.ma/migration/En/documentation.htm> (last accessed 2 August 2006)

future may include African military and security agencies, will force migrants to move to other departure points. This, in turn, will increase the risk to the migrants involved²¹.

3. THE HUMAN COSTS OF BORDER CONTROL

The following focuses on the number of migrants who accidentally die while trying to enter the EU, not on deaths caused to migrants by acts of border guards that clearly violate human rights, such as the ones documented by Amnesty International²² and Médecins Sans Frontières²³.

By their very nature, statistics on the number of people who do not survive their attempt to reach Europe are incomplete and, in part, speculative. Stories of migrant deaths appear almost daily as *fails divers* in European newspapers (for example, IHT 7-6-2006, p. 1).

During the 1990s, when sea patrols between Albania and Apulia were increased, the number of migrant deaths increased. To make interception at sea by the authorities more difficult, departures were arranged for when weather conditions would be particularly bad, especially during the winter. The practice of unloading passengers into the sea without lifejackets near the coast began as an attempt to evade apprehension on the Apulian coast. This led to a large increase in the number of accidents, for example, people being mangled by propellers and drownings²⁴. Cuttitta (2005) reports 411 casualties in the Sicily Channel in 2003 and 280 in 2004 on the basis of a press review that he undertook.

A Spanish human rights organisation estimated that some 4.000 people drowned in the Straights of Gibraltar between 1990 and 2003²⁵. In 2005, Amnesty International reported that the Spanish authorities used boats to patrol the Atlantic that were physically equipped for intercepting migrants but not for rescuing them. Thus, migrants drowned after being intercepted by the Spanish Coast Guard. Although the authorities now use different boats, surveillance is expressly stated as being the main mission, saving lives being of only secondary concern²⁶.

Spanish authorities report the following data:

Table 4: Deaths at the Spanish border

	2003 ²⁷	2004	2005
Drowned migrants on the coast	13	14	2
Cadavers at sea	100	81	24

Data 2003: Lahlou, 2005, p. 7; 2004/2005: Spanish Ministry of Labour and Welfare: *Balance de la Secretaria de Estado de Immigration y Emigration de las Embarcaciones Interceptadas en 2005*, Madrid, 2006.

On the basis of data from the same source, Cuttitta (2005) reports 210 casualties in Spain during 2003 and 141 for 2004. Medecins Sans Frontieres, however, reports that the official number of fatalities in relation to border patrols was 284 in 2004 and gives an unofficial

²¹ Comp. Gregor Noll. *The Euro-African Migration Conference: Africa Sells out to Europe*, 14 July 2006, available at <http://www.opendemocracy.net>

²² Amnesty International, 2005

²³ Médecins Sans Frontières, *Violence and Immigration. Report on Illegal Sub-Saharan Immigrants (ISSs) in Morocco*, 2005

²⁴ Monzini, n.d. p. 17

²⁵ APDHA, *El Estrecho: La Muerte de Perfil. Los Derechos Humanos y la Inmigración Clandestina*, December 2003, quoted in Amnesty International, 2005, p.83

²⁶ Amnesty International, 2005, p. 53

²⁷ Lahlou, 2005, p. 7

estimate of around 500²⁸. On the basis of press reports, United (see below) counted 641 deaths at the Spanish border in 2003, 280 during 2004 and 444 for 2005.

It seems clear that the death toll is increasing, particularly given statistics from the only register of people who have died at the border known to the author, a register kept by the NGO United²⁹. This register is based on press clippings and is fairly detailed as to the number of deaths, identities and sources. It should be noted that it also includes people who commit suicide pending deportation, who are not relevant to this research study. The overwhelming majority of people on the list died while trying to cross Europe's borders. Because this list is based on press reports, the larger incidents, such as the 58 people who were found dead in a truck in Dover in June 2000 and the 283 people who drowned near Malta on Christmas day 1996, are reported in the list while smaller incidents may not be reported in the press at all. Thus, one can reasonably assume that the actual number of fatalities is higher than indicated in Table 5. This assumption is confirmed by the fact that, based on press reports, Cuttitta counted 411 and 280 casualties in, respectively, 2003 and 2004 *in the Sicily Channel alone*.

Table 5: Documented deaths at the European Borders, 1993-2006

1993	57
1994	123
1995	179
1996	457
1997	361
1998	390
1999	516
2000	652
2001	444
2002	820
2003	1309
2004	898
2005	769
2006*	207
total	7182

*until 3 May 2006

Source: United, Amsterdam, 2006

Although these statistics must be dealt with carefully, one can reasonably conclude that the number of people who died at the European borders has increased significantly since controls were extended to the external borders in 1995.

