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## **Undocumented migrant children in an irregular situation: a real cause for concern**

Report<sup>1</sup>

Committee on Migration, Refugees and Population

Rapporteur: Mr Pedro AGRAMUNT FONT DE MORA, Spain, Group of the European People's Party

### *Summary*

A child is first, foremost and only a child. He or she is entitled to all the rights of a child, guaranteed by the United Nations Convention on the Rights of the Child, and other international human rights instruments.

When looking at undocumented migrant children and their rights, one should first look at the issue from the child perspective and not the migration status perspective.

The Committee on Migration, Refugees and Population is particularly concerned by the lack of domestic legislation and guidance at national level on the rights of these children. It is also concerned by the diversity of approaches across Europe, both in terms of legislation and practice. Certain rights are more clearly protected than others, such as the right to education, the right to health care, and the need to refrain from detaining children whenever possible. Other rights pose more problems, such as ensuring adequate housing, and how to tackle more effectively certain forms of child exploitation, such as begging.

The Committee on Migration, Refugees and Population has highlighted many of the barriers that exist preventing undocumented migrant children from enjoying their rights without discrimination, and proposes recommendations to member states and to the Committee of Ministers on steps that need to be taken to improve legislation and practice.

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<sup>1</sup> Reference to committee: Doc. 12333, Reference 3708 of 4 October 2010.

**A. Draft recommendation<sup>2</sup>**

1. A child is first, foremost and only, a child. This, together with the need to take into account the best interest of the child, and the requirement not to discriminate between children, should be the starting point of any discussion about undocumented migrant children. The issue of migratory status can only ever be a secondary consideration.
2. Undocumented migrant children are triply vulnerable: as migrants, as persons in an undocumented situation and as children.
3. The Assembly highlights five particular areas where the rights of undocumented migrant children need to be clarified and strengthened. These include education, health care, housing, detention and exploitation.
4. Undocumented migrant children are children who, because of their irregular status, are undocumented. They may be with parents or family, they may have been born in or outside Europe. They can be distinguished from unaccompanied children who, once they come under the control of the authorities, are generally treated differently by the authorities.
5. The Assembly notes that there is a wide discrepancy across Europe in how member states treat these children, both in law and in practice, and considers that all member states should have a firm legislative basis for dealing with the rights of persons belonging to this vulnerable group.
6. Notwithstanding legislation in many member states, there are many barriers that exist which restrict the enjoyment of these rights in practice. These barriers include, *inter alia*, administrative barriers, linguistic hurdles, the complexity of the administrative, judicial and other systems, discrimination, lack of information and the fear of being reported.
7. Bearing in mind the need for a firm legislative basis and implementation of the laws in practice, the Assembly recommends that member states:
  - 7.1. guarantee the right to education by:
    - 7.1.1. ensuring the right is enshrined in clear and unequivocal legislation and implemented, *inter alia*, with the assistance of policy documents and education circulars;
    - 7.1.2. tackling administrative obstacles which prejudice the registration or attendance of children at school, such as the lack of a fixed address, lack of documentation, lack of funding and linguistic barriers;
    - 7.1.3. tackling administrative obstacles that act as a disincentive to schools, including complicated administrative steps and problems in receiving funding for children without documents;
    - 7.1.4. encouraging and facilitating integration of the children into the schools, including by linguistic support and teacher training to help teachers deal with children with complex needs;
    - 7.1.5. tackling discrimination, particular at intake, which can lead to exclusion, sidelining in the education system and, in certain cases, the creation of "ghetto schools";
    - 7.1.6. supporting civil society initiatives which facilitate the participation of undocumented migrant children in the education system;
    - 7.1.7. permitting internships where these are part of the education cycle;
  - 7.2. guarantee the right to health care by:
    - 7.2.1. clarifying, through legislation, the entitlement, without discrimination, of undocumented migrant children to health care which goes beyond emergency health care and which includes primary and secondary health care, as well as appropriate psychological assistance;

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<sup>2</sup> Draft recommendation adopted unanimously by the committee on 13 September 2011.

