



COMMISSIONER FOR HUMAN RIGHTS
COMMISSAIRE AUX DROITS DE L'HOMME



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COMMISSIONER FOR HUMAN RIGHTS

**POSITIONS ON THE RIGHTS OF MIGRANTS IN
AN IRREGULAR SITUATION**

This is a collection of Positions on the rights of migrants in an irregular situation from the Council of Europe Commissioner for Human Rights. It is a short summary of the findings of the Commissioner based on his country-monitoring and thematic reports, issue papers, recommendations, opinions and viewpoints. By collating these findings drawn from the different components of his work, the Commissioner presents a summary of his conclusions and recommendations concerning the rights of migrants in an irregular situation.. The Positions will be continuously updated in the further light of the Commissioner's ongoing work.

Though precise statistics are not available, for obvious reasons, it is estimated that there are more than 5.5 million irregular migrants within the European Union, and more still in other parts of Europe. In the Russian Federation it is estimated that there are no less than 8 million.

They arrive from across the ocean in shaky and dangerous boats, many losing their lives along the way, with their anonymous bodies occasionally washing up on European shores. They arrive via land hidden in the back of smugglers' trucks, travelling thousands of miles in cramped and dangerous conditions. They find ways to cross land borders in secret, or elude border controls with false documents. Some overstay their visas in European countries. However they arrive, they join the ranks of Europe's *sans papiers*, with no rights in their countries of residence and vulnerable to many forms of exploitation and abuse. Many already owe large debts to smugglers or have become victims to traffickers before arriving in their destination countries. European countries tend to approach this population as a "security threat". Seeking to protect their borders, they criminalise these migrants, lock them up in prison-like conditions, and expel them as quickly as possible – even to countries where they risk persecution and torture.

These foreigners are not criminals; they are guilty only of having aspired to a better life, a job or, in the saddest and most distressing cases, protection from persecution.

All migrants have human rights – and these must be respected

All migrants have human rights, even when they are not citizens of the country. This includes irregular migrants. Human rights standards in the UN treaties, the European Convention on Human Rights and the European Social Charter also apply to non-citizens. The general rule is that rights should be guaranteed without discrimination between citizens and foreign nationals. Equal treatment is the principle. This is demonstrated by the use of the word "everyone" as the subject in many of the articles in the key treaties.

These standards protect social, economic, civil, political and cultural rights generally, and give specific protection to women and children. The exceptions relate to the right of political participation and freedom of movement.

Apart from the broader human rights treaties, there are also international conventions specifically addressing the situation of migrant workers. ILO Convention No. 97 deals with remuneration, taxation and access to trade unions. The International Convention on the Protection of All Migrant Workers and Members of Their Families is basically a UN compilation of rights already agreed upon as part of other human rights treaties – including for migrants whose stay in the country is not regularised.

Given the wide number of treaties which apply and the variations in signatures and ratifications by Council of Europe member states, the Parliamentary Assembly of the Council of Europe (PACE) recognised the need to clarify the minimum rights to be enjoyed by irregular migrants based on existing international and European human rights law. The European minimum standards cover civil, political, economic and social rights.

Minimum civil and political rights include:

- *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 anyone from marrying.
- *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 courts to defend rights, and participation in trade unions. The state should 'rigorously' pursue employers breaching these terms.
- Right to primary and secondary education for all children.

Intercepting irregular movement and receiving migrants

In intercepting irregular movement, or preventing irregular entry, states must respect the individual's right to leave his or her own country. Measures to control the entry of non-nationals, and prevent irregular border crossing must be compatible with the prohibition on inhuman and degrading treatment and punishment, and with the right to life. States should adopt the necessary measures to ensure that these rights are always respected regardless of the manner in which an individual enters or attempts to enter a country.

In order to function effectively and humanely, reception procedures need to be based on clear, human-rights based policies. They also require more resources and adequately trained border police. 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. Accommodation facilities, food and living conditions provided to migrants must meet basic standards of decency.

Furthermore, given their particular needs and vulnerability, traumatised or injured migrants should be afforded basic humanitarian assistance, including medical and psychological care upon arrival. They also have the right to access health care in the event of illness and their children have the right to education without discrimination.

Obstacles – such as making access contingent on a certain length of presence on national territory – should not be placed in the way of access to these rights.

Decriminalising migration

International law has clearly established the principle that foreign nationals whose only offence is the violation of provisions relating to migration should not be treated as criminals or potential criminals by transit or host states. Despite this, the state trend is quite the opposite and criminalisation has become more and more common.

The irregular entry and stay of an alien should in principle be an administrative offence, and not a criminal one. Criminalising irregular migrants is extremely harmful and leads to inextricable situations

in which these persons, who are in no sense offenders, are treated as if they were guilty. The countries that have established criminal law provisions relating to foreigners' irregular entry and stay, should thus move to decriminalise such offences.

The principle of not criminalising irregular migrants should apply to all aspects of their treatment. Member states should accordingly refrain from adopting criminal laws which apply exclusively to foreign nationals unless this is specifically and clearly justified on grounds of international human rights commitments and is consistent with the relevant Council of Europe treaties.

