COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME

CommDH/Speech(2013)2
English only

"Addressing the human rights challenges underlying the criminalisation of irregular migrants and national minorities in Europe"

Keynote speech by Nils Muižnieks
Council of Europe Commissioner for Human Rights

The Centre for European Policy Studies Seminar

Brussels, 22 February 2013

Ladies and gentlemen,

It is a pleasure for me to give this keynote at the Centre for European Policy Studies, on the question of the human rights challenges posed by criminalisation of migration. My Office had the chance in 2009-2010 to work on this subject with one of CEPS' senior research fellows, Prof. Elspeth Guild, and produce an Issue Paper.

The use of criminal sanctions,[1] or administrative sanctions that mimic criminal ones, such as detention, in response to the irregular entry and presence of migrants, including asylum seekers, is not new. What is relatively recent though in Europe is the very wide use of the language of criminalisation by political leaders and the subsequent scapegoating of migrants, widely practised in many European states in the current times of economic crisis and public frustration. I regret to say that similar, illegality-centred, language has also been employed in key EU migration-related legislation such as the 2009 directive concerning sanctions on employers of "illegally staying" migrants and the 2008 'Return Directive'.

The choice of language is crucial for the image of migrants which national authorities and European institutions project. The oft-used terms 'illegal migrant/migration", instead of 'irregular migrant/migration', are stigmatising. "Illegal migration" renders suspicious in the eyes of the public the movement of persons across borders. The suspicion is linked to criminal law – the measure of legality as opposed to illegality.

The situation is compounded by the use of other, sensational terms, such as "flood" or "inundation", and "invasion" or even "bomb", by a number of politicians in Europe and the media, linking thus migratory movements to natural calamities or even armed conflicts.

Indeed, irregular, or even regular, migration in Europe is too often manipulated for micro-political purposes to gain votes from a frightened public opinion. This is particularly the case of a number of extremist, racist and violent political parties in Europe that unfortunately rise this period of time putting at serious risk European human rights standards and democratic values. Often in this context the media also forget the public service nature of their work and the deontological principles that should guide them. For this, any migration-related discussion needs to be based on facts and not myths.

[1] At least 12 of the EU member states provide for criminal sanction for irregular entry/stay/border crossing see European Migration Network, Annexes to Synthesis Report on Practical Measures to Reduce Irregular Migration, 2012.

Despite widely shared perceptions, data of 2010 indicate that third-country nationals in the EU area constitute only approximately 4% of the total EU population. Also, data concerning the period of 2008 to 2011 indicate that irregular migration is, in fact, in decline in many EU member states, the major migrant recipients. While in 2008 the number of third-country nationals found to be irregularly present in EU countries was around 608 000, in 2011 this number was around 470 000. Available early 2012 data concerning apprehensions of irregular migrants indicated a similar downward trend. Given the interrelation between economic growth in host countries and immigration, there are strong reasons to believe that the decrease of irregular migration inflows is one of the side effects of the current economic crisis in the Europe.

This however does not mean that all the EU member states face the same migratory pressures. Those in the south continue to be faced with considerably higher irregular, mixed migration flows and to be in dire need of effective solidarity and responsibility sharing with the other European countries.

As to states' responses, they do have a legitimate interest to control their borders and can refuse the entry and stay of non-nationals. What is often sidelined though in practice is the fact that there are binding international and European agreements, such as those concerning the right of individuals to seek asylum through fair procedures. In this regard, the principle of *non-refoulement* has been established in international law and practice in order to protect individuals from being sent back to situations which would threaten their lives or personal safety.

Migrants, including asylum seekers, are finding themselves increasingly targeted in Europe and some governments have even set quotas on how many should be found and deported through fast-track procedures. It is necessary – and important – to make clear that irregular migrants too have human rights such as freedom from ill-treatment and from the arbitrary application of the law.

I am also aware of measures taken particularly in certain south-east Council of Europe member states that *criminalize* attempts to, inter alia, enter another European state in order to seek asylum. These are retrogressive steps that jeopardise long-standing, ethical and legal principles.

For one thing, to put a criminal stamp on attempts to enter a country undermines the right to seek asylum and affect refugees. In addition, persons who have been smuggled into a country should not be seen as having committed a crime. This is an established principle of international law. There are also agreed international standards to protect persons who have been victims of human trafficking from any criminal liability.

The 1990 International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, expressly holds that if migrants are detained for violating provisions relating to migration, they should be held separately from convicted persons or persons detained pending trial. They are not criminals and should not be seen as such.

I wish to stress that criminalization is a disproportionate measure which exceeds a state's legitimate interest in controlling its borders. To criminalize irregular migrants, in effect, equates them with the smugglers or employers who, in many cases, exploit them. Such a policy causes further stigmatization and marginalization, even though the majority of migrants contribute to the development of European states and their societies. Immigration offences should remain *administrative* in nature.

There are two particular side effects which states should also bear in mind when they think about resorting to criminal law in order to control irregular immigration:

Firstly, the issue of over-burdening the court system. Courts in many European countries face serious problems of excessive length of proceedings, in violation of Article 6 of the European Convention on Human Rights. Indeed, this in turn encourages a large number of applications before the European Court of Human Rights.

Secondly, the issue of over-crowding in prisons and detention centres. Categorizing irregular migrants as “criminals” under national law entails their pre-trial and post-conviction detention. It is well-known that a number of Council of Europe member states are faced with a serious problem of overcrowding and of inhumane and degrading conditions in detention centres and prisons. Foreign nationals in administrative detention are particularly vulnerable to such abusive treatment.