- 7.2.2. simplifying the administrative requirements on the recipients and the providers of health care, and ensuring that the persons concerned receive relevant information on the right to health care, responsibility to provide health care and information on how to access it;
  - 7.2.3. providing financial assistance, or keeping costs to a minimum, so as to ensure that the cost does not become an insurmountable hurdle to accessing health care;
  - 7.2.4. ensuring that there are no reporting instructions on the status of children and their families, which might be dissuasive to undocumented migrant children or their parents seeking health care for them;
  - 7.2.5. ensuring that undocumented migrant children are provided with an individual medical dossier which can move around with them;
  - 7.3. guarantee access to housing by:
    - 7.3.1. ensuring a legislative basis for dealing with the accommodation needs of undocumented migrant children, which does not simply provide for taking them into care;
    - 7.3.2. respecting the right to family life under the European Convention on Human Rights (ETS No. 5);
    - 7.3.3. paying particular attention to the situation of those most vulnerable, including single parents with young children;
    - 7.3.4. providing support to local authorities and civil society, to allow them the possibility of assisting children who would otherwise be destitute;
  - 7.4. refrain from detaining undocumented migrant children, and protect their liberty by respecting the following principles:
    - 7.4.1. a child should, in principle, never be detained. Where there is any consideration to detain a child, the best interest of the child should always come first;
    - 7.4.2. where exceptionally detention is necessary, it should be provided for by law, with all relevant legal protection and effective judicial review remedies, and only after alternatives to detention have also been considered;
    - 7.4.3. if detained, the period must be for the shortest possible period of time and the facilities must be suited to the age of the child; relevant activities and educational support must also be available;
    - 7.4.4. if detention does take place, it must be in separate facilities from adults, and the child should not be separated from a parent, except in exceptional circumstances;
    - 7.4.5. no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure;
    - 7.4.6. where a doubt exists as to the age of the child, the benefit of the doubt should be given to the child;
  - 7.5. tackling exploitation in the area of work by carrying out further research on the problem, the persons primarily at risk and the persons or groups carrying out the exploitation. In this respect, the issues of sexual exploitation, the use of children for begging and criminality, exploitation of children as domestic workers and as child labour in sweat shops, as well as other forms of labour exploitation, all require greater examination.
8. The Assembly considers that, notwithstanding the difficulties faced by member states in taking up rights-based issues linked to irregular migration in the current political and economic climate, the human rights problems of undocumented migrant children warrant particular attention. The Assembly therefore recommends that the Committee of Ministers:

8.1. invite its relevant intergovernmental committees to:

8.1.1. examine the problematic of ensuring access to education of undocumented migrant children and to provide member states with guidelines and good practice on how to guarantee the right to education in practice;

8.1.2. provide guidelines to member states on minimum health-care requirements which need to be made available to undocumented migrant children, taking into account the recent decision of the European Committee on Social Rights (Collective Complaint, FIDH v. France).

8.2. examine with its relevant intergovernmental committee, the problematic of assuring housing for undocumented migrant children, with a view to advising member states on how to tackle this politically sensitive human rights issue, taking into account the recent decision of the European Committee on Social Rights (Collective Complaint, Defence for Children International v. the Netherlands);

8.3. consider the steps necessary to tackle the growing problem of begging and the link to exploitation and trafficking, and the human rights concerns that may arise from criminalisation of this activity. While this issue affects undocumented migrant children, it is not restricted to them as a group.

9. The Assembly welcomes the attention paid to undocumented migrant children by both the Council of Europe Commissioner for Human Rights and the European Commission against Racism and Intolerance (ECRI). It encourages them to continue their monitoring of the situation of these children, both in general terms and also in each member state.

10. The Assembly invites the World Health Organisation to examine further the problem of health care of undocumented migrant children with a view to strengthening their right to health care, and to follow up on the proposal for each undocumented child to have a health card or dossier which can move around with them.

