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Human rights of irregular migrants

The large number of irregular migrants living in the member states of the Council of Europe will definitely be one of the most serious human and social tragedies in the years to come. Although a more precise number is by definition not available, the more or less official estimates vary from 3 to 5 million (18 million in the USA).

In a recent resolution by the Parliamentary Assembly of the Council of Europe, adopted in June 2006, it was preferred to use the term “irregular migrants” because this term is neutral and does not carry the stigmatisation of the term “illegal”, which is in many cases not appropriate. There are a great variety of reasons why they entered the country of residence.

The resolution does not deal with the migration problem as such. Most member states argue that there are, at the end of the day, only two alternatives: either regularisation or a return to the country of origin. But whatever the policies of the member states are, it is a fact of life that there will always be a number of irregular migrants present in Europe. This, despite the fact that they are not officially registered, that their existence is ignored and, worst of all, that they are completely deprived of human rights. Because of that reason irregular migrants are extremely vulnerable and are increasingly the target of exploitation and organised crime.

The Assembly is of the opinion that, whereas human rights are universal, many of them are applicable to all persons regardless of their nationality or status. It invited four outstanding European lawyers to analyze the most relevant international and European conventions and treaties, which are The Universal Declaration of Human Rights (1948), The International Covenant on Civil and Political Rights (1966), the 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 ILO Convention on Migrant Workers (1975), the European Convention on Human Rights (1950), the European Social Charter (1961), the Revised Social Charter (1996) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005). These experts made an inventory of minimum rights that should be respected under all circumstances. These minimum rights are:

- The right to life. Unreasonable force should not be used to prevent the entry of non-nationals into a country and a duty exists for the authorities to try to rescue those whose life may be in danger as a result of seeking to enter a country;

- Irregular migrants should be protected from torture, inhuman or degrading treatment or punishment. The return process should be carried out while completely respecting the returnee's right to dignity.
- Detention should be used only as a last resort and not for an excessive period of time. The detention of children and other vulnerable persons (pregnant women, mothers with young children, the elderly, people with disabilities) should be avoided wherever possible;
- The right to asylum and non-refoulement should be respected;
- Collective expulsion of aliens, including irregular migrants, is prohibited;
- The right to confidential treatment of information should be respected. Information relating to an asylum application should not be made available to the authorities of the receiving state upon return;
- The right to respect for private and family life should be observed. Removal should not take place when the irregular migrant concerned has particularly strong family or social ties with the country seeking to remove him or her.

Needless to say, most of these fundamental rights (I have only presented a selection) are violated and ignored by most member states (the Netherlands included) on a day-to-day basis in spite of the fact that all the international treaties concerned have been ratified.

Apart from these fundamental civil and political rights the Assembly also tried to identify a number of minimum social rights which should be considered to belong to the very heart of the protection of irregular migrants' rights as formulated in the most relevant international and European conventions. None of these following rights have been "*invented*" for the occasion. They have already been guaranteed for many years, but most of them are not applied or respected in most of the member states.

- At least a right to adequate housing and shelter guaranteeing a minimum level of human dignity;
- Emergency health care should be available to irregular migrants and States should seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly;
- Social protection through social security should not be denied to irregular migrants where it is necessary to alleviate poverty and to 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;
- A right to adequate conditions of employment (not a right to work) in order to prevent certain forms of exploitation, which means fair wages, reasonable working conditions, compensation for industrial accidents, access to the courts 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 the 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.
- All children, but also vulnerable groups such as the elderly, single mothers and more generally single girls and women, should be given particular protection and attention.

The Assembly invites the governments of the member states to assure that the large number of irregular migrants are able to enjoy these minimum rights *in practice*. It is no longer acceptable that the presence of so many people without a status is officially ignored as if they are not human beings at all. While steps are being taken by states across Europe to reduce the number of irregular migrants, such as through the tightening of borders, promoting voluntary and forced returns and regularising the situation of many of them, there will always be a significant number of irregular migrants in Europe, who for one reason or another cannot be returned or regularised (and certainly not immediately). For these people a minimum level of rights should be guaranteed in the law and in practice to allow them to live in dignity and to avoid their exploitation.

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The legal experts who have been consulted are:

- Prof. Jean Francois Akandji-Kombe (University of Caen): the European Social Charter and protection of illegal immigrants.
- Prof. Jeremy McBride (University of Birmingham): the European Convention on Human Rights and protection of irregular migrants
- Prof. Ryszard Cholewinski (University of Leicester): Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights.
- Prof. Paul Schoukens and Prof. Danny Pieters (European Institute of Social Security): Exploratory Report on the Access to Social Protection for Illegal Labour Migrants.

Netherlands Helsinki Committee, *Annual Report 2006*, (The Hague 2006) 58-60.