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*“Protecting the human rights
of irregular migrants: the role
of national human rights structures”*

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WORKSHOP DEBRIEFING PAPER

University of Padua
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Université de Padoue
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¹ *The electronic version of this publication is also available at www.centrodirittiumani.unipd.it*

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INTRODUCTION

Co-financed by the Council of Europe (CoE) and the European Union (EU), the “*Peer-to-Peer Project*” consists of a work programme to be implemented, in 2009, by the Council of Europe’s Directorate General of Human Rights and Legal Affairs (DGHL) and the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua². The main tool of the programme is the organisation of workshops for staff members of the National Human Rights Structures (NHRSs), in order to convey information on the legal norms governing priority areas of NHRS action and to proceed to a peer review of relevant practices used or envisaged throughout Europe.

In accordance with a list of workshop’s topics previously agreed in consultation with NHRS contact persons, this second “*Peer-to-Peer*” workshop, which took place on 17–19 June 2008 in Padua (Italy), focused on “*Protecting the human rights of irregular migrants: the role of national human rights structures*”. In particular, the aim of the workshop was to convey selected information on international legal standards applicable to irregular migrants. To this purpose, during the first session a flow chart of applicable rights to irregular migrants surrounding their arrival, stay and departure, was presented and explained to the participants. The working sessions focussed on three interrelated situations relevant to irregular migration, from the time of the possible rescue at sea up to the event of repatriation.

The two-day workshop was attended by a total of 39 persons, including participants, speakers and organisers. Participants were mainly from NHRSs of CoE non EU countries such as Albania, Armenia, Azerbaijan, Bosnia

² *The Interdepartmental Centre on Human Rights and the Rights of Peoples is the structure of the University of Padua established in 1982 with the mandate to carry out teaching, training and research activities in the field of human rights.*

and Herzegovina, Georgia, Montenegro, the Russian Federation (including the Federal Ombudsman of Russia), Serbia (including the Deputy Provincial Ombudsman of Vojvodina) and Ukraine, as well as from Kosovo³.

The good mix of speakers background (including staff of NHRs, NGO representatives, practitioners, academicians and government representatives) and the order of topics presentation, which followed the initial flow chart of applicable rights, resulted in a participants discussion quite relevant to the work of NHRs. In particular, it was outlined the ever growing phenomenon of irregular migration, on the one hand, and the ever growing restrictive policies of governments, on the other. In addition, the experts' contributions and discussion among participants allowed for a thorough review of the most recent Directive of the EU Parliament and Council on common standards and procedures on returning illegally staying third-country nationals. It is to be noted that on the very day of the workshop the Directive was discussed and approved by the EU Council. While it is clear that EU Directives aiming at a common approach in this matter are necessary, a number of criticisms were expressed by participants towards the lack of a human rights dimension in the measures proposed in this directive's minimum standards. Moreover, it was noted the tendency in some EU countries, while transposing Directives into the national legal system, to lower even further the EU standards to the minimum extent possible. The EU, CoE and OSCE policies on anti-trafficking in the context of the irregular migration were also presented to participants.

As a follow up to this event, it was decided to produce this workshop debriefing paper⁴ which provides practical information to the NHRs and references to documents concerning the protection of irregular migrants.

³ *All reference to Kosovo, whether to the territory, institutions or population, in this document shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.*

⁴ *All information contained in this publication is updated till July 2009.*

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CHAPTER 1

Definitions

Definition of “irregular migrants”

In considering the question of irregular migration, the first difficulty is one of definition. There are many underlying reasons for migration. There are political, social and economic motives underlying the decision or need of migrants to move away from their countries of origin. Political upheaval and human rights abuses have created population movements. The United Nations High Commissioner for Refugees (UNHCR) recognises the concept of “*mixed flow*” where, among a flow of migrants moving for ostensibly economic reasons, there may also be many individuals who have needed to leave their countries of origin because of the risk of persecution or other human rights abuses to which they risk being subjected if they remain and therefore have international protection needs.

The term “*irregular migrant*” is used because it avoids the negative, and in many cases, overtly judgmental alternative labelling of “*illegal*” migrant. The term “*illegal migrant*” is clearly unhelpful since it also carries a connotation of criminality which, in many cases, may be inaccurate.

“IRREGULAR” IMMIGRATION V. “ILLEGAL” IMMIGRATION

The Italian Senate voted a law on 2 July 2009 introducing the crime of “illegal immigration”, for which fines are provided ranging from a minimum of 5,000 up to 10,000 Euros. Being now the irregular entry or residing in Italy a crime, it requires any public official (thus including any person exercising a public duty such as medical officials and school principals) to report law enforcement authorities immediately upon notice of this crime (i.e. that a person is “illegally” residing). Moreover, the law brings from 60 to 180 days the period in which an immigrant can be detained in the centres of identification and deportation, while it costs a 200 Euros fee to ask for citizenship. The law introduces also a fee from 80 up to 200 Euros for a residence permit request, including the request for the renewal of it.

Those migrants, for example, who are eventually recognised as refugees may have used irregular means to travel to and enter and stay in a particular country of safety because there were no other feasible alternatives open to them in order to leave their countries of origin, precisely because of the difficulties created by their national authorities. Again, there are many migrants who because of their particularly vulnerability (for example because, they are children, or they are victims in their own right, because they have been trafficked or exploited) where such negative labelling of illegality would be inappropriate.

DIFFERENT CATEGORIES OF IRREGULAR MIGRANTS REQUIRING ENHANCED PROTECTION

Any legal framework of irregular migrants has to recognise the diversity of reasons for migration, and recognise that within a general migration flow, there may be certain individuals who require enhanced standards of protection. Within the existing framework of international standards, there is a recognition of the requirements of some of these groups, including:

- *Refugees and asylum seekers;*
- *Those who have been trafficked or brought in illegally by people smugglers;*
- *Vulnerable groups, such as minors, particularly unaccompanied minors.*

The scope of irregular migration in Europe

MIGRATION AND POPULATION CHANGES IN AGEING EUROPE

The weight of migration as a factor in population growth or decrease could be shown by these two extreme examples:

- Countries with population loss which register more natural decrease than net emigration are mainly located in Central and South East Europe, as well in former USSR countries: migration is not the main factor;
- Countries with population gain due to more net immigration than natural increase are found in all EU Countries and in particular Italy, Germany, Czech Republic, Slovakia and Slovenia: migration is the main factor.

However, the accuracy of these examples is hampered by statistical data problems related to the very fact of the “irregular” migration phenomenon. In particular:

- Data on irregular migration are not always included in official figures;
- These data are often classified as confidential and presented at the discretion of states;
- Data rely mainly on police estimates based on refusals to entry, illegal border crossings, apprehensions, expulsions and trafficking data, which do not include all possible sources for irregular migration;
- Additional data are based on the number of application from irregular migrants on the occasion of regularisation programmes;
- All of the above-mentioned data are not homogeneous and could include multiple events for one person;
- In addition, there are hidden migrants who are not likely to be subject to police detection, e.g. the domestic workers.

Despite the inaccuracy of the dimension of this phenomenon, a number of political actors have “*cried wolf*” depicting the irregular migration as a massive barbarian invasion. In other words, xenophobic rhetoric has run ahead of research and data’s accuracy.

Notwithstanding this lack of official and/or reliable statistical sources, data on irregular migration provided for example in CoE documents⁵ and by the NGO “*No Fortress Europe*”⁶ describe the following situation:

- It is grossly estimated that there are up to 5.5 million irregular migrants in the EU countries;
- It is also estimated that there are up to 8 million in the Russian Federation;
- CoE documents set at 0.8 million the number of irregular migrants entering EU each year;
- According the NGO “*No Fortress of Europe*”, 12,347 persons died or disappeared trying to enter EU from the South Mediterranean coasts in the decade 1988-2008;
- Apparently at the moment there are between 120,000 and 500,000 irregular migrants who once entered irregularly in the EU countries, are moving within EU each year. This is another aspect of irregular migration called as “*irregular circulation*”.

A number of main flows of irregular migrants all over the world are of interest to Europe and in particular to EU countries such as:

- The rapidly growing irregular immigration to the South part of EU from North Africa;
- The effects of EU enlargement on irregular migration, which could be seen as a de facto regularisation of European irregular migrants from Eastern Europe;
- The EU enlargement has changed the irregular immigrants composition with nowadays more irregular migrants of non European origin than of European origin, presently staying in EU countries;
- The irregular circulation within EU is also another recent phenomenon typical of the “*Schengen*” area.
-

⁵ *Current trends in international migration in Europe*, John Salt, Council of Europe publishing. Also available at www.coe.int/t/dg3/migration/Documentation

⁶ www.no-fortress-europe.eu

At the same time outside the EU borders but within Europe there is a growth in irregular labour immigration from Eastern Europe and Central Asia into Russian Federation. In addition Turkey, at the crossroads of Asia, Africa and Europe, faces irregular migration flows, both as a country of destination and of transit: Turkey has become a country of irregular migration transit, as well as irregularly residing work force⁷.

