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# **THE HUMAN RIGHTS OF IRREGULAR MIGRANTS IN EUROPE**

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## Introduction

*States shall secure the rights and freedoms defined in the European Convention on Human Rights 'to everyone within their jurisdiction' (Article 1, ECHR)*

Historically, the State has pledged to protect the rights of its citizens at home – for instance from torture or from exploitation – and of citizens of other states who enter the country lawfully. Where refugees flee persecution at the hands of their own state, international law requires other states to provide the protection denied at home.

This paper deals with another category: migrants who are not refugees or asylum seekers and who are in another country without the state's consent. Perceptions of these irregular migrants are polarised. 'Irregular migrant' refers to non citizens who have no valid leave to enter and / or remain within a state. The countries from which they come often see this as migration out of necessity, not choice, and also as the source of remittances which support families and contribute to development. 'Host' states tend to see them as non citizens who are illegally in the country, and should be removed at the earliest opportunity. From a human rights perspective, migrants are entitled to protection under international law, regardless of any irregularity under national law. In practice, many irregular migrants are in fact outlaws in the original sense of that term: they live outside the law, and outside its protection, in ways which are described in this paper.

Who are irregular migrants? Irregularity is defined by national immigration rules, and is not a fixed condition. Irregularity arises in a number of ways. Migrants may enter a country illegally, without valid visas, by avoiding border controls or with false documents. Those who enter legally but overstay their visas, become illegal; this is likely to account for most irregular migration, including those who are trafficked. Migrants may also enter on a non-working visa, then work, and this may make the entry illegal retroactively. Most irregular migrants are workers; they tend to be less skilled than those who move legally because legal avenues for 'managed' migration are increasingly restricted to those with the technical skills needed by developed economies: doctors, nurses, and i.t. specialists.

The challenge in human rights terms is to reconcile these different perspectives by protecting migrants' rights in host states and by reducing the causes of much involuntary migration through greater rights protection in home countries. The challenge for the state is to strike a proper balance between protecting the rights of all those who are inside or at its borders, and maintaining control of the borders.

Migrants are at particular risk in four situations:

- During the journey and at the border: loss of life and serious injury to migrants as a result of (a) the actions of private individuals in the course of trafficking and smuggling by land or at sea; and (b) excessive use of force by law enforcement officials charged with border control.
- During periods of illegal stay: through discrimination, denial of access to basic rights such as emergency health care, exploitation by private employers without safe means of escape or complaint;
- In detention: inhuman or degrading conditions; lack of access to legal means to challenge detention; the detention of children;
- In the course of expulsion procedures.

Six examples illustrate these situations.

- Italian authorities rescued a small boat, which had run out of fuel, food and water on its journey from North Africa, leading to the deaths of most passengers; fifteen out of an original boatload of eighty five who were still alive were thought to be Somalis who had travelled from Libya. One rescuer described the vessel carrying the dead and survivors as resembling 'a scene from Dante's Inferno'.
- Asked why he had come to Europe, one boy – an immigration detainee in Greece - replied: "(m)y father told me 'you have to become a doctor, you must not fight' – and that's what I wanted to do". (Amnesty International, Greece, Out of the Spotlight, 2005)
- 'Our Roma are mainly sold to Italy. Both girls and boys are being sold: the boys for the purpose of forced labour, the girls for begging and prostitution. The children are transported in cardboard boxes....children of 5 years are valued most since they can work for 10 years or more'. (Victimology Society of Serbia, 'Trafficking in People in Serbia', quoted in ODIHR, Awareness Raising for Roma Activists on the Issues of Trafficking in Human Beings in South-Eastern Europe, 2006, p.11)
- A Moldovan woman was trafficked to Montenegro and made to work as a prostitute. She suffered horrendous physical and sexual abuse for three years resulting in severe injuries including several broken bones, internal injuries... scars from handcuffs, cigarette burns on her genitals, and bruises in her mouth. She alleged that politicians, judges, police and civil servants had tortured and raped her. No prosecution has taken place. The Deputy State Prosecutor and one Prosecutor were dismissed after intervention by the Council of Europe and OSCE. (Summary of Cases, UN Special Rapporteur on Trafficking, E/CN.4/2006/62/Add.1, paras 130 – 134.)
- A gang imported workers for illegal factory work between 2002 and 2004. They were promised work permits, but given false passports. If they attempted to escape, they were threatened and forced to continue. On arrival they were told that they would work seven days a week to repay the costs of their transport, food and accommodation. Once the debts had been cleared, they would work for at least one year, for no pay or 'pocket money'. Their salaries would be paid into the employer's bank account. They would be moved from house to house, and kept in isolation. Any breach of conditions, including absences for sickness, would be added to their debt or deducted from their pocket money. Control was maintained through beatings, and threats of assault on workers, and on their families back home. (ILO, A Global Alliance against Forced Labour, Report, 2005, para. 260)
- When the bodies of 35 young men – 12 from the same Moroccan village of Hansala – washed ashore outside his home on the Bay of Cadiz, Rafael Quiros founded a charity to help to stem the flow of young men who try to reach Spain in rafts piloted by smugglers. The families are held liable for the Euro 8,000 charged for the crossing, even though it ended fatally, so the charity also covered these debts. It has also built a solar powered health centre, a school and a teacher's home in Hansala, as well as paying parents to allow their children to study. 'We calculated how much the children would earn tending goats and we gave the families more'. (The Guardian, 8 May 2007.)

The focus of this paper will be the European and international law which binds the 47 Council of Europe member states<sup>1</sup>. It will look firstly at the national and international factors which underlie irregular migration. It will secondly review the special vulnerability of irregular migrants to human rights abuse. Thirdly, it will outline the rights which irregular migrants enjoy under European and International law, and set out the protection duties of states. Fourthly, it will identify some obstacles

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<sup>1</sup> This paper does not include analysis of the European Union's normative framework on these matters.

which prevent these rights from being enjoyed, as well as some best practices. Finally, it will draw a number of conclusions.

## I. Factors Underlying Irregular Migration to Europe: the International Context

### i. 'Push' Factors in Countries of Origin

Because international law protects refugees who have fled persecution, refugee protection is closely related to an individual's reasons for moving, and there is a sizeable body of research into the causes of refugee flight. International migration, on the other hand, has tended to be understood primarily in development terms, as a response to disparities in income levels and employment opportunities between countries.

One of the principal 'drivers' of contemporary international migration is economic globalisation, in which goods and capital flow freely and create employment across national borders, better communication makes differences in living conditions clearly visible across frontiers, cheaper travel facilitates movement between countries and continents, and transnational – diaspora - communities link families at home with workers abroad.

Within this global economy, economic disparities between richer and some poorer countries have grown, and the gap has widened. Even within Europe, there is a chasm between high and low income countries. Norway and Holland have per capita GDPs of around \$38,000 and \$32,000, while the equivalent figures for Ukraine, Albania and Moldova are \$6,400, \$5,000 and \$1,700.<sup>2</sup> The global impact of such disparities on human lives is evident in the flows of irregular migrants from the poorest to more developed countries.

Although economic asymmetry is an underlying factor in all migration, wage and income inequalities do not fully explain all migration. Many of those undertaking the long and dangerous journey from countries in – for example – sub-Saharan Africa to Europe, do so in response to famine, denial of economic and social rights, corrupt and 'bad' governance, conflict and other forms of human insecurity. Poverty in these situations is understood as the outcome of violations of economic, social and other rights. While these are often national problems, international factors also play a role.