**B. Explanatory memorandum by Mr Agramunt, rapporteur****Contents**

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**1. Introduction**

1. A child is first, foremost and only, a child.
2. This is the starting point for any discussion about undocumented migrant children. The status of the child is secondary and arguably irrelevant.
3. As indicated in the Convention on the Rights of the Child, signed by all member states of the Council of Europe, a “child, by reason of his physical and mental immaturity, needs special safeguards”<sup>3</sup> and has to be “protected against all forms of discrimination or punishment on the basis of the status ... of the child’s parents, legal guardians, or family members”.<sup>4</sup>
4. As the Council of Europe’s Commissioner for Human Rights has said, “Migrant children are first and foremost children and they have the same rights as others to enjoy all the rights of the child. The principle of the best interest of the child means that each child must be seen as an individual and special consideration must be given to his or her particular circumstances”.<sup>5</sup>
5. In reality, undocumented migrant children do not get this level of protection. They are triply vulnerable, as migrants, as persons in an irregular situation and as children. The laws applicable tend to tackle their situation from a migration and status standpoint, and not from a child viewpoint.
6. Even when there are laws providing rights and protection to undocumented migrant children, there are often huge barriers in practice, preventing them from enjoying their rights and protection. These barriers, include, *inter alia*, administrative obstacle, linguistic hurdles, the complexity of the administrative, judicial and other systems, discrimination, lack of information, fear of being reported, etc. To these barriers one can add that the enjoyment of most rights are interlinked with other rights, so whilst one might provide for the right of education, the absence of housing or health care will seriously prejudice the enjoyment of that right.
7. In this report, the rapporteur will examine five key areas in which access to rights of undocumented children remain highly problematic. These include access to education, health care and housing, and also issues relating to detention and labour exploitation. There are other areas which are similarly problematic, but because of their complexity, or because they are covered in other reports by the Assembly or by other organisations or bodies, they will not be covered here.<sup>6</sup>

<sup>3</sup> United Nations Convention on the Rights of the Child, Preamble.

<sup>4</sup> *Ibid.* Article 2.

<sup>5</sup> Council of Europe Commissioner for Human Rights. Positions on the rights of minor migrants in an irregular situation (June 2010).

<sup>6</sup> Some of these include: birth registration, trafficking, including in their own right as well as with trafficked mothers, violence and abuse in the home, access to justice (covered in the Guidelines of the Committee of Ministers on child friendly justice, adopted on 17 November 2010) and unaccompanied children.

8. In this report, when we talk about undocumented migrant children we mean children who because of their status are undocumented.<sup>7</sup> They may be with their parents or they may be with relatives. They may have been born in Europe or they may have been born outside of Europe. The rapporteur has chosen not to deal with unaccompanied children who once they come under the control of the authorities, are generally dealt with differently by the authorities.<sup>8</sup>

9. The rapporteur is at a loss to estimate the number of undocumented migrant children in Europe. If there are around 4 million irregular migrants in the European Union (with many millions more in the Russian Federation and other non-EU member states), one can estimate that at least 10% of these are children.<sup>9</sup> Even with a conservative estimate there are a significant number of these children in Europe.

10. The rapporteur, in preparing this report, organised a hearing in Brussels on 15 March 2011, and gathered information from a wide variety of sources. He is particularly grateful to participants at that hearing and to the Platform for International Co-operation on Undocumented Migrants (PICUM) for advice, material and comments throughout the preparation of this report.

## 2. Education

11. The right to education is less contentious than some of the other rights examined in this report. Under the United Nations Convention on the Rights of the Child, Article 28 requires that “States Parties recognise the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular: (a) make primary education compulsory and available free to all”.<sup>10</sup>

12. The European Convention on Human Rights (ETS No. 5, “the Convention”) (Protocol 1, Article 2) requires that “no person shall be denied the right to education”. The European Court of Human Rights, for example, in the case of *Timishev v. Russia*, found a violation of the Convention in relation to the exclusion from school of two children aged seven and nine as a result of their Chechen father no longer having a migrant’s card.<sup>11</sup>

13. The revised European Social Charter (ETS No. 163), under its Article 17, provides a duty on states to provide children with “the education and the training they need”. Notwithstanding the general exclusion of irregular migrants from the scope of the Charter, the European Committee on Social Rights has said that equal access to education must be ensured for all children and that in this respect particular attention should be paid to vulnerable groups.<sup>12</sup> To date, the Committee has never expressly stated that undocumented migrant children must have equal access to education. However, notwithstanding the general exclusion of irregular migrants from the scope of the Charter, the European Committee on Social Rights found that children of irregular migrants must be granted certain rights such as rights to shelter and free medical care.<sup>13</sup> If this reasoning is extended, then the European Committee on Social Rights may well find that the Revised Charter protects the right to education of all children present within a jurisdiction.

14. Notwithstanding the clarity of international law and general compliance of member states with this right, there are different levels of formal protection provided and even greater levels of discrepancies in terms of protection in practice.

15. In terms of formal protection, countries such as Belgium, Italy and the Netherlands have a clear and explicit reference in their legislation to the right of undocumented migrant children to education. Some other countries, such as France, Poland, Spain and the United Kingdom have an implicit right to education for

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<sup>7</sup> The rapporteur draws no distinction between children of irregular migrants and undocumented migrant children in the context of this report.