⁷ “Rethinking irregular migration in Turkey: Some Demo-Economic Reflections” by Ahmet İcduygu. <http://hdl.handle.net/1814/10117>

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CHAPTER 2

*International legal standards applicable to irregular migrants**Key stages in the migration process*

The aim of an international regime must be to provide protection and recognition of applicable standards at all stages of the process of migration. The process of migration begins in the country from which the migrant originates, during any journey towards the eventual state of destination, and transit through other countries en route. It continues during the stay in the destination state, and up to the point of expulsion, if that is appropriate, because the migrant has no legitimate entitlement to remain in the state. If expulsion is to be enforced, removal must be in compliance with international standards, and may also involve the assistance or cooperation of the authorities in the state of origin, in order to ensure the migrant's welfare on return⁸.

So far as the process of migration is concerned, there are therefore a number of key stages, considered in more detail below, at which the migrant has protection needs:

- **During the journey**, particularly those who are trafficked, are brought in by agents or people smugglers, or come in by hazardous routes such as by sea. States owe obligations under the Laws of the Sea and international maritime law to rescue those who are in danger;

⁸ *This is reflected in the framework of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (see Art 1 (2) of the Convention). So far as the position of migrant workers is concerned, the protection standards in the Convention are designed to address a process of migration which includes: "preparation for migration, departure, transit and the entire period of stay and remunerated activity in the State of employment as well as return to the State of origin or the State of habitual residence."*

- **At the border** when seeking entry. Those migrants who, for example, are in an irregular position because they are fleeing persecution or violations of their human rights, must have an opportunity to claim asylum, and an assessment of their claim should involve access to a comprehensive and fair determination procedure ;
- **During any period of stay**, even where irregular, following an unauthorised entry or stay beyond the period of any permission to remain in the country. Migrants, particularly those who are vulnerable, need access to basic socio-economic provision, such as basic healthcare, education or housing. Irregular migrants potentially suffer discrimination because of their status, and may be exploited, including in the workplace;
- **Protection during the period of stay** from action by the authorities or private individuals in the particular state. Such protection has to recognise the migrant's right to life, and their right not to be subjected to torture or inhumane or degrading treatment;
- **Detention**: because of their irregular status, migrants may be detained. Conditions of detention need to be regulated to accord with minimum standards and in order to provide the possibility of judicial scrutiny of the decision to detain;
- **Expulsion**: even though some migrants enter irregularly or remain beyond the period of stay granted to them, that does not mean that they can be in all cases expelled. International norms prohibit the expulsion of migrants who would risk persecution or torture in the country to which they are to be returned. Others, such as children, have protection needs because there would be no-one to adequately care for them in the country to which they are to be expelled. Migrants, despite the irregularity of their position, may establish private and family lives during a long period of stay, and may have children or partners with rights under national law, making expulsion a disproportionate measure.

What follows, by way of overview, simply reflects some degree of recognition of minimum rights and protection standards. Precisely because this is a protection regime associated with the human rights of vulnerable individu-

als, the applicable perspective should not be that the objective is to protect simply those basic rights.

The analysis of the international framework is based on international instruments, and materials from the European Union and CoE.

Key international provisions

The key international instruments are relevant in examining the rights of irregular migrants because they recognise that there are certain core rights that apply to all individuals, regardless of their formal legal status in a particular state, and also recognize that certain rights will apply without discrimination. So far as fundamental human rights standards are concerned, the key instruments include:

- The Universal Declaration of Human Rights (1948);
- The International Covenant on Civil and Political Rights (1966);
- The International Covenant on Economic, Social and Cultural Rights (1966);
- The Convention on the Rights of the Child (1989);
- The International Convention on the Elimination of All Forms of Racial Discrimination (1965);
- The International Labour Organisation (ILO) Convention 143 on Migrant Workers (1975);
- The European Convention on Human Rights (1950);
- The European Social Charter (1961); additional Protocol providing for a System of Collective Complaints (1995), and Revised Social Charter (1996);
- The CoE Convention on Action against Trafficking in Human Beings (2005).

The International Convention on the Protection of the Rights of All Migrant Workers

The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families was adopted by the UN General Assembly by Resolution 45/158 on 18 December 1990⁹.

It is the international instrument of most direct relevance since it protects certain core rights, regardless of the formal status of the migrant worker; although the Convention is of course limited, as its name suggests, to the protection of migrant *workers*. The primary difficulty with the Convention, however, and the reason that the international instruments identified above continue to be of such fundamental importance is that it has not yet been widely ratified.

The Convention provides a list of human rights applicable to all migrant workers and members of their family, whether in a regular or irregular situation (with other additional rights for those who have a regularized position). The provisions in the Convention include:

- A non-discrimination provision (Article 7);
- The freedom to leave any country and to enter their country of origin (Article 8);
- The right to life (Article 9);
- Freedom from torture and ill-treatment (Article 10);
- Freedom from slavery or forced labour (Article 11);
- Freedom of thought, conscience, and religion (Article 12);
- Freedom of opinion and expression (Article 13);
- Freedom from arbitrary or unlawful interference with privacy, family, home, correspondence, or other communications (Article 14);
- Property rights (Article 15);
- Liberty and security of person (Article 16);

⁹ <http://www2.ohchr.org/english/law/cmw.htm>

- The right of migrants deprived of their liberty to be treated with humanity (Article 17);
- The right to a fair and public hearing by a competent, independent, and impartial tribunal (Article 18);
- Prohibition of retroactive application of criminal laws (Article 19);
- No imprisonment for failure to fulfill a contract (Article 20);
- No destruction of travel or identity documents (Article 21);
- No expulsion on a collective basis or without fair procedures (Article 22);
- The right to consular or diplomatic assistance (Article 23);
- The right to recognition as a person before the law (Article 24);
- Quality of treatment between nationals and migrant workers as to work conditions and pay (Article 25);
- The right to participate in trade unions (Article 26);
- Equal access to social security (Article 27);
- The right to emergency medical care (Article 28);
- The right of a child to a name, birth registration, and nationality; equality of access to public education (Article 30);
- Respect for migrants' cultural identity (Article 31);
- The right to repatriate earnings, savings, and belongings (Article 32).

Some of these provisions closely replicate rights which are now considered to be uncontroversial and are included in the major international and regional human rights instruments (such as the right to life; freedom from torture; procedural protection during any criminal proceedings or deprivation of liberty) with the intention that they should be applicable to everyone within the territory of a state regardless of their legal status.

Other articles in the Convention, such as equal access to social security, the right to emergency medical treatment and protection of the migrant's property are important because of the difficulty that has arisen securing the recognition of such rights. They are clearly very important to irregular migrants and their families during their stay in a particular country and engage with some of the specific difficulties created by their irregular status.

ECHR case-law pertaining to the rights of irregular migrants

A. ON ENTRY

States have a general right under international law to regulate who enters their territory. In the words of the European Court of Human Rights, as stated in the case of *N. v. Finland*¹⁰, contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including their obligations under the Convention, to control the entry, residence and expulsion of aliens. However states cannot escape their duties under the ECHR by arguing that immigration control is a key attribute to their national sovereignty.

Concerning detention the most important case is the Grand Chamber judgment in the case of *Saadi v United Kingdom*¹¹. The case concerned the detention of asylum seekers in the United Kingdom in order to conduct preliminary processing of their asylum claims.

The Court accepted that there is a general power to detain those seeking entry to the country, even if there is no attempt to evade immigration control by the individual who is being detained, so the powers to detain are potentially wide. The Grand Chamber said:

“... until a State has “authorised” entry to the country, any entry is “unauthorised” and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to “prevent his effecting an unauthorised entry”. It [the Court] does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an “authorised” entry ... To interpret the first limb of Article 5 § 1(f) as permitting detention only of a person

¹⁰ Application no. 38885/02, 26 July 2005
www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

¹¹ Application no. 13229/03, 29 January 2008
www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control ...” [para 65].