Three examples illustrate the complex interplay between national and international factors:

- Migration of skilled workers, including teachers, doctors and nurses who are actively recruited by European states, has had a negative impact on education and health in some of the poorest countries, and is a major obstacle to development in some of the states with high rates of outward migration;
- Villagers from one Senegalese fishing community explain the migration of young men in terms of over fishing by large European trawlers, with which the small local wooden fishing boats cannot compete, and so sons and husbands leave: 81 drowned off the Canary Islands on their way to Europe early in 2006;
- In some west African countries migration has been spurred by the collapse of cotton markets; subsidised cotton exports from the US and the EU were a major factor in the decline of world cotton prices after 1997. In cotton producing countries such as Mali and Burkina Fasso, this decline led in turn to loss of income for farmers, increased poverty levels, a reduction in state health and education budgets, and migration to Europe from areas where cotton is the only crop. Arriving in the Canary Islands in 2006, two young Malians said they had left their villages when cotton prices fell so they could earn money for their families. They said that they travelled through Libya and Morocco, paid for a place in a smuggler's boat, and were rescued by Spanish coastguards. By then, their clothes and the money they had saved had been stolen by the smuggler.

<sup>2</sup> UNDP Human Development Report, 2006.

In the future, irregular migration is likely to be increasingly driven by poverty, deficits in human rights and human security, and conflict caused by climate change.

Research into trafficking, one extreme form of involuntary migration, sheds light on the complex reasons which 'push' irregular migration. Analyses typically recognise poverty and lack of economic opportunity as the most visible cause, with the majority of trafficked victims coming from the poorest countries. In Europe, Albania, Moldova and Ukraine are important trafficking 'source' countries.

But poverty is not the only determinant. Another factor underlying irregular migration is the particular vulnerability of women and children in some societies, where patterns of discrimination exclude them, and social and cultural prejudices, lack of education, and the prevalence of gender violence make them susceptible to trafficking. Forms of social discrimination which increase vulnerability include inheritance laws, land laws and employment regimes which discriminate against women, and traditional practices whereby young girls are sold into prostitution. Ethnic and racial exclusion is also a factor in Europe. Several factors increase a child's vulnerability, many children who are trafficked in Albania are Roma, as are those who are trafficked in "the former Yugoslav Republic of Macedonia", Romania and Serbia; where births are not always registered, and girls do not go to school. The UN Special Rapporteur on Trafficking has noted that growth in trafficking has been paralleled by an increase in undocumented migration, encouraged by inequality, poverty and gender discrimination.<sup>3</sup>

The economic benefits to countries of origin from remittances, and the employment opportunities resulting from demographic deficits in some European countries also act as "push factors".

Migrant remittances totalled \$203 billion in 2006, outstripping overseas development assistance, a sevenfold rise since 1990. In Europe, remittances make up more than a third of Moldova's GDP, and more than 5% of national income for Bosnia, Albania, Serbia, and Armenia. The figure is similar for Georgia, which lost one fifth of its population through migration in the 15 years after 1989.<sup>4</sup> The need to support families is a reason given by migrants from sub-Saharan Africa, intercepted at the sea borders of southern Europe, to explain why they were willing to undertake such long and dangerous journeys. If they succeed, their earnings contribute to development at home. Thus, two hundred migrants from Mali are sending money from France to their home village, in Kayes, to pay for essential village amenities: pumps to irrigate the fields and electric millet grinders, a new well, grain and rice silos, a new school, and a mosque.<sup>5</sup>

## **ii. 'Pull' Factors in Countries of Destination**

Migration is encouraged - 'pulled' – by other factors. Important amongst these are large diaspora communities in countries of destination, families ties and hope of access to education and health care.

Irregular migration is also driven by demand. Low birth rates and ageing populations are creating demographic deficits in a number of European countries, which migration offers one means of addressing. In 2000, the UN forecasted that by 2050 the [then] 15 member states of the European Union would need more than 40 million migrants to maintain the overall size of their populations. Without migration, the ratio of people of working age to pensioners in some European countries is expected to fall from its present level of more than 4 to 1, to below 2 to 1 in 2050, bringing lower tax revenues and increased expenditure for health care and pensions.

While these demographic trends may modify through later retirement or higher birth rates, immigration will continue to be seen as part of long term solutions to the situations outlined above.

These trends are evident in the demand for unskilled workers in the 'informal' economies of some European states. When Spain regularised 570,000 migrant workers in 2005, it did so on the

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<sup>3</sup> UN Special Rapporteur on Trafficking, Report on Visit to Albania, 2005. E/CN.4/2006/67/Add.2.

<sup>4</sup> *Migration and Remittances: Eastern Europe and the Former Soviet Union*, World Bank, January 2007.

<sup>5</sup> 'Mali counts the cost of migration', *Le Monde* [reprinted *Guardian Weekly*, 6 January 2006].

application of their employers, an indication of the degree to which economic demand had circumvented immigration restrictions. The sectors in which demand for irregular migrants is high are those which are least regulated, and from which reports of exploitative labour are most frequent. They are also highly profitable; the International Labour Organisation (“ILO”) estimates total illicit profits produced in one year by trafficked forced labourers at about \$32 billion; half made in industrialised countries.

In many industrialised countries economic recession in the 1970s led to restrictive immigration policies. Using carrier sanctions, tight border controls and strict visa regimes, European countries enforced laws to cut – even end - entry for employment. As globalisation of markets grew it was not accompanied by globalisation of the work force. This led to a discordance between the numbers of workers who wished to migrate – for all of the reasons set out above - and the legal opportunities to do so. Restrictive laws did not reduce migrant numbers, but rather led to travel outside legal channels, and to the use of traffickers and smugglers. In turn, criminal networks expanded to meet restriction-driven demand:

*‘States’ policies in promoting immigration restrictions and reducing opportunities for regular migration have not been effective in preventing migration. Rather they have created a market for irregular migration, often as organised serious crime, through trafficking and smuggling of people’. (Report of Experts Group on Trafficking in Human Beings, European Commission, Brussels, 2004)*

Confronted with rising numbers of irregular arrivals, often in mixed flows of asylum seekers and migrants, some states have resorted to undifferentiated interception procedures resulting in *refoulement*. A number of European states have ‘externalised’ their border controls. UNHCR has emphasised the need to ensure that measures taken to manage borders, fight trafficking, and facilitate removal and readmission, do not result in violations of basic rights, including the right of access to effective asylum procedures.<sup>6</sup>

## II. Vulnerability and the Need for Protection

The special vulnerability of migrants stems from the fact that they are not citizens of the country in which they live, they have crossed an international border and – unlike citizens – they may enter and live in another country only with the express consent of its authorities, or where states have agreed to allow free movement, as in the case of EU citizens.

This dissociation between nationality and physical presence has many consequences. As strangers to a society, migrants may be unfamiliar with the national language, laws and practice, and less able than others to know and assert their rights. They may face discrimination, and be subjected to unequal treatment and unequal opportunities at work, and in their daily lives. They may also face racism and xenophobia. At times of political tension, they may be the first to be suspected – or scapegoated – as security risks. By linking security measures and immigration control, some governments have encouraged – however unintentionally – xenophobia against migrants and refugees.