In this context, I should like to reiterate my grave concern about the possibility of detaining irregular migrants in EU member states for a maximum period of 18 months. This possibility was provided for by the “Return Directive”. This was an unfortunate response to the need to harmonize European policies in this area.

Depriving migrants from their liberty has not proven to be effective. It is also very costly financially for the states and traumatising for migrants and their families. I support the Council of Europe Parliamentary Assembly Resolution 1707 (2010) and call on states to incorporate into national law and practice a proper legal institutional framework to ensure that alternatives to detention are considered first, if release or temporary admission is not granted. Alternatives such as registration and reporting or controlled release to individuals, family members, or non-governmental organisations, are feasible and easily reconcilable with human rights standards.

Political decision-makers should not lose the human rights perspective in this discussion and should try to formulate a rational long-term strategy. Such an approach has to include the need for migrant labour to perform the jobs which nationals very often refuse to take. In other words, European states should face up to the reality that irregular migrants are working because migrant labour is needed in a number of sectors, such as computer and information technology, agriculture, tourism and health care.[2]

Migration is a social phenomenon which requires multi-lateral and intelligent action by states. Irregular migration has increased and thrived not only because of underdevelopment in migrants’ countries of origin.

Another root cause is the lack of clear immigration mechanisms and procedures which can respond to labour demands through regular migration channels, and the lack of comprehensive and efficient mechanisms of cooperation between receiving states on the one hand, and, on the other, sending and transit states. Thus I welcome the European Commission’s willingness to promote a migration-related dialogue with Turkey, a country that plays a pivotal role for migration management in Europe.

Drawing upon the important guidelines contained in the Council of Europe Parliamentary Assembly’s Recommendation 1618 (2003) and Resolution 1509 (2006) regarding irregular migrants, European states should endeavour to establish transparent and efficient legal immigration avenues, as a way out of irregular migration routes.

[2] European Integration Forum, Background paper on “The contribution of migrants to economic growth in the EU”, October 2012.

Such efforts may well benefit from member states' accession to the 1990 International Convention on Migrant Workers, the most comprehensive, international treaty on migrant workers reaffirming and establishing basic human rights norms for regular and irregular migrants. To date it has been ratified by few European states, even though many European countries actively participated in its drafting. Ratification and implementation of this treaty will enhance the effective protection of all migrant workers' human rights which should be an absolute priority for every state's migration policy and practice.

*

Migration criminalization is compounded when it targets national minorities. This has been in particular the case of Roma migrants in Europe, at the level of both host countries and countries of origin. The harsh and questionable, from a human rights point of view, responses and practices in recent years against Roma migrants in some European countries, such as Italy and France, have been widely debated. What needs though to be even more debated, analysed and acted upon is the situation of Roma migrants in their countries of origin, especially those in the Western Balkans, that aspire to become EU member states.

Measures such as imprisonment for a failed attempt to seek asylum in another European state, repossession of travel documents or automatic exit bans in cases of forced returns from EU states or even suspicion of possible misuse of visa-free travel regime in the EU, targeting in practice Roma migrants, give rise to serious human rights-related concerns and leave many more unanswered in the countries of origin. Such concerns are echoed in the November 2012 judgment of the European Court of Human Rights in the case of *Stamose v. Bulgaria*, concerning the automatic exit ban imposed on a Bulgarian national who had breached the immigration law of another state. The Court found in this case a violation of the applicant's freedom of movement as enshrined in the European Convention on Human Rights.

There is a dire need to tackle the root causes of Roma migration in Europe. Most of the countries of Roma migrant origin, especially in the region of former Yugoslavia, and a number of central and eastern European states that are now EU members, suffer from long-standing structural, institutional shortcomings that make difficult the full enjoyment of human rights by all community members.

Certain national minorities, especially Roma, continue to suffer from overt, often institutionalized, discrimination and social exclusion. The fact that Roma are overrepresented in the category of Western Balkan asylum seekers in the EU reflects their plight on the ground and calls for the source countries', as well as the EU's, alert and sensitization.

Many of those who have moved to and sought asylum in the EU have done so because of a genuine experience of physical and/or economic insecurity. They have wanted to get away from injustices and/or poverty and abject misery that I have witnessed during my visits.

Effective protection of national minority members, including the Roma, needs to be part and parcel of the necessary institutional reforms in the Western Balkan countries that are still transiting from wars and instability to stability and long-term security. I welcome the European Commission's and states' position that 'assistance to minority populations, in particular Roma communities, should be increased and more targeted in the countries of origin'.

The multi-ethnic nature of all countries in this region call for the adoption by determined and wise political leaderships of positive, socially and politically inclusive measures benefitting all

national minorities. Of particular importance is the promotion of participation of minority members in key states sectors, such as the judiciary and the police. As regards in particular Roma, all serious shortcomings in the areas of education, health care, housing and employment need to be systematically addressed by the states concerned without delay.

Particular attention is required to the problem of still thousands of Roma stateless persons from the Western Balkans, whether remaining there or are migrants, including those who still remain with basic personal identification documents. I reiterate my call on all states in the region that have not done so to proceed to the accession of two key Council of Europe treaties, the 1997 Convention on Nationality and the 2006 Convention on the avoidance of statelessness in relation to state succession.

*

I would like to conclude by stressing that criminalization is first a political and then a legal construct. Putting the stigma of a criminal on a person who migrates irregularly, in the hope of attaining better living conditions or being provided with international protection, is contrary to established principles in international law and ethics. Moreover, and above all, it is utterly superficial and counter-productive given that it leaves untouched the root causes of migration.

What European states need is a paradigm shift and the adoption of a much wider prism of thinking and action that would give emphasis on the effective protection of everybody's human rights in Europe, as well as in the rest of the world from which Europe may not be disassociated.