However, a decision to detain must not be arbitrary or based on an ulterior motive or bad faith, as the Court had earlier said in the case of *Conka v. Belgium*¹². An attempt by the authorities to improve the effectiveness of a planned operation for the removal of aliens by misleading the individuals concerned about the purpose of a notice requesting them to report to a police station so that they could be detained, was not compatible with Article 5. The Court said:

“To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country” and the length of the detention should not exceed that reasonably required for the purpose pursued.”

So far as “close connection” with the stated aim is concerned, it could simply be, as made clear in *Saadi*, that an individual had been detained in the context of the effective operation of a proper asylum procedure.

In *Saadi*, the government justified a short period of detention as necessary in order to interview and process asylum claims. There was no suggestion that Saadi was attempting to circumvent immigration control or enter unlawfully, and he was released after the initial processing of his claim. The justification was accepted by the Court, who considered that the need to secure resolution of a large number of asylum claims meant that they had to be rapidly processed: it was therefore acceptable to detain Mr Saadi pursuant to that policy.

¹² *Application no. 51564/99*, 5 February 2002

www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

B. DURING THEIR STAY

It may be inherently degrading to deliberately place individuals in a position where they have no means of sustaining themselves, and are effectively destitute. Asylum seekers, as noted above, have a general entitlement to remain while their claims are determined. If it were government policy to prevent asylum seekers from working, and they have no other means of support, the risk is that they will become destitute and live in inhuman or degrading conditions while their claims are determined. Where these conditions of destitution are in effect created by a deliberate policy decision (by preventing asylum seekers with no other means of supporting themselves from working), then the responsibility of the state may well be engaged, with the possible consequences that the provisions of the European Convention are breached.

C. DEPORTATION AND EXPULSION

The most relevant case in this context is *Chahal v United Kingdom*¹³. According to this judgement detention in the deportation context can be justified by the fact that deportation proceedings were ongoing:

“... as long as a person was being detained “with a view to deportation”, that is, as long as “action [was] being taken with a view to deportation”, there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing” [para 112].

So far as the length of detention was concerned, the Court in *Chahal* held that detention should not continue for an unreasonable length of time to the extent that:

“Any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible...” [para 113].

¹³ Case 70/1995/576/662, 15 November 1996
www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

A connected question is whether an irregular migrant can claim any basis to remain *because* of his/her acute need to do so to receive social welfare or medical assistance.

In cases considered by the European Court of Human Rights, this has been in the context of the need of irregular migrants to receive life-sustaining medical treatment that would not have continued to be available to them if they had been removed to their countries of origin because of less-developed medical provision in those states.

In the case of *N v. UK*¹⁴, the Grand Chamber of the Court considered the basis on which expulsion by a migrant with no formal entitlement to remain might be resisted on the basis of a need to receive life-sustaining medical treatment. Ms N had an HIV diagnosis and was receiving antiretroviral therapy; without access to such therapy, the foreseeable consequence was her life expectancy would significantly reduced and that she would develop AIDS related illnesses. The majority of the Court concluded (there is a powerful dissenting judgment):

“Aliens who are subject to expulsion cannot in principle claim any entitlement to remain in the territory of a Contracting State in order to continue to benefit from medical, social or other forms of assistance and services provided by the expelling State” [para 42].

“... The fact that the applicant’s circumstances, including his life expectancy, would be significantly reduced if he were to be removed from the Contracting State is not sufficient in itself to give rise to breach of Article 3. The decision to remove an alien who is suffering from a serious mental or physical illness to a country where the facilities for the treatment of that illness are inferior to those available in the Contracting State may raise an issue under Article 3, but only in a very exceptional case, where the humanitarian grounds against the removal are compelling” [para 42].

¹⁴ Application no. 26565/05, 27 May 2008

www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

That was subject, however, to a proviso that there might be certain cases where the humanitarian pull of the case meant that expulsion should not be implemented. The earlier decision of the Court in *D v. UK*, concerned a man with AIDS who was close to death, and had no means of social or medical support if returned. The Court recognised that humanitarian considerations made it pointless and inhumane to remove an individual in such a situation; he was close to death, and without fixing any obligation for him to be treated, would die in difficult conditions after removal.

In the older case of *15 Foreign Students v UK*¹⁵, the European Court of Human Rights emphasized that the right to education did not provide a right of entry as the right to education is independent of the right to stay in a particular country, and does not protect that right, although the possibility of expulsion leading to deprivation of primary education potentially raised an issue under the Convention.

D. ABSOLUTE PROHIBITION OF DEPORTATION TO FACE TREATMENT CONTRARY TO ARTICLE 3 OF THE ECHR

Starting from the leading case of *Soering v. United Kingdom*¹⁶ the Court has constantly affirmed that a contracting state is in violation of its obligations under the ECHR if it exposes a person to the likelihood of treatment contrary to Article 3 in a place outside its own jurisdiction.

In the already mentioned case of *Chahal v. United Kingdom*, the Court reiterated that the prohibition of deportation to face treatment contrary to Article 3 is absolute, irrespective of the victim's conduct and residential status.

¹⁵ *Application no. 7671/76, decision on admissibility, 19 May 1977*
www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

¹⁶ *Application no. 14038/88, 7 July 1989*
www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

Recently, in the case of *Saadi v. Italy*¹⁷, the Strasbourg Judges have noted that even if the terrorist threat has increased, the new circumstances would not call into question the conclusions of the *Chahal* judgment concerning the consequences of the absolute nature of Article 3, despite the fact that the applicant entered and stayed in Italy irregularly and was suspected by the Ministry of Interior of Italy to be a terrorist.

E. FAMILY REUNIFICATION AND REMOVAL

Much of the case law of the European Convention, so far as it is concerned with the private and family life impact of expulsion decisions, relates to migrants who had regularized their status, but who fall to be expelled because of their criminal conduct. Particularly in cases where there is family life, long-term or permanent exclusion, envisaged in the expulsion orders following criminal conviction, may have a very serious impact on the family of the migrant.

In the case of *Uner v. The Netherlands*¹⁸, the Grand Chamber provided general guidance in the approach to be taken in examining deportation or expulsion cases (Uner was a case involving a regular migrant) [Paras 57-9]. The Grand Chamber summarized the Court's general approach: "*Article 8 of the Convention does not therefore contain an absolute right for any category of alien not to be expelled. However, the Court's case-law amply demonstrates that there are circumstances where the expulsion of an alien will give rise to a violation of that provision*"

The court elaborated a case-law setting out relevant criteria which it would use in order to assess whether an expulsion measure was necessary in a democratic society and proportionate to the legitimate aim pursued.

¹⁷ *Application no. 37201/06, 28 February 2008*
www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

¹⁸ *Application no. 46410/99, 18 October 2006*
www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

These criteria include:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant's stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant's conduct during that period;
- the nationalities of the various persons concerned;
- the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age and
- the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled.

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CHAPTER 3

International policies with respect to irregular migrants

Council of Europe, European Union and OSCE policies to prevent trafficking

The **Council of Europe** has adopted a Convention on Action against Trafficking in Human Beings (2005)¹⁹.

Article 1 of this Convention recognizes the range of general obligations that need to be addressed, and places the human rights of those who have been trafficked as a primary consideration in their treatment since they are victims, despite their irregularity of their status. Article 1 indicates that the purposes of the Convention are to:

- a. to prevent and combat trafficking in human beings, while guaranteeing gender equality;
- b. to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;
- c. to promote international cooperation on action against trafficking in human beings.

Elsewhere in the Convention, there is more specific guidance on the measures to be adopted by the state party. Victims of trafficking may be vulnerable and in need of assistance because of the abusive treatment to which they have been exposed. Precisely because they are often victims of criminal gangs, they may also be at risk of reprisal if they face summary expulsion.

¹⁹ <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=197&CM=1&CL=ENG>

This means that it may be appropriate to grant at least some form of residence permit which may also be needed if victims are going to consider the possibility of co-operating in any attempt to prosecute traffickers.

Article 12 of the Convention provides:

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
 - a. standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
 - b. access to emergency medical treatment;
 - c. translation and interpretation services, when appropriate;
 - d. counseling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
 - e. assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
 - f. access to education for children.
2. Each Party shall take due account of the victim's safety and protection needs.
3. In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.
4. Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.

The issue of a renewable residence permit is also contemplated in Article 14 of the Convention if one or both of the following apply:

- a. the competent authority considers that their stay is necessary owing to their personal situation;
- b. the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.

Article 18 requires states to take proper steps to introduce a framework for the prosecution of those involved in trafficking.

Article 16 (7) recognises the particular vulnerability of children:
*“Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child”*²⁰.