While many migrants are well protected, particularly the highly skilled, irregular migrants are doubly vulnerable, both as non citizens, and because their status is illegal under national laws.

One indicator of this vulnerability is statistical invisibility. Global estimates for international migration were 190 million in 2005, with one million moving from less developed countries to Europe each year,<sup>7</sup> and around 85 million women migrants.<sup>8</sup> No-one knows what proportion are irregular, or how they are distributed - globally, regionally or in European states.

By their nature, irregular migrants are a hidden population, and there is little reliable statistical data. Some figures exist for example for those who became irregular after an asylum application was rejected and whose identity was known to the State authorities through the asylum application, and

<sup>6</sup> See UNHCR *Note on International Protection*, 2007 [A/AC.96/1038]; *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, UNHCR, 2007. Recommendations for Portugal’s EU Presidency, 2007.

<sup>7</sup> *International Migration 2006*, UN Population Division, New York.

<sup>8</sup> *Women and International Migration*, Report of Secretary General, A/59/287/Add.1, para 29.

because NGOs monitor refugee protection issues with a diligence which is generally lacking for migrants.<sup>9</sup> Information on migrants who moved to work, or to escape poverty, conflict and insecurity, is more elusive, although there is growing statistical attention to victims of trafficking. Those who enter illegally do so, by definition, without being recorded as such, while many who enter legally but remain without leave, are not counted, because there is no cross checking of entry and departure records. Migrants may be recorded as deported even if the order is not carried out, and they remain - inside the country but outside official statistics.

For all these reasons, official statistics give only a 'very partial coverage' of irregular migrants. Estimates suggest that between 10% and 15% of migrants are irregular;<sup>10</sup> that there are 4.5 million irregular migrants in the EU, upwards of 400,000 in the UK, and between 10 and 12 million in Russia.<sup>11</sup> Whether the introduction of biometric identity documents will result in more reliable data is unclear.

Another indicator of vulnerability is the acute *lack of information* on types of violation, the places where they occur, and their characteristics. Violations are unrecorded, or under recorded where migrants are irregular. Migrant women are one example; another are forced labourers who work in the underground economy and so tend to escape national statistics. Media and governmental reports on rights violations are increasing, but it is not clear whether this reflects increased levels or increased exposure. NGO reporting on migrants' rights is also increasing, but it still modest in comparison with that on refugees.

The Council of Europe's Parliamentary Assembly drew attention to the lack of information on abuses during removal, noting that it is 'often only by chance' that ill treatment comes to light<sup>12</sup>.

In practice, vulnerability is greatest at four points in the migration cycle: in the course of arrival, by land and sea; during irregular stay; in detention; and on removal.

### ***i. Arrival***

As states have tightened legal controls and strengthened – even fortified – their geographical borders, and as the opportunities for legal migration have shrunk, migrant trafficking and smuggling have expanded, refugees and migrants often travel together in 'mixed flows', routes have become more hazardous, and there has been an exponential increase in the dangers facing migrants as they move. One consequence of tighter border control, observed in Europe and on the US/Mexican border, has been to divert smugglers' boats into longer and more dangerous journeys. Many sea journeys from Africa to Europe are organised by smugglers. These journeys are accompanied by a significant loss of life, with regular reports of persons drowning, dying of exposure and dehydration, and even reports of deaths from violence by boat operators. Similar incidents are reported within countries when stowaways fall from container lorries, and are killed on motorways.

Another consequence is that states tend to conflate measures to deal with arriving migrants with action to deal with security threats. Thus Frontex's mandate to manage security risks at Europe's external borders has involved its patrols in intercepting boats carrying migrants from North Africa, and also in stopping 'illegal migration' by using false documents to leave their country. The purpose of both is to prevent illegal entry to EU member states.

Countries on the eastern land frontiers of Europe, are increasingly transit states for migration to the EU; they receive migrants and refugees from Asia and the Middle East, and then migrants and rejected asylum seekers are sent back from EU states under bilateral return agreements. There are reports that in some countries migrants and asylum seekers are routinely detained in bad conditions, subjected to violence, robbery and extortion; denied legal assistance and in some cases returned to

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<sup>9</sup> But even here official data is often weak. 'The actual number of failed asylum seekers still in the UK is not known.' *Returning Failed Asylum Applicants*, Report by the Comptroller and Auditor General, House of Commons (HC) 76 Session 2005-2006, London, 14 July 2005, para. 8.

<sup>10</sup> *Towards a Fair Deal for Migrant Workers in the Global Economy*, ILO, 2004, paras 36-37.

<sup>11</sup> Parliamentary Assembly Recommendation 1807 (2007) on Regularisation Programmes for Irregular Migrants, 1<sup>st</sup> October 2007.

<sup>12</sup> Recommendation 1547 (2002) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, Parliamentary Assembly, 22 January 2002.



countries where they face persecution and torture.<sup>13</sup> All receiving countries are making great efforts to cater for the large scale arrivals, although some countries, such as Malta, are struggling to provide adequate reception conditions. While there are calls for more-burden sharing from countries in the region, such as Malta, there seems to be a reluctance on the part of some member states to help out.

The challenge for national authorities, often with limited resources, is to protect the rights of migrants, and identify and protect asylum seekers, in the course of operations to rescue, receive, and where appropriate return, arrivals by sea and land. There is as yet no general system, comparable with that developed by UNHCR for refugees, for registering arriving migrants, providing them with temporary documentation, and maintaining a register of those who are known to have died, or who are reported missing.<sup>14</sup>

*Lack of identity papers* is both a source of vulnerability, and a serious problem for states. It can arise if asylum seekers are able to leave countries of persecution only on the basis of false identity papers; false passports are often used in smuggling operations; many trafficked women have their documents stolen or destroyed on arrival; other migrants may destroy identity documents and claim a false nationality to avoid removal. One tragic consequence is that the identities of those who die on the journey, whether drowned at sea or killed as stowaways, are often unknown – to national authorities and to their families.

Faced with the need to establish identity – name, date of birth, and nationality – some states have adopted procedures to determine nationality and to assess age. Nationality attribution through language and dialect analysis is criticised because it does not necessarily take into account the degree to which national borders cut through language groups.<sup>15</sup> If inaccurate, it may result in the return of migrants to countries of which they are not nationals. Similarly, age assessment procedures used to determine whether young migrants are under 18, and so entitled to protection as children, are criticised on the ground that age determination is a complex process involving physical, social and cultural factors, and particularly difficult in the case of older children. Wrong assessments may result in the wrongful detention of a separated or unaccompanied child.<sup>16</sup>

## **ii. During Irregular stay**

Some arriving migrants are removed speedily, without leaving detention. But for significant numbers removal may not take place for several years, or even at all. Removal is most delayed where the individual does not leave voluntarily, and where the state has lost track, or where identity and nationality are unclear, or return is impossible for practical reasons [for example because conflict makes return travel impossible]. Removal is legally impossible where the migrant is stateless, or where he or she has no effective nationality because the state of nationality does not protect by co-operating with return. The result may be a situation of continuing uncertainty, even ‘limbo’, in which the migrant has no legal immigration status, is liable to removal at some unspecified time, may not work, and is excluded from subsistence rights.