4. SHOULD THE HUMAN COSTS OF BORDER CONTROL BE TAKEN INTO ACCOUNT?

This section begins by examining legal aspects related to the fact that the way in which the EU's external borders are controlled leads to an increasing number of fatalities. In the strictly legal sense, there does not seem to be State responsibility for these fatalities.

Under the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts³⁰, States cannot be held responsible for fatalities that result indirectly from controlling their borders because border control, in itself, is not a wrongful act. Under some circumstances, a State may be held responsible for damage that arises out of

²⁸ APDHA (Human Rights Association of Andalusia), *Report on Illegal Immigration in 2004*, p. 9, quoted in Médecins Sans Frontières, 2005, p. 4

²⁹ <http://www.unitedagainstracism.org>

³⁰ See the Annex to General Assembly resolution 56/83 of 12 December 2001

acts not prohibited by international law, as when it undertakes a hazardous activity, defined by the International Law Commission as "an activity which involves a risk of causing significant harm"³¹. The question remains, however, whether increased border controls themselves *cause* the fatalities. One may argue that they are a contributing factor but that, in themselves, increased border controls do not cause the fatalities. Other factors may be more important, such as the willingness of migrants to take considerable risks, as well as factors beyond anyone's control, such as the weather during migration. Hence, States are not responsible in the legal sense for fatalities that occur indirectly as a consequence of controlling their borders.

A parallel that is often drawn is that of the Iron Curtain. Between 1961 and 1989, many people lost their lives when attempting to cross the border between East and West Germany because of anti-personnel mines or automatic fire systems or after being shot by East German border guards. While the official death toll according to the Federal Republic of Germany was 264, other sources quote a number as high as 938. On account of this, East German leaders were convicted as indirect principals to intentional homicide³². Analogising this to the fatalities at the EU's borders, however, is flawed. Anti-personnel mines and automatic fire systems, as well as orders to shoot at fugitives (*Schiessbefehl*) were conscious, affirmative measures that directly led to the deaths of people who tried to cross the border between the two Germanys. There is a distinction to be made between measures that directly result in fatalities and tightening border controls, the effect of the latter being that migrants will use travel routes that are riskier.

The above parallel does suggest, however, that States can be held responsible for fatalities that occur as a direct consequence of particular border control measures, such as shooting at migrants who attempt to cross the border or placing landmines at the border³³. Because of this, the authority to shoot at irregular migrants should be cancelled, and the minefields between Greece and Turkey should be dismantled.

The fact that States generally cannot be held legally responsible, however, does not end the story. Consider the European Court of Human Rights' decision in *Osman*, which involved Article 2(1) of the European Convention on Human Rights. According to Article 2(1):

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Osman involved a stalker who had harassed a family for a number of years and ended up killing a father and wounding a son. The Court held:

³¹ U.N. Doc. nr. A/CN.4/L.686, 26 May 2006

³² European Court of Human Rights, 22 March 2001, application nrs. 34044/96, 35532/97 and 44801/98, *Streletz, Kessler and Krenz v Germany*

³³ As indicated above, this is not the focus of the present paper. It should be noted, however, that such fatalities occur regularly. According to press reports quoted by United, migrants were shot on 29 March 1995 (Greece), 20 August 1995 (France), 5 September 1996 (Spain), 17 August 1998 (Italy), 10 May 2000 (Turkey, 9 people), 15 November 2000 (Turkey), 3 December 2000 (Spain), 16 July 2001 (Turkey), 12 January 2002 (Turkey, 2 people), March 2002 (Macedonia, 7 people), 22 May 2002 (Turkey), 19 June 2002 (Turkey, 2 people), 23 September 2003 (Greece), 3 October 2003 (Spain), 11 April 2004 (Spain), 17 April 2004 (Slovakia, 2 people), 10 September 2005 (Greece), 19 September 2005 (Turkey) and 29 September 2005 (Morocco, 5 people). Migrants died in the minefields between Turkey and Greece on 13 September 1995 (4 people), 30 June 1996 (2 people), 15 September 1997 (3 people), 16 April 1998 (2 people), 26 August 1999 (3 people), 31 October 1999 (5 people), 1 May 2000, 29 August 2000, 1 September 2000 (2 people), 29 March 2001 (2 people), 21 May 2001, 22 May 2001 (2 people), September 2001, 23 December 2001 (4 people), 20 March 2002 (2 people), 27 March 2002, 28 August 2002, 4 January 2003 (2 people), March 2003, 29 September 2003 (7 people), 5 August 2004, 14 November 2004 (3 people), 4 April 2005 (2 people), 29 May 2005 (2 people) and 9 December 2005 (2 people)

The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see the *L.C.B. v. the United Kingdom* judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-III, p. 1403, § 36). It is common ground that the State's obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions. It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of this obligation is a matter of dispute between the parties³⁴.