Member states should avoid using the terms “illegal migrant” or ‘illegal immigration’ in their press releases and discourage their use generally in the media. Ministers and other public officials should be vigilant in this regard in all their public and semi-public pronouncements and deliberations. The term is counter productive and misleading. People are not ‘illegal’. Their status vis-à-vis state authorities may not be regular but that does not render the individual somehow beyond humanity.

Conditions of 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 in full compliance notably with Articles 3 and 5 of the European Convention on Human Rights and the European Court of Human Rights' pertinent case law.

Detention should be used only as a last resort, judicially authorised, and not for an excessive period of time. No one should be subject to detention of any kind on the sole basis that he or she is not a national. As a matter of principle, no person seeking international protection should be subject to detention. It should always be recalled that irregular migrants who are detained for breaching provisions relating to migration are not criminals and should be held in appropriate conditions.

Pre-deportation detention should only be used when it is thoroughly justified and when it is clear that the deportation can in fact take place in the immediate future. Authorities should keep the number of rejected asylum seekers and irregular migrants as well as the time they have to spend in detention to a strict minimum.

Detention must not be used with the intention of bringing pressure on an individual to co-operate with authorities to facilitate the deportation process. In situations where it is impossible to deport foreigners whose applications to stay have been finally rejected, the authorities should find alternative solutions to confinement for indefinite periods.

Any place of detention must provide conditions which meet the needs of the individuals and fulfil the requirements set out by the Council of Europe standards. For example an “open station” approach in detention facilities, where cells or holding areas are kept open during the day for access to an open area, are examples of appropriate conditions. Strict regimes where detainees are kept in prison-like conditions in closed cells for most of the day are highly inappropriate, as is placing them in prisons.

The standards set out in a Parliamentary Assembly Resolution on the “Human rights of irregular migrants” stipulate that:

“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], access to adequate medical care and access to an interpreter and free legal aid where appropriate. There should be independent 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.

Those detained should be expressly informed, without delay and in a language they can understand, of their rights and the procedures applicable to them.¹

Migrant detainees should benefit from frequent access to means of communicating with the outside world, including being able to use a telephone and receive visitors. It should be recalled that for some individuals visits are their only means of communicating with a person capable of understanding their language. Special attention should also be given to facilitating visits by family members to whom “more lenient measures” may have been imposed and it should be ensured that there are no bureaucratic or other obstacles in the way of NGO access to detainees.

Detainees should also be provided with information about their situation and possibilities for release, in order to minimise feelings of uncertainty. In addition, a variety of meaningful activities, such as sports, vocational training and other education, should be made available to all individuals detained for several weeks.

Conditions for accommodating asylum seekers and migrants must respect their human dignity and should in no circumstances amount to inhuman or degrading treatment.

The European Committee for the Prevention of Torture (CPT) has made it clear that the prohibition on cruel, inhuman and degrading treatment applies to a variety of custodial settings: transit and international zones at airports, police stations, prisons and specialised detention centres.

Factors that must be appropriate include: hygiene, sanitary facilities, sleeping arrangements, state of the building, the environment (light, size of holding cells, smokiness, whether there is overcrowding), ventilation, access to the outdoors, recreation possibilities and access to health care.

Detainees must not be held in police stations for prolonged periods, be deprived of all forms of activity or be compelled to share cells with criminal detainees.² Persons 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 also be guaranteed.

Strict rules concerning removal

Collective expulsion of foreign nationals is prohibited, as provided notably by Article 4 of Protocol No 4 to the European Convention on Human Rights.

In all cases, return should take place in safety and dignity. Removal is strictly prohibited when it would constitute refoulement 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 of subsequent removal. Diplomatic assurances do not provide an adequate safeguard against such ill treatment.

The prohibition of refoulement also implies that states need to ensure that deportees are not asylum seekers; individuals must be given sufficient time to apply for asylum, taking into consideration that many arrive physically and mentally distressed after dangerous journeys. In human rights law, the prohibition applies irrespective of any security considerations in the host state. This principle must also be firmly respected when migrants are intercepted at sea or at points of entry to the country. Furthermore, it should be recalled that democratic countries which are generally safe may still, on

¹ PACE Resolution 1509 (2006) 12.4 - 12.6.

² See discussion in Issue Paper, “The Human Rights of Irregular Migrants in Europe”, CommDH/IssuePaper(2007)1.

occasion, be unsafe for certain persons or groups. Countries must examine the safety of a state with respect to the individual situation of a deportee. In the extreme context of terminal illness, for example AIDS, deportation to a country where treatment is not available, could breach the right to be protected from inhuman and degrading treatment.

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 an individual would be removed means that removal would irrevocably sever all social ties between the deportee and the community she or he is living in.

Individuals must be given the opportunity to challenge removal orders before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence: preferably a court. Such appeals should have a suspensive effect when the returnee has an arguable claim that the removal order could lead to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment.