Some states deny irregular migrants access to *social and economic rights* as a means of forcing them to leave ‘voluntarily’. Refusal of asylum applications may be followed by exclusion from social provision. The practice differs from state to state, but several reports have identified such policies including in Germany, Holland, the UK and Norway.<sup>17</sup>

Although states should provide free emergency *health care* regardless of legal status, there is no agreement on what treatment falls inside this narrow and often undefined category. A UK parliamentary inquiry reported that although the Health Department categorised maternity care as ‘immediately necessary treatment’, the patients remained liable for charges ‘and the debt should be pursued in the normal way’. In some cases, vulnerable patients such as pregnant women and people with HIV/AIDS had been refused hospital treatment. In the case of HIV/AIDS, the inquiry noted the

<sup>13</sup> Ukraine: On the Margins, Human Rights Watch, 2005.

<sup>14</sup> *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*, UNHCR, 2007.

<sup>15</sup> ‘Guidelines for the Use of Language Analysis in Relation to Questions of National Origin in Refugee Cases’, *International Journal of Speech, Language and the Law: Forensic Linguistics* (2004), Vol. 11, No. 2, pp. 179-266.

<sup>16</sup> See generally Statement of Good Practice, Separated Children in Europe Programme, Save the Children & UNHCR, 2004.

<sup>17</sup> See *The Return of Asylum Seekers*, ECRE, June 2005 and *European Survey on Undocumented Migrants’ Access to Health Care*, Médecins du Monde European Observatory on Access to Health Care, June 2007.

negative consequences of refusal in terms of cost and risk of infection; people wait until they were treatable as an emergency, at which point their viral load had increased. The African HIV Policy Network told the inquiry that anti-retroviral therapy was most cost effective; if denied, 'they will simply present in the emergency department and then in intensive care with greater and greater frequency' and in a matter of a couple of days cost as much as a year's antiretroviral treatment'. Medical groups noted the inconsistencies where a state's overseas development agency is 'very actively campaigning for universal global access to anti retroviral treatment', and a very vulnerable group is denied treatment in the UK.<sup>18</sup>

Abuse in the private sector typically arises in *exploitative employment*, and when women, children and men are trafficked. Four UN human rights Special Rapporteurs - on migrants, the sale of children, trafficking, and violence against women - have reported abuses under their mandates in Europe, including trafficking of pregnant women whose babies are sold for illegal adoption; trafficking of women and girls for sexual exploitation, trafficking of children to beg or sell on the streets, trafficking of minors to obtain illegal social security benefits, and trafficking of men for exploitative employment in sectors such as agriculture, construction, catering, and domestic work.

*Racism and xenophobia* take many forms. When violence broke out in Karelia in Russia in 2006, migrants from Chechnya, Azerbaijan and Georgia were attacked, two died, and homes and businesses were destroyed. The local governor did not blame the mobs for violence, but rather the migrants, whose behaviour had been 'beyond the pale'.<sup>19</sup> The European Committee for the Prevention of Torture ['CPT'] criticised the practice in one detention centre of calling detainees by their immigration file/tag numbers, and of referring to them similarly in all official documents, including medical files. This was felt by many detainees to be humiliating and degrading, as was the practice of addressing detainees by their presumed nationality ("Sudanese, come here"..., "Algerian, do that...").<sup>20</sup>

Xenophobic popular attitudes are encouraged where irregular migration is linked to crime, unemployment, and terrorism, often by the tabloid media. This discourages objective reporting because of the sensitivity of the issue, the risk that positive coverage of an issue will act as a 'trigger' to tabloid stereotyping, and because of commercial pressures on print media with falling circulations, which encourage sensationalist reporting

### **iii. Detention**

Detention typically takes place on arrival and pending removal; where removal is impossible or does not take place, irregular migrants may remain 'liable' to be detained until such time as they are removed, or their status is regularised. Reports by Human Rights Watch, Amnesty International and other NGOs, as well as from the CPT, describe severe overcrowding, inadequate bedding and clothing, recreation or exercise, fresh air, food, or medical services in a number of states.

- In Ukraine, immigration detainees lacked basic rights, including access to counsel, doctors and interpreters, the right to apply for release, and the ability to contact relatives. Many 'had no idea why they had been detained or how long they were likely to be held'.<sup>21</sup>
- Allegations of ill treatment are reported in emergency detention centres holding unaccompanied children in the Canary Islands, especially younger children, by peers as well as staff; According to one report, responsible authorities failed to investigate conditions, and children 'had nowhere to turn for help'.<sup>22</sup>

<sup>18</sup> UK Parliamentary Joint Committee on Human Rights, *The Treatment of Asylum Seekers*, 2006-7, paras 125-152.

<sup>19</sup> *International Herald Tribune*, 14 September 2006.

<sup>20</sup> *CPT Report on visit to Malta*, August 2005. CPT/Inf (2005) 15, para. 27.

<sup>21</sup> *On the Margins: rights violations against migrants & asylum seekers at the new eastern border of the EU*, Human Rights Watch, 2005.

<sup>22</sup> *Unwelcome Responsibilities: Spain's Failure to Protect the Rights of Unaccompanied Migrant Children in the Canary Islands*, Human Rights Watch, 2007.

- The UK Inspector of Prisons has noted that at the point where an initial detention decision is made, 'the child becomes invisible ...there is no consideration of whether the welfare of a child in a family will be adversely affected by the process of detention'.<sup>23</sup>
- In one Greek detention centre the detainees 'had nothing to do all day and spent a lot of time playing chess with pieces they had cut out of cardboard....'<sup>24</sup>

The CPT has reported treatment in detention centres which

*'displayed a number of negative features - a prison-like environment, a climate of tension, a quasi-total absence of activities, a lack of regular outdoor exercise, inadequate medical/psychiatric care, a lack of information for foreign nationals concerning their situation, leading to uncertainty about their future - which for many of the detainees rendered their detention unbearable. Not surprisingly, cases of self-mutilation, suicide attempts, hunger strikes, vandalism and violence were relatively common. Such a state of affairs could well be considered as amounting to inhuman treatment.'*<sup>25</sup>

#### **iv. On Removal**

Some irregular migrants return voluntarily. Some do so with financial assistance provided by the International Organisation for Migration. In all cases, return should take place in safety and dignity.

But some do not wish to return, and it is in this context that the question of the legitimate use of force by officials and contracted workers arises. Research by the UK Medical Foundation identified patterns of 'excessive or gratuitous force'.<sup>26</sup> The CPT found that where resistance is encountered during deportation by air, escort staff usually immobilise the detainee completely on the ground, face down, in order to put on the handcuffs. *'Keeping a detainee in such a position, in particular with the escort staff putting their weight on various parts of the body [pressure on the ribcage, knees on the back, immobilisation of the neck] when the person concerned puts up a struggle, entails a risk of positional asphyxia.'*<sup>27</sup>

The Parliamentary Assembly of the Council of Europe ['PACE'] has drawn attention to discrimination, racist verbal abuse, dangerous methods of restraint and even violence and inhuman or degrading treatment. 'All too often, the officials responsible for enforcing expulsion orders resort to an unjustified, improper or even dangerous use of force.'<sup>28</sup>

### **III. Rights under International Human Rights Law**

Until the late 1980s, when migration patterns changed, migrants – unlike refugees - were on the margins of human rights standard-setting. Most worker migration took place legally, on the basis of bilateral agreements, and migrants were often able to rely on their home countries for consular protection. This marginalisation was reinforced by the language of human rights law: rules of universal application which neither name migrants nor make *explicit* provision for their protection.