The European Union Council Directive 2004/81/EC²¹ provides for the issue of residence permits to victims of trafficking or those who have been the subject of an action to facilitate illegal immigration and who cooperate with the authorities in the state that is implementing the directive. The directive provides protection that potentially extends beyond those who have been trafficked, since it can extend to those who have been brought in illegally by agents. This, in implementing the directive, however, is at the discretion of the national authorities.

OSCE participating States recognized migration as a comprehensive security issue already since the Helsinki Final Act (1975). They reinforced their interest in this matter in several subsequent OSCE documents and commitments, focusing on the rights of migrant workers. Since 2005, migration has been introduced into the activities of the Office of the Coordinator of OSCE Economic and Environmental Activities (OCEEA), where it is being addressed from the wider economic and environmental perspective. Due to recent migration and demographic trends in the OSCE area, a number of OSCE participating States have become countries of destination, transit or origin for migration, or a combination of all three, with eco-

²⁰ *A number of practices and legislation exist at national level to prevent vulnerable minors, including unaccompanied minors, to be returned to their country of origin. See for example a note of the Ministry of Interior Affairs of Italy at www.interno.it/mininterno/export/sites/default/it/temi/asilo/English_version/International_protection_.htm*

²¹ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0081:EN:HTML>

conomic, social, cultural and security implications requiring co-operation at many levels to effectively address migration management.

Similarly, as either countries of origin, of transit or of destination, trafficking in human beings affects virtually all the OSCE participating States. Trafficking encompasses issues of human rights and rule of law, of law enforcement and crime control, of inequality and discrimination, of corruption, economic deprivation and migration. It therefore cuts across all dimensions of OSCE's work and, as such, requires a resolute and multi-faceted approach. Maastricht Ministerial Council Decision No. 2, Combating Trafficking in Human Beings (2003), endorsed the OSCE Action Plan, provides a framework for the anti-trafficking efforts of the entire organization. It establishes a direct link between the political commitments of the participating States since 1975 and recommendations at the national level in the areas of a) investigation, law enforcement and prosecution; b) prevention of trafficking in human beings; and 3) protection and assistance.

To further assist the participating States with the implementation of commitments and full usage of recommendations proposed by the Action Plan, the Maastricht decision established an OSCE mechanism, under the aegis of the Permanent Council, consisting of a Special Representative, appointed by the Chairman-in-Office, and a special unit in the Secretariat. Both structures are now combined into a single organizational unit, the Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings. The current Special Representative and Coordinator is Eva Biaudet of Finland²².

²² www.osce.org/cthb/13336.html

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CHAPTER 4

The protection of the rights of irregular migrants surrounding their arrival

Travel towards the State

The clearest framework exists (as will apply to many irregular migrants entering states in southern Europe) for those who travel by sea.

As already noted, States owe duties under maritime law to rescue those who are in distress at sea. These obligations include those under the UN Convention on the Law of the Sea which provides, at Article 98, that ships belonging to a particular state are required to render assistance to any person found at sea in danger and to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected. Coastal States are also required to promote the establishment, operation and maintenance of an adequate and effective search and rescue service.

At the border and on entry

States have a general right under international law to regulate who enters their territory, and they are generally permitted to detain to prevent unlawful entry in to their territory.

The territory of the state includes the border and airport waiting areas and states should not seek to restrict the jurisdiction of national law or the ECHR by claiming that such areas are outside the territory of the state²³.

²³ See the ECHR case of *Amuur v France*, application no. 523/609, 25 June 1996.

The Committee for the Prevention of Torture (CPT) has access to such areas and has published critical reports on conditions in airport holding areas and other areas where irregular migrants have been held²⁴.

A. REFUGEES AND THOSE SEEKING ASYLUM AT THE BORDER

Specific measures of protection apply to refugees (and by implication those seeking asylum). Article 31(1) of the Refugee Convention²⁵ provides:

Refugees unlawfully in the country of refuge – “The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom in was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence”.

The key issues here are therefore whether the entry has been direct, and what amounts to “reasonable delay” and “good cause” (frequently refugees, precisely because of their fear of their national authorities, have no legitimate means of leaving their country of origin and have to make an entry without proper documents).

Asylum seekers and refugees cannot be summarily turned back at the border. That would create a risk of *refoulement* contrary to Article 33 of the Refugee Convention. If an application for asylum is made, it must be considered.

²⁴ See extract from the 7th General Report [CPT/Inf (97) 10] on foreign nationals detained under aliens legislation www.cpt.coe.int/en/documents/eng-standards.doc#_Toc83607171

²⁵ Convention relating to the Status of Refugees
<http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>

EXTRATERRITORIAL APPLICATION OF THE PRINCIPLE OF NON-REFOULEMENT

In a “advisory opinion” the Office of the United Nations High Commissioner for Refugees (UNHCR) has addressed the question of the extraterritorial application of the principle of non-refoulement¹. The opinion supports the view that the scope ratione loci of the non-refoulement provision in Article 33(1) of the 1951 refugee’s Convention is not limited to a State’s territory. It affirms there is in international law (conventional and customary) and jurisprudence “significant evidence that the non-refoulement provision in Article 33(1) was intended to prohibit any acts or omissions by a Contracting State which have the effect of returning a refugee to territories where he or she is likely to face persecution or danger to life or freedom” irrespective of whether the refugee is in the national territory of the state concerned.

¹ www.unhcr.org/refworld/docid/45f17a1a4.html

The EU Reception Directive (Directive 2003/9/EC) now provides detailed framework guidance on minimum standards for the reception of asylum seekers and their treatment during the processing of their claims up to expulsion.

B. GENERAL RECOMMENDATIONS ON THE TREATMENT OF MIGRANTS ON ENTRY

The Commissioner for human rights of the CoE made recommendations in relation to the rights of aliens wishing to enter a CoE member State²⁶:

1. Everyone has the right, on arrival at the border of a member State, to be treated with respect for his or her human dignity rather than automatically considered to be a criminal or guilty of fraud.
2. On arrival, everyone whose right of entry is disputed must be given a hearing, where necessary with the help of an interpreter whose fees must be met by the country of arrival, in order to be able, where

²⁶ *CommDH (2001)19* at www.coe.int/t/commissioner

appropriate, to lodge a request for asylum. This must entail the right to open a file after having being duly informed, in a language which he or she understands, about the procedure to be followed. The practice of refoulement “*at the arrival gate*” thus becomes unacceptable.

3. As a rule there should be no restrictions on freedom of movement. Wherever possible, detention must be replaced by other supervisory measures, such as the provision of guarantees or surety or other similar measures. Should detention remain the only way of guaranteeing an alien’s physical presence, it must not take place, systematically, at a police station or in a prison, unless there is no practical alternative, and in such case must last no longer than is strictly necessary for organising a transfer to a specialised centre.
4. Member States should avoid holding unaccompanied minors, pregnant women, mothers with young children, the elderly, and people with disabilities in waiting areas. Where appropriate, unaccompanied minors must be placed in specialised centres, and the courts immediately informed of their situation. Members of the same family should not be separated.
5. Aliens held pending authorisation of entry must be placed in a specialised centre, and under no circumstances during their detention must they be placed with ordinary prisoners. The same applies to aliens awaiting enforcement of an expulsion order except, of course, in the case of persons expelled on having served their sentence and persons detained at the border with a view to being extradited.
6. All detainees, however long they are held, must have the right to emergency medical care as required by their state of health.

THE ROLE OF NHRSS: EXAMPLES

The Greek National Commission for Human Rights (GNCHR)¹ has dealt with the issue of rescue at sea of irregular migrants in its work. In particular, it has issued a decision “on the situation of aliens trying to enter Greece via the Aegian and the practices of the Greek coast guards” advising the Country’s authorities on legal and practical matters. Two conclusions/recommendations of this decision definitely worth a mention: Greek State needs to fully comply with the obligation of non-refoulement of persons in need of international protection; a modus operandi has to be found for guarding the borders which will ensure that irregular immigrants and persons in need of international protection are not assimilated and treated as one and the same.

¹ www.nchr.gr

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CHAPTER 5

*The protection of the rights of irregular migrants during their stay**Minimum standards during the stay in a particular country*

Some rights, such as the right to life, not to be subjected to inhuman or degrading treatment, and protection against *refoulement* have a clear basis in international norms and are likely therefore to be uncontroversial. Similarly, the right not to be arbitrarily detained, as discussed above in the context of the ECHR case law, is a key protected right even where the status of the migrant is irregular.

What is more controversial is in the area of socio-economic rights. Irregular migrants, precisely because of their lack of formal status, are often vulnerable and disadvantaged, and have significant difficulties in sustaining themselves because they suffer exploitation in irregular employment, may find it difficult to find adequate housing, and lack access to social security provision and education and health care.