As in the border control cases, *Osman* did not involve a causal relationship between failing to take preventive measures to protect individuals' lives and those individuals' deaths. The obligation of a State to take appropriate steps to safeguard lives is not conditioned on a causal relationship between the State's actions and someone's death. Rather, the obligation is triggered by the State's knowledge that a particular life is at risk and that same State's ability to do something about it.

Increases in the number of fatalities of irregular migrants are related to the tightening of border controls. Thus, these fatalities are a foreseeable consequence of this policy. Although this does not lead to State responsibility, it does trigger a State's positive obligation to take preventive measures to safeguard the lives of those who are put at risk. In the context of border control measures, because States' policies increase the loss of lives of irregular migrants, they are obliged to exercise their border controls in such a way that loss of lives is minimised.

In other policy fields, measures aimed at increasing safety, such as measures related to traffic, health care and labour relations, are taken not because otherwise the State would be responsible for fatalities but, rather, because human lives deserve protection by the State. The same reasoning should be applied to migration policy³⁵.

When it is clear that a particular set of State policies will lead to increased fatalities, it seems reasonable to take account of this in policy debates. Until now, however, this has not happened in the debate about border control. Increased human costs from intensifying border controls should factor into the debate about the future of European border control. What weight the human costs should have can only be determined when more information becomes available.

Information on the number of fatalities at the EU's external borders is scarce and inconsistent. In order to support a debate on border control in which human costs play a role, three things are necessary:

1. Research should be carried out to get as much information as possible about the number of fatalities at the EU's external borders since the Schengen system became operational in 1995. This should be done by collecting data from governments, human rights organisations, local police authorities, churches and similar bodies.
2. On the basis of (1.), a network should be created to permanently collect data on fatalities. This should involve a fact finding report submitted by the Commission to

³⁴ European Court of Human Rights, 28 October 1998, appl. nr. 23452/94, *Osman v. United Kingdom*

³⁵ Comp. Saskia Sassen, *Migration Policy: From Control to Governance*, 13 July 2006, available at <http://www.openDemocracy.net>

the Parliament every three months.

3. When discussing new policies or evaluating existing ones on external border controls, a standard topic for discussion should be the human costs of such measures.

The Parliament should ask the Commission to undertake research as mentioned under (1.) and to establish the network discussed under (2.). Building on this, the Parliament should ask the Commission to address the human costs of border control measures in every document that deals with the issue. In the short term, collecting information about the human costs of border controls could be one of the concrete actions that are listed in Article 5 of the Decision on the External Borders Fund.

The research and the network could be activities of a new or existing EU agency or could be undertaken by an NGO funded by the EU.

Furthermore, authority to shoot at irregular migrants should be withdrawn, and minefields between Greece and Turkey should be dismantled.

5. SUMMARY

The number of migrants reaching Europe has been consistently increasing. Although there are yearly differences, the general trend is clear. Member States have responded to this by intensifying their border controls over the past few years, especially at sea. This has displaced the flow of migrants from one place to another, involving longer journeys under more dangerous circumstances. Increased fatalities have occurred. Although data on this is scarce and contested, the number of people who do not survive their trips has increased. The number of fatalities reported by United, which has the most comprehensive data available, has varied between 800 and 1.300 over the past few years. It is safe to assume that the actual numbers are considerably higher than this. This means that every day people die trying to cross the external borders of the EU. There is a plausible link between increased fatalities and intensified border control.

The effect of intensifying border controls should play a role in the public policy debate. Some measures will have less fatal consequences than others. In order to be able to discuss this thoroughly, it is necessary to learn much more about the number of fatalities at the external borders of the EU.

In order to trigger a sensible debate on border controls in which human costs play a role, three things must be done:

1. The Commission should undertake research to get as much information as possible about the number of fatalities that have occurred at the external borders of the EU since the Schengen system became operational in 1995. This should be done by collecting data from governments, human rights organisations, local police authorities, churches and similar bodies.
2. On the basis of the network used to acquire this data, a network should be created to permanently collect data on fatalities. This should involve a fact finding report submitted by the Commission to the Parliament every three months.
3. When discussing new policies or evaluating existing ones on external border controls, a standard topic for discussion should be the human costs of such measures.

Furthermore, authority to shoot at irregular migrants should be withdrawn, and minefields between Greece and Turkey should be dismantled.