Then, in response to rising migrant numbers, often moving irregularly, and to evidence of human rights abuse during the migration cycle, migrants were identified as a vulnerable group and brought within the human rights mainstream. The International Convention on Protection of the Rights of All Migrant Workers and Members of their Families was adopted by the UN General Assembly Resolution

<sup>23</sup> Report of HMIP, cited in UK Pmt Jt Cttee on Human Rights, *The Treatment of Asylum Seekers*, 10th report of session 2006-7, para. 243.

<sup>24</sup> *Greece: Out of the Spotlight :The rights of foreigners and minorities are still a grey area*, Amnesty International, 5 October 2005.

<sup>25</sup> *CPT Report on visit to Malta*, August 2005. CPT/Inf (2005) 15, para. 28

<sup>26</sup> *Harm on Removal*, Medical Foundation for the Care of Victims of Torture, London, 2004.

<sup>27</sup> *Deportation of foreign nationals by air* [Extract from 13 General Report [CPT/Inf (2003) 35], para.34.

<sup>28</sup> PACE Recommendation 1547 (2002) on Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity.

45/158 of 18 December 1990 ['CMW'] and a UN Special Rapporteur on the Rights of Migrants was appointed; some rights protection was integrated into the Palermo Protocols, and the UN treaty bodies confirmed that all non citizens are protected by human rights treaties. Most recently, PACE adopted minimum human rights standards for irregular migrants in Europe, drawn from international human rights law ['European minimum standards'].<sup>29</sup>

States have a general duty to protect all migrants' rights, regardless of nationality or status, both in transit, and within each state. Equally, migrants' home states have a duty to protect the rights of their citizens, and to address human rights violations which underpin involuntary migration, including refugee flight. Human rights law thus provides a framework for policies to reduce the 'drivers' of involuntary migration, by – e.g. ending gender discrimination, strengthening rights to health and education, and protecting civilians in situations of civil conflict. In turn, migrants have duties to respect national laws in 'host' states.

Migrants in Europe have rights under regional and international human rights law, which – with narrow exceptions - protect both citizens and non citizens. The European Convention on Human Rights ['ECHR'] is the most developed human rights treaty, through its case law, and because it is applied in national law and by national courts<sup>30</sup>. In addition to their duties under this Convention, all European states have also agreed to protect human rights under other international agreements, which protect social, economic, civil, political and cultural rights generally, and give specific protection to women and children. For example, international labour standards protect migrant workers; the CPT monitors to prevent torture and ill treatment regionally; and – for most European states – treaties protect victims of trafficking and smuggling. All European states are parties not only to the ECHR and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, but also to UN treaties: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture, the Convention on the Elimination of All forms of Discrimination Against Women, the Convention on the Elimination of All Forms of Racial Discrimination, and the Convention on the Rights of the Child. Most European states are parties to the Trafficking and Smuggling Protocols, and some to the Optional Protocol to the Convention Against Torture.

These treaties create a composite body of law which binds European states. It reaffirms the rights protected in the ECHR, and in some instances goes beyond to provide wider protection. The Convention on the Rights of the Child ['CRC'], for example, creates a comprehensive framework for child protection, including social and economic rights; the International Covenant on Civil and Political Rights ['ICCPR'], gives a right to equality before the law which – unlike the ECHR<sup>31</sup> – is freestanding, and not linked to other rights; the International Covenant on Economic, Social and Cultural Rights ['ICESCR'] includes migrants regardless of their status in most social and economic rights – e.g. to health and education.

The UN treaties are interpreted through General Comments. Thus, the rights in the CRC are

*'not limited to children who are citizens .... and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of nationality, immigration status or statelessness'.<sup>32</sup>*

Although few European states have yet ratified the International Convention on the Rights of All Migrant Workers and Members of their Families<sup>33</sup> it is important to recognise that this does not affect their duty to protect migrant workers' rights, since the Convention essentially mirrors rights already protected in other treaties which already bind these states. The Convention is important because it articulates rights defined in other treaties in ways which take into account the particular situation of migrant workers, including irregular migrant workers, and it provides a framework for state co-operation, including collaboration to prevent and eliminate illegal movements.

<sup>29</sup> PACE Resolution 1509 (2006).

<sup>30</sup> See Jeremy McBride, *Irregular Migrants and the European Convention on Human Rights*, AS/Mig/INf(2005)21, 2005.

<sup>31</sup> This distinction is becoming less important, as more states ratify Protocol No. 12 to the European Convention on Human Rights.

<sup>32</sup> CRC Committee General Comment No. 6 (2005) Treatment of unaccompanied and separated children outside their countries of origin, para. 12.

<sup>33</sup> Only three Council of Europe Member States have ratified this Convention: Turkey, Azerbaijan, and Bosnia and Herzegovina.

International law recognises the right of each state to determine which foreign national may enter and remain in its territory, and to return those it refuses to their countries of nationality. Within this framework, states are required to secure rights to 'everyone in their jurisdiction'.<sup>34</sup> ECHR case law is clear that illegality of status does not automatically preclude enjoyment of Convention rights.<sup>35</sup>

The Human Rights Committee has set out the general rule that each of the rights in the ICCPR must be guaranteed without discrimination between aliens and citizens. The exceptions are narrow. Non citizens have no right to political participation, or to enter or remain, and consent for entry may be given subject to conditions relating, for example, to movement, residence and employment; a state may also impose general conditions upon an alien who is in transit.

But once a migrant is physically in a state's territory, the rights set out in the Covenant

*'must ... be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons'.<sup>36</sup>*

The principle of equality and non-discrimination means that distinctions between groups are only permissible if they are prescribed by law, pursue a legitimate aim, and are strictly proportionate to that aim.

PACE has recognised a need to clarify the rights to be enjoyed by irregular migrants, despite the fact that this is a 'difficult and sensitive issue' for states<sup>37</sup>. The European minimum standards cover civil, political, economic and social rights.

#### *Minimum civil and political rights*

- *The right to life*: unreasonable force should not be used to prevent the entry of non nationals, and authorities have a duty to try to save those whose lives may be in danger in seeking to enter a country.
- *Protection from torture and inhuman or degrading treatment or punishment*. The return process should respect the right to dignity, and coercive measures should be 'kept to a minimum'.
- *Protection from slavery and forced labour*.
- *Detention* should be used *only as a last resort*, judicially authorised, and not for an excessive period of time.
- *The right to asylum and non refoulement* should be respected.
- *The right to an effective remedy before removal*, which should be before a competent, independent and impartial authority, with interpretation and legal aid.
- *Respect for private and family life*; removal should not take place where there are 'particularly strong ties'.
- *The right to marry*; 'total barriers' should not prevent them from doing so.
- *The right to equality*: there should be no discrimination in the enjoyment of rights; or discrimination on grounds of race or ethnicity in admission, stay or expulsion.

#### *Minimum economic and social rights include:*

- *Adequate housing and shelter* guaranteeing human dignity.
- *Emergency health care* should be available to irregular migrants.
- *Social protection where it is necessary to alleviate poverty and preserve human dignity*. Migrant children should enjoy social protection on the same footing as national children.
- *Rights in employment*: fair wages, reasonable working conditions, access to court to defend rights, trade activity. The state should 'rigorously' pursue employers breaching these terms.
- *Right to primary and secondary education* for all children.