The Parliamentary Assembly of the CoE in its resolution of 4 May 2006 emphasised the need for clear guidance and standard setting in these more controversial areas²⁷:

“It should be noted that as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants need protection and are entitled to certain minimum human rights in order to live in a humane and dignified manner. These rights include certain basic civil and political rights and social and economic rights.”

²⁷ *The human rights of irregular migrants*, PACE Doc.10924 <http://assembly.coe.int>

Moreover the Parliamentary Assembly 1755 (2006) addressed a recommendation to the Committee of Ministers to draw up a list of rights²⁸. The minimum standard is considered that to set out in the ECHR:

“In terms of civil and political rights, the Assembly considers that the ECHR on Human Rights provides a minimum safeguard and notes that the Convention requires that its Contracting Parties take measures for the effective prevention of human rights violations against vulnerable persons such as irregular migrants.”

In the socio-economic area, the recommendation (in additions to the rights considered above) outlined the following minimum rights (at para 12):

“While certain restrictions can be placed on the political activities of aliens, the restriction on the rights to freedom of assembly, association and expression should not extend beyond what is reasonably necessary;

Irregular migrants have the right to marry and total barriers should not be put in place preventing them from marrying;

Irregular migrants should be entitled to the protection of their property. They should be able to manage or dispose of it, including through banking facilities allowing for the transfer of earnings and savings;

Irregular migrants should not be discriminated against in accordance with Article 14 of the ECHR on Human Rights and under Protocol No. 12 to the Convention;

There should be no discrimination on grounds of race or ethnicity in granting or refusing admission, in authorising a stay or an expulsion of an irregular migrant”.

In the already mentioned resolution *“Human rights of irregular migrants”* minimum economic and social rights were considered by the Assembly to include (para 13):

- Adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants;
- Emergency healthcare should be available to irregular migrants and States should seek to provide more holistic health care, taking into

²⁸ Recommendation 1755 (2006) <http://assembly.coe.int/Documents/AdoptedText/ta06/EREC1755.htm>

account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly;

- Social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and preserve human dignity. Children are in a particularly vulnerable situation and they should be entitled to social protection which they should enjoy on the same footing as national children;
- Irregular migrants who have made social security contributions should be able to benefit from these contributions or be reimbursed, for example if expelled from the country;
- In relation to irregular migrants in work, they should be entitled to fair wages, reasonable working conditions, compensation for accidents, access to the courts to defend their rights and also freedom to form and to join a trade union. Any employer failing to comply with these terms should be rigorously pursued by the relevant authorities in member states;
- All children have a right to education extending to primary school level and also to secondary school level in those countries where such schooling is compulsory. Education should reflect their culture and language and they should be entitled to recognition, including through certification, of the standards achieved;
- All children, but also other vulnerable groups such as the elderly, single mothers and more generally single girls and women, should be given particular protection and attention.

There is also an earlier Recommendation of the Committee of Ministers to member States on “*the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship*”²⁹ that certain rights should be open to all citizens and foreigners, whatever their status:

1. Member States should recognise, in their law and practice, a right to the satisfaction of basic material needs of any person in a situation of extreme hardship;

²⁹ Recommendation No. R (2000) 3

2. The right to the satisfaction of basic human material needs should contain as a minimum the right to food, clothing, shelter and basic medical care;
3. The right to the satisfaction of basic human material needs should be enforceable, every person in a situation of extreme hardship being able to invoke it directly before the authorities and, if need be, before the courts;
4. The exercise of this right should be open to all citizens and foreigners, whatever the latter's position under national rules on the status of foreigners, and in the manner determined by national authorities;
5. The member States should ensure that the information available on the existence of this right is sufficient.

The European Social Charter and the Revised Social Charter

The European Social Charter³⁰ has been ratified by 42 out of 47 member states of the CoE³¹. It covers a range of socio-economic rights, including employment, housing, and social welfare rights.

The wording of the Revised Charter would appear to be unpromising, so far as the availability of the protection of socio-economic rights contained in the Charter to irregular migrants is concerned. The appendix to the Revised Charter stipulates that Articles 1 to 17 and 20 to 31 (setting out core parts of the charters' provisions) apply to aliens:

“Only in so far as they are nationals of other Parties lawfully resident or working regularly [although refugees are within the ambit of the protection] within the territory of the Party concerned”.

³⁰ www.coe.int/t/dghl/monitoring/socialcharter/default_en.asp

³¹ For an updated list of ratifications see www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp

The Charter provides in its additional protocol for a collective right of petition to the European Committee of Social Rights³² overseeing implementation of its provisions, and it is via this right of petition that the Committee has developed important protection available to migrants, even though their position may be irregular. The Committee has produced a number of important decision, clarifying the ambit of the Charter, and the meaning of its provisions.

In the landmark decision in *FIDH (International Federation of Human Rights) v. France*³³, the Committee held:

“The charter was envisaged as a human rights instrument to complement the ECHR on Human Rights. It is a living instrument dedicated to certain values and inspired by it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the ECHR of Human Rights” [para 27].

“... The Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the charter” [para 29].

In the *FIDH* case, concerned with legislation that restricted immediate access by irregular migrants to health care in France, the Committee held, despite the apparent exclusion of irregular migrants in the Appendix to the revised charter (above), that access to health care:

“... treads on a right of fundamental importance to the individual since it is connected to the right to life itself and goes to the very dignity of the human being. Furthermore, the restriction in this instance impacts adversely on children who are exposed to the risk of no medical treatment” [para 30].

³² *Additional Protocol of 1995 providing for a system of collective complaints (CETS No. 158)*

³³ *Collective Complaint No. 14/2003 from the International Federation of Human Rights Leagues (FIDH) v. France*
www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp

“Human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the European Social Charter or under the ECHR on Human Rights and health care is a prerequisite for the preservation of human dignity” [para 31].

“The Committee holds that legislation or practice which denies entitlement to medical assistance to foreign nationals, within the territory of a state party, even if they are there illegally, is contrary to the Charter” [para 32].

No breach of Article 13 of the Charter was established, since the French legislation (a) provided for access to treatment for irregular migrants after 3 months; and (b) provided for emergency treatment for life threatening conditions.

However, and noting the rights in the Charter *“inspired”* by the UN Convention on the Rights of the Child (best interests’ principle), there was a breach of Article 17 because:

- (a) Medical assistance was limited to situations involving immediate threat to life;
- (b) Children of irregular immigrants were admitted to medical assistance only after a certain period.

As the Parliamentary Assembly Rapporteur, Mr ED VAN THIJN, has noted: *“At the heart of this decision was the significance of the right in question for the individual and for his or her dignity.”* In view of the fact that various other rights under the Charter are closely linked to the notion of human dignity, one cannot exclude a dynamic interpretation by the European Committee on Social Rights on rights such as:

- the right to work, in so far as this prohibits forced labour (Article 1§2);
- the right to social and medical assistance (Article 13);
- the right of persons with disabilities to protection (Article 15);
- the right of children to protection (Articles 7 and 17);
- the right of elderly persons to social protection (Article 23);
- the right to dignity at work (Article 26);

- the right to protection against poverty and social exclusion (Article 30);
- the right to housing (Article 31), particularly from the standpoint of preventing and reducing;
- homelessness (para 2)³⁴.

Specific rights

A. HEALTH

The UN International Covenant on Economic, Social and Cultural Rights provides that *“The States Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”*.

The FIDH decision, mentioned above, is clearly very important. Complete deprivation of access to health care would raise an issue in relation to the damage to human dignity that it does. Most pressing is the denial of access to *emergency* treatment, necessary to sustain life. Limiting health care to vulnerable groups, such as children, who must have their *“best interests”* at the heart of consideration of access to health care, is of particular significance.

The Committee on the Covenant on Economic, Social and Cultural Rights has said that states may act incompatibly by *“refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants...”* (CESCR General Comment No.14 (2000) “The Right to the highest attainable standard of health”)

As the Parliamentary Assembly rapporteur notes, while there may be common ground as to the need to provide urgent or emergency health care as a minimum standard, there is a difficulty in finding agreement on *what treatment* falls inside this potentially narrow and often undefined category.

³⁴ *“The human rights of irregular migrants”* PACE Doc.already quoted <http://assembly.coe.int>

The nature of the obligation to provide health care is also likely to depend on the particular vulnerability of the individual: children, elderly, pregnant women and the disabled are likely to have enhanced entitlement.