Legal proceedings must fully respect procedural guarantees, particularly the right to legal assistance, representation and an interpreter. The grounds for the decision should be indicated along with the appeals that can be made. All cases of unlawful deportations or returns should be thoroughly investigated and the appropriate administrative and criminal sanctions imposed. It is essential that member states carefully respect Protocol 4 to the ECHR and the *Twenty Guidelines on Forced Return*³, issued by the Council of Europe Committee of Ministers. These prohibit collective expulsion orders and also require that each case be individually examined and each deportation order individually adopted.

Where a forced return is unavoidable, it must be carried out with complete transparency in order to ensure that fundamental human rights are respected at all stages. There are clear limits to the means and degree of coercion which European states may use to enforce removal.

The European Committee for the Prevention of Torture (CPT) has set standards in this area. Any 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 transportation 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 CPT recommends an absolute ban on the use of means likely to obstruct the respiratory system [nose and/or mouth] partially or wholly, which create a considerable risk to the lives of the persons concerned. 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.⁴

States should authorise the presence of a representative of a humanitarian organisation throughout the removal procedure as a means of ensuring the adequate treatment of individuals being deported. When allegations of ill treatment arise, there should also be an effective and independent investigation and appropriate sanctions. It is essential that law enforcement officials and other actors responsible for deportations receive thorough training in applicable human rights standards.

Arrests carried out for the purpose of removal must also comply with human rights standards. In this connection, authorities should ensure that foreigners are not arrested inside or around schools or administrative offices, such as prefectures.

³ *Twenty Guidelines on Forced Return*, adopted by the Committee of Ministers on 5 May 2005, www.coe.int/t/cm.

⁴ Commissioner for Human Rights. *The Human Rights of Irregular Migrants in Europe*, CommDH/IssuePaper(2007)1, Strasbourg, 17 December 2007.

Furthermore, the setting by states of quantitative removal targets for the numbers of unlawful migrants should be ceased. The pressure generated by such targets may prompt police to take into custody growing numbers of people, sometimes using dubious methods. There is also a risk that discriminatory police checks based on physical appearance will increase.

KEY RECOMMENDATIONS

All migrants have human rights and these should be respected. The general rule is that rights should be guaranteed without discrimination between citizens and foreign nationals. European minimum standards encompass a broad range of civil, political, social and economic rights.

Member states should accede to the 1977 European Convention on the Legal Status of Migrant Workers and to the International Convention on the Protection of All Migrant Workers and Members of Their Families.

Measures to control the entry of non-nationals, and prevent irregular border crossing must be compatible with the prohibition on inhuman and degrading treatment and punishment, and with the right to life.

Reception procedures need more resources, adequately trained border police and clear, human-rights-based policies in order to function effectively and humanely. Accommodation facilities, food and living conditions provided to migrants must meet basic standards of decency. It is also essential that migrants have access to necessary health care.

Irregular entry or stay should not be regarded as a criminal offence nor treated as such or as an aggravating circumstance for non-related offences.

No one should be subject to detention of any kind on the sole basis that he or she is not a national. As a matter of principle, no person seeking international protection should be subject to detention.

Detention should be used only as a last resort, judicially authorised, and not exceed a reasonable period of time. In addition, the use of pre-deportation detention should be restricted to situations where it is clear that the deportation can in fact take place in the immediate future. In relevant cases, authorities should find alternative solutions to confinement for indefinite periods.

Rather than prison-style facilities, detention centres for migrants should maintain a more open approach, with cells and common spaces open during the day. Detainees should also have regular access to means of communication and be able to receive visits; they should receive accurate information about their situation and possibilities for release. In the event that they are detained for several weeks, they should have access to meaningful activities such as sport and vocational training.

The prohibition on cruel, inhuman and degrading treatment is absolute and applies to all varieties of custodial settings: transit and international zones at airports, police stations, prisons and specialised detention centres. Detainees held in airport lounges should be provided with suitable sleeping space, access to their luggage, to open air spaces for exercising, washing facilities, food and medical care.

Refoulement of a refugee or a migrant to a situation of persecution, or to a situation where there is a real risk of 'irreparable harm', such as killing or torture, in any country of subsequent removal, must be prohibited. Individuals must be given sufficient time to apply for asylum, and countries must thoroughly examine the safety of a state with respect to the individual situation of a deportee.

Member states should effectively abide by Protocol No 4 to the European Convention on Human Rights which prohibits collective expulsion of foreign nationals. Member states that have not as yet done so should promptly ratify this Protocol.

Removal should be avoided when it would sever an individual's strong family or social ties with the receiving country.

There must be opportunities to challenge a removal order before a competent authority or body composed of members who are impartial and who enjoy safeguards of independence: preferably a court. These appeals should have a suspensive effect when the returnee has an arguable claim that the removal order could lead to a real risk of the death penalty, torture or inhuman or degrading treatment or punishment.

Legal proceedings must offer all procedural guarantees, including effective access to legal assistance and representation and the right to an interpreter.

Forced returns and arrests must be carried out with complete transparency and respect for fundamental human rights at all stages. The use of force, medication or restraint must be strictly regulated and monitored. No arrests should be conducted in schools or administrative offices. Furthermore, all actors responsible for deportations or dealing with immigration issues should receive thorough training in applicable human rights standards.