<sup>34</sup> ECHR, Art. 1; ICCPR, A.2; CRC, A.2.

<sup>35</sup> See MacBride, above.

<sup>36</sup> HRC *The Nature of the General Legal Obligation Imposed on States Parties*, General Comment No. 31, para. 10.

<sup>37</sup> PACE resolution 1509 (2006).

## **Protection in Specific Situations**

How do these principles apply where the rights of irregular migrants are most at risk - on the journey; during irregular stay; in detention; and during return to countries of origin? In each situation, the state has both negative and positive duties to protect irregular migrants. There is a negative obligation to ensure that state officials do not abuse rights, e.g. by inflicting ill treatment, or by removing an individual to such treatment in another country. The positive obligation to protect requires states to take measures to ensure that private persons, including employers, do not ill treat those within their power.

### ***i. On the journey***

Restriction of avenues for legal migration has gone hand in hand with a growth in criminal involvement in the illegal transportation of migrants.

States' protection duties take a number of forms. They must protect the lives and safety of migrants - under international human rights, refugee, maritime, and criminal law. Most European states are now bound by the two Palermo Protocols on trafficking and smuggling,<sup>38</sup> which define trafficking and smuggling as international criminal offences; require states to prosecute smugglers and traffickers [but not migrants], incorporate the state's duty to rescue those in distress under maritime law, and require states to protect migrants' rights regardless of status. The fact that smuggling is defined as an illegal act in which the migrant is complicit, does not affect the state's duty to:

*'take all appropriate measures...to preserve and protect the rights [of smuggled persons] ... in particular the right to life and the right not to be subjected to torture, inhuman and degrading treatment or punishment'.*

Where arrivals include both migrants and refugees, States must put in place procedures to identify those requiring international protection and to ensure access to fair and efficient asylum procedures.

In intercepting irregular movement, or preventing illegal entry, states must respect the individual's right to leave his or her own country. Measures to control entry of non nationals, and prevent illegal border crossing must be compatible with the prohibition on inhuman and degrading treatment and punishment, and with the right to life; the European Court found that an order to border guards to fire in order to protect borders 'at all costs' was incompatible with the right to life.<sup>39</sup>

Given their particular needs and vulnerability, traumatised or injured migrants should be afforded basic humanitarian assistance, including medical and psychological care upon arrival.

### ***ii. In Detention***

Although states are not prohibited from detaining irregular migrants to prevent unauthorised entry, or with a view to deportation or removal, a state's power to detain is limited, and it must protect the rights of those detained<sup>40</sup>. Irregular migrants who are detained are not prisoners, have not been convicted of a criminal offence, and should be held in appropriate conditions. Detention should be used only as a last resort, judicially authorised, and not for an excessive period of time.

*'Where necessary, irregular migrants should be held in special detention facilities and not with convicted prisoners. Suitable accommodation should be available to lodge families together but otherwise men and women should be housed separately.'*

*Detainees should have the right to contact anyone of their choice [lawyers, family members, NGOs, UNHCR, etc], have access to adequate medical care and access to an interpreter and free legal aid where appropriate. There should be independent*

<sup>38</sup> Protocol to Prevent, Suppress and Punish Trafficking in Persons, A.9(4) ; Protocol against the Smuggling of Migrants by Land, Sea and Air.

<sup>39</sup> *Streletz, Kessler and Krenz v Germany* (934044/96; 35532/98;44801/98), 2001.

<sup>40</sup> See Guideline 6, 'Conditions under which Detention may be Ordered', Twenty Guidelines on Forced Return, CM(2005)40 final, May 2005.

*judicial scrutiny of the legality and need for continued detention. Those detained should be informed of their rights, and entitled to challenge the lawfulness of detention in court.*

*Detention of irregular migrants should be judicially authorised. Independent judicial scrutiny of the legality and need for continued detention should be available. Those detained should be expressly informed, without delay and in a language they can understand, of their rights and the procedures applicable to them. They should be entitled to take proceedings before a court to challenge speedily the lawfulness of their detention.*

*They are entitled to communicate with the consular posts of their country of origin.'*  
(PACE Resolution 1509 (2006) 12.4 – 12.6.)

CPT standards apply the prohibition on cruel, inhuman and degrading treatment to a variety of custodial settings: transit and international zones at airports, police stations, prisons and specialised detention centres. It is 'axiomatic' that detainees held in airport lounges should be provided with suitable means for sleeping, granted access to their luggage and to sanitary and washing facilities, and allowed to exercise in the open air; access to food and, if necessary, medical care should be guaranteed. It is 'indefensible' for detainees to be held in police stations for prolonged periods, deprived of any form of activity and sometimes compelled to share cells with criminal detainees. The Committee notes that 'by definition' a prison 'is not a suitable place in which to detain someone who is neither convicted nor suspected of a criminal offence'.<sup>41</sup>

There is a clear tension between human rights principles and state practice where children are detained. The CRC requires that in all actions by public authorities concerning children the best interests of the child is to be a primary consideration. Detention 'cannot be justified' solely on the basis of irregular status under national immigration law. The CRC requires – *inter alia* - that special arrangements must be made for living quarters that are suitable for children and that separate them from adults, unless it is considered in the child's best interests not to do so; the underlying approach to such a programme should be 'care' and not 'detention'. Children should have access to legal aid, the opportunity to receive visits from friends, relatives, religious, social and legal counsel and their guardian. They should be provided with all basic necessities as well as appropriate medical treatment and psychological counselling where necessary. During their period in detention, children have the right to recreation and play.<sup>42</sup>

The Optional Protocol to the UN Convention against Torture ['OP CAT'] requires states to establish 'visiting bodies' for the prevention of torture. This provides an additional safeguard for migrants at the national level, in addition to CPT visits.

### ***iii. During Irregular stay***

Entering a country in violation of its immigration laws does not deprive migrants of their fundamental human rights, nor does it affect the obligation of states to protect irregular migrants. The duty extends not only to rights for which the state is directly responsible – for example state health care – but also to abuse by private individuals, including employers.

In one rare national court decision, foreign nationals detained for reasons of national security successfully challenged their indefinite detention without trial as a violation of their *right to equality and liberty*. They argued that the law under which they were detained applied to foreigners, not to nationals, and that it was not permissible for the state to discriminate between aliens and its own nationals as regards their right to liberty. The UK House of Lords held that while the rights of the two groups might differ in an immigration context, international human rights law did not permit discrimination between citizens and aliens in their right to liberty.<sup>43</sup>

<sup>41</sup> European Committee for the Prevention of Torture: The CPT Standards, Part IV: Foreign Nationals Detained under Aliens Legislation; 7<sup>th</sup> General Report [CPT/Inf(97) 10].

<sup>42</sup> Committee on the Rights of the Child, General Comment No 6 (2005): *The treatment of unaccompanied or separated children outside the country of their origin*.

<sup>43</sup> A(FC) and others (FC) (Appellants) v. SSHD (Respondents) [2004] UKHL 56, at #136.