The EU Directive on common standards and procedures in Member States for returning illegally staying third-country nationals recognises a need “*to take due account*” of the state of health of an irregular migrant facing removal action, and recognises that expulsion might be *postponed* (alternatively, there is always a discretion to grant a residence permit) for reasons that include “*the person’s physical state or mental capacity*”. Pending any enforced return, states implementing the directive should “*take in to account as far as possible*” the need to provide emergency and other essential health care (Article 14).

B. EMPLOYMENT

Conventions of the International Labour Organisation (ILO) set out employment standards with relevance to regular and irregular migrant workers.

The ILO Convention 143 on Migrant Workers (1975) states that Contracting Parties are obliged to respect the “*basic human rights of all migrant workers*”³⁵.

Article 9 (1) of the Convention contains a guarantee of equal treatment between regular and irregular migrant workers but it is limited: “*in respect of rights arising out of past employment with regard to remuneration, social security and other benefits*”.

C. EDUCATION

Article 26 of the Universal Declaration of Human Rights, provides that “*Everyone has the right to education*”. The United Nations Convention on the Rights of the Child recognizes in Article 28 “*the right of the child to education*”.

³⁵ www.ilo.org/ilolex/english/convdisp1.htm

The ECHR follows this line in Article 2 of the First Protocol, which provides that *“No person shall be denied the right to education”*.

So far as entitlement to receive education is concerned, the nature of the obligation depends on the level of the education, with general consensus about the need for children to have proper access to primary education.

Children of asylum seekers, or unaccompanied children have specific entitlement to receive education under the terms of the Reception EU Directive 2003/9/EC³⁶.

The EU Directive on common standards and procedures in Member States for returning illegally staying third-country nationals of 18 June 2008 sets out (but does not fix as absolute obligation: see Article 14) needs for minors to be *“granted access to the basic education system subject to the length of their stay”*.

D. PRESSING NEEDS FOR SUPPORT

It may be inherently degrading to deliberately place individuals in a position where they have no means of sustaining themselves, and are effectively destitute. Asylum seekers, as noted above, have a general entitlement to remain while their claims are determined. If it were government policy to prevent asylum seekers from working, and they have no other means of support, the risk is that they will become destitute and live in inhuman or degrading conditions while their claims are determined. Where these conditions of destitution are in effect created by a deliberate policy decision (by preventing asylum seekers with no other means of supporting themselves from working), then the responsibility of the state may well be engaged, with the possible consequences that the provisions of the ECHR are breached.

Similarly, and as recognised in the EU Removals Directive and the *FIDH* case, it may be necessary to intervene to safeguard the welfare of children to protect their best interests. That, of course, may also involve the obligation to assist families in which there are minor children.

³⁶ Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>

THE ROLE OF NHRS; EXAMPLES

The Ombudsman of Spain asked the Secretary of State for Immigration Office (Secretaría de Estado de Inmigración) to offer temporary work permits to the immigrants whose origin cannot be determined and cannot be expelled. The executive has replied that this kind of document would stimulate the mafias trafficking immigrants and would convert those immigrants into “resident”. The Ombudsman asked the government to reconsider.

The Greek National Commission for Human Rights (GNCHR)¹ has dealt with the issue of the right to health of irregular migrants in its decision “regarding the right to health of undocumented migrants”. In this decision addressed to the Greek authorities it was stressed the risk of limiting access of undocumented migrants which renders the timely diagnosis of transmittal diseases impossible.

¹ www.nchr.gr

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CHAPTER 6

The protection of the rights of irregular migrants surrounding their departure

a. Whether an irregular migrant can be expelled

1. RISK ON RETURN

The UN Refugee Convention provides, in Article 33, for a general prohibition of *refoulement* (subject to the proviso in Article 33 (2), on the basis that the refugee's presence constitutes a danger to the community).

As already seen in chapter 2 under “*ECHR case – law*” the protection provided by the ECHR is wider, since the protection provided is absolute. The fact that an irregular migrant has been convicted of a serious offence or is even a danger to the community cannot justify expulsion if there would be a risk of exposure to a breach of Articles 2 or 3 of the Convention in the country to which expulsion is to be implemented (i.e. if there is a risk of being arbitrarily killed, or of torture or other prohibited treatment or punishment).

This protection includes protection against (I) the actions of state authorities in the country of return (II) non-state agents where the authorities are unable to provide the requisite level of protection (III) civil war situations in the country of return or (IV), in certain very exceptional cases, non-intentional harm in the state of return³⁷.

³⁷ See the case of *D v UK* no 146/1996/767/964, 2 May 1997 on the expulsion of a convicted prisoner in the terminal stages of AIDS, where there were no adequate support in the country of return, with the result that death would be in conditions that were inhumane or degrading.

The general principles linking expulsion and potential violation of Article 3 have been summarized by the Grand Chamber in the already quoted case of *Saadi v. Italy* whereas the Court provides a strongly worded re-iteration of the fundamental principles underlying the protection provided by Art 3 of the Convention:

“... expulsion by a Contracting State may give rise to an issue under Article 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person concerned, if deported, faces a real risk of being subjected to treatment contrary to Article 3. In such a case Article 3 implies an obligation not to deport the person in question to that country” [para 125].

“... As the prohibition of torture and of inhuman or degrading treatment or punishment is absolute, irrespective of the victim’s conduct ... the nature of the offence allegedly committed by the applicant is therefore irrelevant for the purposes of Article 3” [para 127].

“... it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State. In that connection, the conduct of the person concerned, however undesirable or dangerous, cannot be taken into account, with the consequence that the protection afforded by Article 3 is broader than that provided for in Articles 32 and 33 of the 1951 United Nations Convention relating to the Status of Refugees” [para 138].

2. STRONG FAMILY OR OTHER TIES

Irregular migrants may have spent a considerable period of time in a particular country before the national authorities attempt to expel them. During their stay, they may have developed strong ties with the community, and have family lives, because they have partners and children. The effect of expulsion may be to do irrevocable damage to those ties, and it may make family life, often involving partners or children with settled rights of residence or the nationality of the particular country concerned, impossible to continue.

(I) THE RETURNS DIRECTIVE

The EU Directive on common standards and procedures in Member States for returning illegally staying third-country nationals³⁸ requires that the following must be *taken in to account* in considering whether to enforce a return decision against an irregular migrant (Article 14):

- The maintenance of unity with family members present in their territory;
- special needs of vulnerable persons are taken into account .

Those who face involuntary removal under the terms of Article 11 of the Directive may be subject to a re-entry ban, of up to five years (or longer if there are reasons for removal connected to public policy or public or national security). There is therefore the possibility of a significant interference in family life where other members of the family unit are entitled to reside in the member state.

States participating in the terms of the Directive do, however, have the power to grant a residence permit at any time, taking in to account such considerations (Article 6). Furthermore, decisions must be based on scrutiny of the individual factual merits of the particular migrant's circumstances, and there must be access to an appropriate judicial or administrative body to review removal decisions (Article 13).

(II) FAMILY LIFE UNDER ARTICLE 8 OF THE ECHR

Article 8 of the ECHR requires a signatory state to respect an individual's private and family life. However, the review of the pertinent ECHR case law in chapter 2 shows that it is not an absolute right, and in the context of immigration control, the state may be entitled to interfere with the exercise of that right by enforcing expulsion, providing that the interference is in all the circumstances proportionate, in pursuit of a legitimate aim, and in accordance with the law as set out in Article 8 (2) of the ECHR. Article 8 provides:

³⁸ Text adopted on 18 June 2008 www.europarl.europa.eu

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Where an irregular migrant is in a long-term relationship or is married, the case law of the Court has frequently re-iterated that there is no unlimited freedom available to the couple to choose their country of residence. However, that is subject to the full circumstances of the particular migrant's individual situation.

An important consideration will be whether the migrant has ever had formal immigration status in the signatory state. Many migrants who find that their situation is irregular may be in that position because they have overstayed a residence permit; or failed to regularize their status when they had an opportunity to do so. However, migrants who have never had any formal right to reside may, if they are simply relying on the strength of their private or family life connection, find it difficult to resist expulsion under Article 8 of the Convention³⁹.

In general, much greater deference to the rights of the migrant will be due when they have long-term residence, or arrived in the country as children, and have therefore become integrated in to the particular society.