A body of international norms defining the *right to health* has been developed, primarily within the UN - by treaty bodies, by the Special Rapporteur on the Right to Health, and by the World Health Organisation. As parties to the International Covenant on Economic, Social and Cultural Rights, European states have direct obligations to respect the right to health generally; and specifically by 'refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants...'. It follows that health services must be available and accessible to the disadvantaged, the vulnerable and those living in poverty. On this issue, see the European Committee on Social Rights' decision in respect to health care to children and young persons within a State territory, including irregular migrants<sup>44</sup>

Within Europe, the ECHR protects those in extreme situations through its provisions relating to the right to life and the protection from inhuman and degrading treatment. The minimum standards identified by PACE which draw on the provisions of international and European human rights treaties, rights require states to make emergency health care available to irregular migrants, and to seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly. Those with long term medical conditions, such as HIV/AIDS are one vulnerable group.

Denial of essential treatment – e.g. for pregnant women – can breach the right to life as provided for in the ECHR; in the extreme context of terminal illness, e.g. AIDS, deportation to a country where treatment is not available, could breach the right to be protected from inhuman and degrading treatment. Similarly, where access to antenatal care is normally free, but made dependant on payment in the case of irregular migrants, issues of discrimination in the enjoyment of the right to life, to protection from inhuman treatment, and to family life arise.<sup>45</sup>

International law, notably the International Labour Organisation ("ILO") employment standards, and criminal laws on smuggling and trafficking, set frameworks for protection and prosecution in situations of *forced and exploitative employment*. Under the European minimum standards, irregular migrants are entitled to fair wages, reasonable working conditions, compensation for accidents, access to the courts to defend their rights, and freedom to form and join a trade union. Any employer failing to comply with these terms should be 'rigorously pursued' by the relevant authorities in member states. The European Court has defined as forced labour a situation where an individual is forced to work against his or her will and without pay; slavery would arise where the worker had no personal autonomy and had been reduced to the status of an object.<sup>46</sup>

Although trafficking is a serious crime in most European states, in practice there have been few prosecutions of trafficking for forced labour because forced labour tends not to be defined as an offence in national legislation, making it difficult to prosecute. The ILO has therefore identified six elements of forced labour which can be separately prosecuted as criminal offences: threats or actual physical harm to the worker; confinement to the workplace; debt bondage: where the worker works exclusively to pay off a debt to the employer or loan; withholding of payment; retention of passports, so that the worker cannot leave; and threat of denunciation to the authorities.

#### **iv. Removal**

In exercising their right to control entry and residence of migrants, states are generally entitled to return irregular migrants, using measures which respect human rights, safety and dignity. Forced return raises three distinct protection issues. When does human rights law prohibit removal and return? What limits are placed on the means and methods which a state may use in effecting return? What is the position where removal cannot take place?

Removal is prohibited when it would constitute *refoulement* – forcible return – of a refugee to a situation of persecution, or of a refugee or migrant to a situation where there is a real risk of 'irreparable harm' such as unlawful killing or torture, either in the first country or in any country to of subsequent removal. International human rights law prohibits *refoulement* – including through the informal transfer or 'extraordinary rendition' – to a state where he would face torture or inhuman or

<sup>44</sup> ECSR, *FIDH v. France* (14/2003), 7 November 2003.

<sup>45</sup> See ECtHR, *D v UK* (30240/96), 2 May 1997; CESCR General Comment No.14 (2000) The Right to the highest attainable standard of health.

<sup>46</sup> ECtHR, *Siliadin v France* (73316/01), 26 July 2005.



degrading treatment or punishment. In human rights law, unlike in refugee law, the prohibition applies irrespective of any security considerations in the host state.<sup>47</sup>

Removal may also be prohibited where, for example, there are particularly strong family or social ties with the 'host' country, and where the lack of links with the country to which s/he would be removed means that removal would irrevocably sever all social ties between the deportee and the community s/he is living in<sup>48</sup>. Central to protection is the migrant's ability to challenge removal in court.

There are clear limits to the means and degree of coercion which European states may use to enforce removal. The issue most commonly arises where irregular migrants, including rejected asylum seekers, are unwilling to leave the country. The limits to coercive action relate to the form of physical force used in removal proceedings and to measures like withdrawal of social benefits from irregular migrants, or sanctions on their employers, in order to compel them to co-operate with return or to leave voluntarily.

The tension which arises between the state's right to remove under immigration laws, and its duty to protect under human rights law, arises in acute form where irregular migrants with young children are excluded from health and social provision. In some instances this is a policy intended to act as an incentive for 'voluntary' departure, but it contravenes the Convention on the Rights of the Child's requirement that 'no child' is deprived of access to health care.<sup>49</sup>

The CPT has set standards for the use of coercion during removal. It recognises that law enforcement officers may on occasion have to use force, but the force used should be no more than is reasonably necessary. It would be 'entirely unacceptable' for migrants to be physically assaulted as a form of persuasion to board a means of transport or as a punishment for not having done so. Any medication must only be given on the basis of a medical decision and in accordance with medical ethics. The Committee recommends 'an absolute ban on the use of means likely to obstruct the airways [nose and/or mouth] partially or wholly, which create a 'considerable risk' to the lives of the persons concerned, for example by gagging the mouth and/or nose with adhesive tape, putting a cushion or padded glove on the face, or pushing the face against the back of the seat in front. Security considerations 'can never serve to justify' escort staff wearing masks during deportation operations. The practice is highly undesirable since it could make it difficult to ascertain who is responsible in the event of allegations of ill treatment.<sup>50</sup>

Guidelines adopted by the Council of Europe's Committee of Ministers apply states' human rights duties to the specific circumstances of forced return: procedural protection, protection during detention, and during removal. They confirm state responsibility for the actions of private contractors as well as state employees, and require 'effective and independent investigation' into any complaint of ill treatment.<sup>51</sup>

#### IV. Some Obstacles and Dilemmas

This paper has set out the human rights which migrants enjoy, regardless of legal status, in theory and in practice. The reasons why they frequently do not enjoy such rights may be explained on a number of different levels. These obstacles include: illegality; ignorance of rights; impact of counter-terrorism measures; violations in the private sector; an economic and social rights protection 'gap'; the use of biometric ID and statelessness.

##### *Illegality*

International law leaves the decision whether to penalise irregular migration to States. Many criminalise illegal entry or stay; this is a 'victimless' crime, with injury to the state's authority in controlling its borders, rather than to an individual. *Illegality* has a number of negative effects which can create dilemmas for states, as well as becoming obstacles to protection. The dilemmas arise

<sup>47</sup> CAT, *Agiza v Sweden* (233/2003), 20 May 2005; ECtHR, *Chahal v UK* (22414/93), 15 November 1996.

<sup>48</sup> ECtHR, *Berrehab v Netherlands* (10730/84), 21 June 1988; ECtHR, *Nasri v France* (19465/92), 13 July 1995.

<sup>49</sup> CRC Art.24(1).

<sup>50</sup> *Foreign nationals detained under aliens legislation*, 7th General Report [CPT/Inf(97) 10], para. 36. *Deportation of foreign nationals by air*, 13 General Report [CPT/Inf (2003) 35], para. 36, and 38.

<sup>51</sup> *Twenty Guidelines on Forced Return*, CM(2005)40 final, May 2005.

because although illegality deters and penalises irregular migration, it also affects the state's ability to collect tax and social security revenues, prosecute exploitative employers, and gather statistics, because irregular migrants avoid contact with national authorities, even if their passports are stolen, or wages are not paid; this then increases their vulnerability to abuse. Another consequence is that criminal justice policies may edge out social policies, as where child protection gives way to immigration enforcement. At the same time, the success of criminalisation in preventing demand driven migration has been, at best, very mixed.