³⁹ See the case of *Konstantinov v The Netherlands* no. 1635/03, 26 April 2007 www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

(III) UNACCOMPANIED MINORS

A positive element of the EU Returns Directive⁴⁰, is the protection towards unaccompanied children that it affords. Article 10 places a positive obligation on the removing state:

“Before removing an unaccompanied minor from its territory, the authorities of the Member State shall be satisfied that he/she will be returned to a member of his/her family, a nominated guardian or adequate reception facilities in the state of return.”

b. Removal procedures: “The twenty guidelines on forced return”

So far as removal procedures are concerned, the Committee of Ministers “*Twenty Guidelines*”⁴¹ set out importance guidance and an indication of best practice:

- Collective expulsions should be prohibited. The expulsion must be based on an examination of the individual case;
- Those who are medically unfit shall not be removed so long as they remain unfit;
- The safety of the returnee, other passengers and crew is paramount. Removal may have to be interrupted if this would be endangered;
- The authorities of the expelling state are responsible for the actions of private contractors;
- Restraint techniques must be strictly proportionate. Techniques creating a risk of asphyxia cannot be used;
- Medication can only be administered on the basis of a medical decision.

⁴⁰ *The EU Directive on common standards and procedures in Member States for returning illegally staying third-country nationals of 18 June 2008.*

⁴¹ *CM(2005)40 final 9 May 2005 and CM(2005)40 Addendum final 20 May 2005.*

Best practice indicates that:

- Measures should be taken to promote voluntary return as an alternative to forced return. Co-operation of detainees should be sought if possible;
- Unaccompanied children should be granted legal assistance; there should be consideration of the best interests of the child; the expelling authorities should satisfy themselves as to reception arrangements for the child in the country to which expulsion is intended;
- The removal order should be in writing, with a summary of the relevant facts and relevant legal framework and available remedies;
- Escorts should be properly trained;
- There should be an effective system of monitoring of returns;
- The guidance also envisages co-operation with the country of return and that there should not be enforcement if there is a likelihood that the person returned will not be re-admitted.

c. Readmission agreements

In Europe readmission agreements are concluded either between the EU and third countries or bilaterally between two countries. Their aim is to facilitate the return of irregular migrants to their home countries, or to countries through which they have travelled. Once a return decision has been taken, the readmission agreement kicks in and, under certain circumstances, the re-admitting state thus has a contractual obligation to take the person back.

According to the Rapporteur of the Parliamentary Assembly of the CoE on this issue, Mrs TINEKE STRIK,⁴² *“There are two strands of thought concerning a possible answer to the neutrality of readmission agreements, namely readmission agreements are neutral in terms of human rights or they might in some cases constitute a threat to migrants. The intentions with readmission agreements might be innocent, but they can nevertheless cause problems in terms of human rights. The type of bilateral agreement that sees migrants*

⁴² www.assembly.coe.int/CommitteeDocs/2009/aminf06_2009rev.pdf

*being returned without having had the opportunity to put forward an application for asylum might be contrary to international refugee law, in particular if returned to a country where no functioning asylum system is in place. The use of these agreements, which, however, are not readmission agreements in the formal sense should be viewed with great scepticism and should be followed carefully.”*⁴³

⁴³ See also UNHCR Position on Readmission Agreements, “Protection Elsewhere” and Asylum Policy www.unhcr.org/refworld

CONCLUSIONS

The role of NHRs

One of the most important questions raised during this workshop was how much NHRs actually do and can do for improving the human rights situation of irregular migrants? It is evident from the reading of this debriefing paper that a considerable body of relevant standards, designed to protect irregular migrants at all stages of the migration process, has been developed. Many of the standards are to be considered as settled law; in other areas, particularly socio-economic rights, the standards are still emerging and are often only provided by soft law. What remains fundamentally important is that settled protection standards should be regarded as minimum standards, and that the fundamental recognition of the dignity and vulnerability of a group that have diverse protection needs must be recognised. In this context, the role of NHRs seems to be of pivotal importance in enhancing, or at least protecting, those minimum standards, particularly concerning socio-economic rights.

From the workshop's discussion transpired a different approach to the question of migration in general between Central and Eastern European NHRs, and Western European ones. Although most countries in Central and Eastern Europe have also experienced some permanent immigration or return migration, flows have been modest and stocks of foreign population remain relatively small, with the exception of the Russian Federation. This different approach is well reflected also in the NHRs annual reports where migration issues are treated from different perspectives. Therefore a brief overview of the issue of migration as it appears from the NHRs reports is given here below.

As already mentioned, in Central and Eastern European countries immigration is usually not a significant issue compared to emigration, while domes-

tic minorities and their discrimination often are. On the contrary, the rights of migrants and refugees crop up in many Western European countries' NHRs reports in the area of traditional human rights. Given that these countries grapple vastly more with the problems stemming from immigration (regular and irregular) and a fairly recent mix of different ethnicities and cultures, several reports put a great emphasis on intercultural dialogue and sensitivity to other cultures. The latter is arguably necessary, given that the complaints often refer to the discrimination faced by immigrants.

Thus discrimination is also an area of concern for NHRs where the treatment of irregular migrants is dealt with, though, once again, more so in the West than in the East. A number of annual reports see this as one of the focal areas of activities which comprises initiatives promoting the fundamental recognition of the dignity and vulnerability of irregular migrants. Even in this case the disparity in the approach may stem from the fact that discrimination in Western Europe is frequently associated with the unequal treatment of migrants, asylum seekers and immigrant communities.

Detention conditions is another important issue in annual reports which relate to the treatment of irregular migrants. The workshop's discussion showed that problems in this area – usually involving an inaccessible and large network of institutions – are difficult to be successfully handled by NHRs in the short term. The establishment of NHRs as OPCAT National Preventive Mechanisms could be a way to strengthen the role of NHRs in this area⁴⁴.

As a final note, a positive remark on the independence of NHRs: during workshop discussions, several NHRs, from countries where democracy has more recently established and the human rights situation remains

⁴⁴ See on this issue a previous workshop debriefing paper on “Rights of persons deprived of their liberty: the role of national human rights structures which are OPCAT mechanisms and of those which are not”.

shaky, were candid and often harsh in denouncing domestic human rights violations, including those committed by State authorities in dealing with foreign workers and irregular migrants.

APPENDIXES

List of background documents

COUNCIL OF EUROPE

Conventions

<http://conventions.coe.int/Treaty/EN/v3MenuTraites.asp>

- European Social Charter
- European Convention on Human Rights
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- Council of Europe Convention on Action against Trafficking in Human Beings

Committee of Ministers

www.coe.int/t/cm/home_en.asp

- 20 Guidelines on Forced Return (2005)
- Resolution ResChS(2005)6, Collective complaint No. 14/2003 by the International Federation of Human Rights Leagues (FIDH) against France 4.05.2005

Parliamentary Assembly

<http://assembly.coe.int>

- Report of the Committee on Migration, Refugees and Population Human rights of irregular migrants (Doc.10924)
- Report of the Committee on Migration, Refugees and Population Regularisation programmes for irregular migrants (Doc.11350)
- Recommendation 1755 - Human rights of irregular migrants
- Recommendation 1807 - Regularisation programmes for irregular migrants
- Resolution 1509 - Human rights of irregular migrants
- Resolution 1568 - Regularisation programmes for irregular migrants

Commissioner for Human Rights

www.coe.int/t/commissioner/default_en.asp

- Press review on the Commissioner's declaration on the public order package in Italy (EN only)
- The Commissioner for Human Rights' views on accelerated asylum procedures and migrant's detention (Compilation of document realised by the Office of the Commissioner for Human Rights)
- Viewpoint (17.03.08) "States should not impose penalties on arriving asylum-seekers"
- Viewpoint (17.12.07) "The new European migration policy should be based on human rights principles, not xenophobia"
- Viewpoint (30.10.06) "Seeking asylum is a human rights not a crime"
- Issue Paper (CommDH/IssuePaper(2007)1) "The Human Rights of Irregular Migrants in Europe"
- Recommendation of the Commissioner for human rights concerning the rights of aliens wishing to enter a council of europe member state and the enforcement of expulsion orders CommDH (2001)19

ECHR and Refugees

<http://book.coe.int/EN>

- Asylum and the European Convention on human rights, Nuala Mole, AIRE Centre, London, United Kingdom, Council of Europe Publishing (2007)

ECHR case-law:

www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database

- ECtHR, Grand Chamber, Üner v. the Netherlands (application no. 46410/99), 18.10.2006 (Article 8)
- ECtHR, Grand Chamber, Saadi v. Italy (application no. 37201/06), 28.02.2008 (Article 3)
- ECtHR, Grand Chamber N. v. the United Kingdom (application no. 26565/05), 27.05.2008 (Article 3)
- ECtHR, Grand Chamber, Saadi v. the United Kingdom (application no. 13229/03), 29.01.2008 (Article 5)
- ECtHR, 5th section C.G. and Others v. Bulgaria (application no. 1365/07), 24.04.2008 (Article 8, 13, article 1 of Protocol No. 7)
- Note sur les conséquences en France de l'arrêt CEDH Gebremedhin-16 juin 2008