This is the broad context in which states have adopted regularisation programmes, like that in Spain in 2005, with the aim of incorporating workers from the underground economy into the formal economy, increasing contributions to tax and social security revenues, and limiting abuse of workers' rights.

#### *Ignorance of Rights*

Another major obstacle is ignorance of rights, both by state agencies and by migrants themselves. Many migrants do not know the rights to which they are entitled, and policy makers do not know their protection obligations. The rights are now clearer – as a result of the identification of European minimum standards - and these general norms now need to be applied in specific situations; one example is the need to define the scope of 'emergency' health care.

#### *Impact of Counter-terrorism Measures*

Conflicts between the interests of national security and migrants' rights can also undermine protection. Prolonged detention is one aspect; another are measures taken by some states to sidestep their non *refoulement* obligations, for example where states have removed migrants who are suspected as terrorists to countries in which they risk being tortured, in violation of treaty obligations, on the basis of 'diplomatic assurances' that ill-treatment will not take place.

#### *Private Sector Violations*

Where rights violations involve the private sector, effective protection requires knowledge by the state that violations are taking place, an ability to prevent them in the situations in which they occur, and on national laws which make it possible to prosecute violations. Where there is no legal employment contract, because the worker is irregular, courts may have no jurisdiction to award compensation. The obstacles for states are also substantial where the victims are irregular, moving under cover of smugglers or traffickers, or working in a 'twilight' economy.

#### *Protection of migrants moving because of violations of social and economic rights*

A broader dilemma is the asymmetry between the protection afforded to refugees who flee violations of their civil and political rights, and the lack of comparable protection for migrants who leave in the face of extreme violations of economic, social and cultural rights. The Special Rapporteur on the Human Rights of Migrants has called for protection for those who migrate because of 'serious socio-economic and developmental failures'.<sup>52</sup>

#### *Biometric Identity Documents*

While biometric identity documents, which operate between countries, are important security measures, the effect of mistake on migrants will be much greater than on citizens where a computer malfunctions, and misidentifies an individual, or fails to record a legal entry, and so nullifies lawful entry; appeals should be a part of immigration law.

#### *Statelessness*

Irregular migrants who are legally stateless cannot be removed because there is no state which they are legally entitled to enter; those who are stateless de facto are in a similar position because their state of origin will not co-operate in their return. In those cases where the 'host' state is unwilling to give a legal immigration status, there is often a situation of very prolonged uncertainty, in which an individual is detained. The numbers may not be high but the cost – in human terms to the individual, and in financial terms to the state - is significant.

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<sup>52</sup> UN Special Rapporteur on Human Rights of Migrants A/61/324, para. 35.

## V. Best Practices

But within this often bleak picture of vulnerability, some good – even “best” – practices can be found.

### *Initiatives to protect workers and ensure decent work.*

- By Civil Society
  - The Platform for International Cooperation on Undocumented Migrants’ (PICUM) Ten Ways to Protect Migrant Workers range from acknowledging the social and economic presence of undocumented workers, and safeguarding the right to organise, to investing in workplace inspection, and ratifying the CMW.<sup>53</sup>
  - The Sveriges Arbetares Centralorganisation [SAC] undertakes outreach to undocumented workers in Sweden.
- By the state and by trade unions
  - Lisbon Trades Council [União dos Sindicatos de Lisboa] has campaigned for legislation to establish the accountability of employers in industries that rely heavily on sub contractors. Under the law, if a worker files a complaint against an employer for exploitation, responsibility is placed on the person who contracted worker, and so upwards until, if necessary, responsibility rests with the main employer.
  - The Gangmaster Act creates a compulsory licensing system in the UK for ‘gangmasters’, who are employment agencies who supply casual labour to food, and agricultural industries, and for related processing and packaging activities. The Act’s purpose is to curb the exploitative activities of gangmasters. It is backed up by criminal sanctions. The campaign to regulate gangmasters was led by the Transport and General Workers Union.

### *Initiative to Prevent Irregular Migration*

- Solidaridad Directa in Cadiz, Spain, provides assistance to one village in Morocco in order to reduce the causes of irregular migration: funds to enable children to stay in school, health care facilities, and information to young men on the dangers of smuggling and the illegal sea crossing to Spain.

### *Rights Based Policies*

- The UK Prison Inspectorate has published *Immigration Detention Expectations*, which sets out criteria for assessing the conditions and treatment detainees, from reception to departure. The criteria are developed from the perspective of the needs of an immigration detainee. They draw on, and are referenced against, international human rights standards.<sup>54</sup>

<sup>53</sup> PICUM, *Ten Ways to Protect Undocumented Migrant Workers*, 2005.

<sup>54</sup> *Immigration Detention Expectations: criteria for assessing the conditions for and treatment of immigration detainees*, HMIP, 2007.

## VI. Conclusions

As is clear from this review, the practical protection of irregular migrants is at an early stage, in Europe and elsewhere, and the issues and needs which have to be resolved are large and complex. Twelve can be highlighted:

1. Migration policies need to go beyond law enforcement and take measures to prevent involuntary migration, by addressing its underlying causes: poverty, human rights violations and conflict in poorer states. Migration should become a matter of choice, and the option to remain in one's country a viable one for all people.
2. Rights based policy making requires accurate and detailed information: on countries, issues and cases of abuse; the work of UN Special Rapporteurs shows how much can be achieved with modest resources; European human rights monitoring bodies should also contribute to strengthening protection, and addressing the information "gap".
3. It is imperative to begin a process to identify and account for the thousands of 'missing' undocumented migrants, who disappear – on the journey or after arrival - and whose identities are unknown.
4. Migrants should be registered on arrival and provided with some temporary documentation, as the UNHCR recommends for asylum seekers and refugees.
5. More work should be done to inform migrants of their rights, irrespective of their irregular situation, in order to fill the knowledge gap.
6. There is a need for universal human rights principles to be effectively applied to the specific situation of irregular migrants. To this end, states should be encouraged to ratify the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.
7. Acting in their capacity as state parties to the Convention on the Rights of the Child, Council of Europe should apply protection principles for children migrating irregularly as developed by the Committee on the Rights of the Child as well as the Separated Children in Europe Programme;
8. States should develop human rights guidelines for border officials who deal with arriving migrants, within the Council of Europe and the European Union, in cooperation with UNHCR.
9. Greater use of the European Social Charter should be made in order to protect basic social and economic rights of irregular migrants. Furthermore, greater use needs to be made of the Collective Complaints mechanism under the European Social Charter in terms of concern to regular and irregular migrants.
10. Detention should only be used as a last resort; where it is used inspection of detention centres – by the CPT – plays a powerful protection role, and should be replicated at a national level, as required by UN OPCAT
11. The development of European Court of Human rights case-law on the rights of irregular migrants will be important for their protection as it is for other vulnerable groups, such as the Roma. This can then set a compass course for national law and practice.
12. States should recognise the special vulnerability of irregular migrants who are stateless in law or in fact, and regularise their immigration status. Another group of migrants whose situation deserves special attention, are those with particularly strong family ties to the country where they are living. For these groups, regularisation programmes are a humane and sensible response.