- Anafé - Association nationale d'assistance aux frontières pour les étrangers (French only)

OTHER DOCUMENTS

- Migrant's rights in the European Social Charter, 22.06.2006: Information document prepared by the Secretariat of the ESC
www.coe.int/t/dghl/monitoring/socialcharter/Presentation/FactsheetMigrants2008_en.pdf
- Study on obstacles to effective access of irregular migrants to minimum social rights, Ryszard Cholewinski, Council of Europe Publishing, December 2005, ISBN 92-871-5878-9 (EN only)
- The position of aliens in relation to the European Convention on Human Rights, Hélène Lambert, 3rd edition, Council of Europe Publishing (2007)
[www.echr.coe.int/Library/DIGDOC/DG2/HRFILES/DG2-EN-HR-FILES-08\(2007\).pdf](http://www.echr.coe.int/Library/DIGDOC/DG2/HRFILES/DG2-EN-HR-FILES-08(2007).pdf)
- European Committee of Social Rights, decision on the merits, complaint No. 14/2003 by the International Federation of Human Rights Leagues (FIDH) v. France, 8.09.2004
www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp
- Trafficking in human beings: Internet recruitment, Council of Europe 2007
www.coe.int/t/dghl/monitoring/trafficking/default_en.asp

EU

http://eur-lex.europa.eu/en/dossier/dossier_05.htm

- European Parliament Committee on Civil Liberties, Justice and Home Affairs (STEPS Consulting Social study for European Parliament) The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones) with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states (2007)
- Council Framework Decision of 19 July 2002 on combating trafficking in human beings
- Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities
- EU Directive 2004/81 on residence permits to victims of trafficking

- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers
- Commission staff working paper Study on the international law instruments in relation to illegal immigration by sea 15/05/2007. (SEC(2007)691)
- Communication from the Commission on policy priorities in the fight against illegal immigration of third-country nationals 19/07/2006. (COM(2006)402).
- European Commission, Report of the Experts Group on Trafficking in Human Beings (Brussels, 22 December 2004)
- Communication from the Commission to the European Parliament and the Council - Fighting trafficking in human beings : an integrated approach and proposals for an action plan
- Proposal for a Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals 16.05.2008

IOM

www.iom.int

- International Migration Law N°12 - Migration and the Right to Health: A Review of European Community Law and Council of Europe Instruments (2007)
- Droit international de la migration N°3 - Migrations et Protection des Droits de L'Homme (FR only)
- Glossary on migration

OSCE

www.osce.org/activities/13029.html

- OSCE publication on National Referral Mechanism
- OSCE Action Plan to combat trafficking
- Addendum to OSCE Action Plan to combat trafficking
- 2007 Report of the OSCE Special Representative for combatting trafficking
- OSCE Decision November 2007
- OSCE Decision June 2006

UN

www.un.org/en

Conventions

- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984) – CAT
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990) - ICRMW
- Convention Relating to the Status of Refugees (1951)

Other documents

- Resolution adopted by the General Assembly (Sixty-second session, 7.03.2008): Protection of migrants
- Resolution adopted by the General Assembly (Sixty-second session, 31.01.2008): Violence against women migrant workers
- Report of the Special Rapporteur on the human rights of migrants, Jorge Bustamante

UNHCR

www.unhcr.org

- Refugee Protection and Mixed Migration: A 10-Point Plan of Action
- Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol 26 January 2007
- UNHCR study on implementation of the Qualification Directive
- UNHCR position on proposed Returns EU Directive
- UNHCR-IMO guidelines on rescue at sea

OHCHR Migration discussion papers

www.ohchr.org

- General foreword
- Paper on Administrative detention
- Paper on Family reunification
- Discussion paper on expulsions of aliens in international human rights law
- Paper on Right to Education of the Migrant Children [Français]

ILO

www.ilo.org

- C143 Migrant Workers (Supplementary Provisions) Convention, 1975

OTHER DOCUMENTS

- Border Management and Human Rights, A study of EU Law and the Law of the Sea, Ruth Weinzierl & Urszula Lisson, German Institute for Human Rights (2007)
- Irish Human Rights Commission Observations on immigration, residence & protection bill 2008 & Press Release (19.03.2008)
- Survey on Alternatives to Detention of Asylum Seekers in EU Member States, Edited by Natasa Chmelickova, The regional coalition 2006, a project supported by the European Commission, Directorate-General for Justice, Freedom and Security

Workshop programme

TUESDAY, 17 JUNE 2008

Arrival of participants in Padua

18.30 – 19.00 Welcome reception

19.00 – 20.15 **Opening session**

Opening address by Prof. MARCO MASCIA, Director of the Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

Issues addressed by the workshop and definition of “irregular migrants”

by MARKUS JAEGER, Deputy to the Director, Head of the National Human Rights Structures Unit, Office of the Council of Europe Commissioner for Human Rights

Scope of irregular migration in Europe

by STEFANO VALENTI, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua, P2P Project Officer

20.30 Dinner

WEDNESDAY, 18 JUNE 2008

9.00 – 11.00 **Working session 1: International legal standards applicable to irregular migrants**

Chair: Prof. JEAN-FRANCOIS AKANDJI-KOMBE, Dean of the Faculty of Law, University of Caen Basse-Normandie, member of the European Social Charter Network

Irregular migrants: a flow chart of applicable rights

by PHILIP HAYWOOD, Barrister, Doughty Street Chambers, London, UK

ECHR case-law pertaining to the rights of irregular migrants

by CATHERINE MEREDITH, Lawyer, The AIRE Centre, London

Discussion

11.00 – 11.30 Coffee break

11.30 – 13.00 **Working session 2 - International policies with respect to irregular migrants** Chair: CATHERINE MEREDITH

EU, CoE and OSCE policies to prevent trafficking in human beings
by Prof. PAOLA DEGANI, Faculty of Political Science, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

Discussion

13.00 – 15.00 Lunch break

15.00 – 16.15 **Working session 3 – The protection of the rights of irregular migrants surrounding their arrival**

Chair and introductory statement: DELPHINE FREYMAN, NHRS Team, Office of the Council of Europe Commissioner for Human Rights, P2P Project Manager

The protection offered by the ombudsman of Spain

by ELENA ARCE JIMENEZ, Office of the Ombudsman of Spain, Member of the NHRI Network of Experts on Asylum and Migration

The protection offered in the absence of national human rights institutions by NGOs in Italy

by TANA DE ZULUETA, former member of the Council of Europe Parliamentary Assembly, member of the Italian Committee for the Protection and Promotion of Human Rights, Italy

Discussion

16.15 – 16.45 Coffee break

16.45 – 18.00 Discussion continued

19.30 – 20.30 Chamber music concert

20.30 Dinner

THURSDAY, 19 JUNE 2008

9.00 – 11.00 **Working session 4 – The protection of the rights of irregular migrants during their stay**

Chair and introductory statement: LAURENT ZANOTELLI, Legal Officer, Office of the National Ombudsman, Luxemburg

The protection offered in Europe, measured at the yardstick of the European Social Charter by Prof. JEAN-FRANCOIS AKANDJI-KOMBE

The protection offered by the national human rights structures of Greece
by LYDIA BOLANI, Legal Officer, Greek National Commission for Human Rights

11.00 – 11.30 Coffee break

11.30 – 13.00 **Working session 5 – The protection of the rights of irregular migrants surrounding their departure**

Chair and introductory statement: KLAUS FREUDENSCHUSS, Legal Advisor, Office of the Austrian **Ombudsman** Board

The protection offered by NHRs and the NGOs of France

by HÉLÈNE GACON, President of ANAFE (Association nationale d'assistance aux frontières pour les étrangers), France

The protection offered in the absence of national human rights structures in Italy
by DAVIDE CORAZZINI, Head of Immigration Office, Police Headquarters in Padua, Ministry of Interior of Italy

Discussion

13.00 – 13.45 Winding-up of the workshop by MARKUS JAEGER

13.45 Close of the workshop by Prof. ANTONIO PAPISCA, Interdepartmental Centre on Human Rights and the Rights of Peoples of the University of Padua

14.00 – 15.00 Lunch

15.00 – 19.00 Guided tour of the city of Padua or transfer to Venice

20.30 Dinner

FRIDAY 20 JUNE

Departure

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This project aims at setting up an active network of independent non-judicial human rights structures in Council of Europe member States.