<sup>8</sup> See also a separate report on this issue by the Committee on Migration, Refugees and Population: Unaccompanied children in Europe: issues of arrival, stay and return (Doc. 12359), rapporteur: Ms Mailis Reps, Estonia, ALDE, and Assembly Resolution 1810 (2011).

<sup>9</sup> In the hearing organised in Brussels on 15 March 2011, Ms Le Voy from PICUM gave the figure that in Switzerland, 10% of 80 000 to 100 000 irregular migrants were children as one indication of the possible numbers in Europe.

<sup>10</sup> Other international provisions that can also be mentioned in this respect include:

Article 26(1) of the Universal Declaration of Human Rights, Articles 28(1) and 29(1) of the Convention on the Rights of the Child, Articles 13 (1)(2) and 14 of the International Covenant on Economic Social and Cultural Rights, Article 5 (e)(v) International Convention on the Elimination of all forms of Racism and Discrimination and Article 30 of the International Convention on the Rights of All Migrant Workers and Members of Their Families.

<sup>11</sup> *Timishev v. Russia*, Applications Nos. 55762/00 and 55974/00, judgment of 13 December 2005.

<sup>12</sup> See the Information Document prepared by the Secretariat of the ESC “Children’s rights under the European Social Charter”, p. 10, and more specifically the conclusion in respect of Slovenia (Conclusions 2005).

<sup>13</sup> See the Collective Complaints, *Defence for Children International v. Netherlands*, and *FIDH v. France*.

these children. A third group of countries, however, provide no legislative basis for protection, and this includes countries such as Malta and Hungary, where the right to education is only provided to persons with a residence permit.<sup>14</sup>

16. The rapporteur considers that it is essential that each country has a law which ensures a legal right to education, in other words that the “school gates are open”<sup>15</sup> for undocumented children to enjoy the right to education.

### 2.1. *Barriers to access to education*

17. Having a law, however, is not enough and there are a myriad of obstacles which in practice prevent the enjoyment of this right. The rapporteur intends to highlight these in the following paragraphs.<sup>16</sup>

18. Administrative hurdles for the child and for the school: A common problem is the lack of any documentation which the child can use to prove he or she is living in the area. The school itself, even if it is ready to accept the child, may face problems in claiming funding and may thus be discouraged from accepting the child.

19. Discrimination and discretion: Acceptance in the school is often at the discretion of the Head or persons responsible for admissions. It can thus depend on goodwill. Some schools may not want to take these children because they already have a large number of undocumented pupils,<sup>17</sup> or because they fear becoming “ghetto schools”, or because they do not want to risk the standards falling,<sup>17</sup> or because they fear social tension, or they do not want to invest in children who may be moving on rather quickly. Discrimination is clearly a problem on all fronts, and certain undocumented children face even greater problems, in particular the Roma. The European Commission against Racism and Intolerance (ECRI) has raised, on a number of occasions, problems in relation to disproportionate representation in “special schools” and also the concern that children of migrant origin risk being steered into vocational schools.<sup>18</sup>

20. Fear of being apprehended: The fear of coming to the attention of the authorities and being apprehended is a major concern for most undocumented migrant families. Having to provide obligatory information to the school in terms of contact information, including an address, is one problem, as parents fear this will be sent on to the police or other authorities. The fear that children or parents themselves might be arrested outside of the school is also a factor which deters parents from sending their children to school.<sup>19</sup>

21. Practical problems: There may be a range of practical problems which inhibit attendance. Families with their children may have to move around regularly. Even when schooling is free of charge, money has to be found for travel, for books, stationary, food, etc. Some children may also need to support the family either by working or by looking after younger siblings at home while parents work. This can affect girls more than boys. A whole host of other factors also come into play, including access to other rights, such as housing (including privacy, space to be a child, space to do homework, etc.) and health (which may affect the capacity of the child to study and attend school).

22. Integration and motivation: The children face a range of integration problems, starting with linguistic problems and lack of assistance to catch up with the class standards. Furthermore, teachers are all too often not trained or equipped to deal with children coming from many different cultures and backgrounds. Furthermore, some of the children will be traumatised by their different past and ongoing experiences. Too often the child is left to sink or swim. For those who are motivated, obtaining a diploma may be problematic,

<sup>14</sup> See *Undocumented Children in Europe: Invisible Victims of Immigration Restrictions*, Platform for International Cooperation on Undocumented Migrants (PICUM), p. 16. Additionally, it should be recalled that unaccompanied minors, in the care of local authorities are not in the same situation, and will normally be provided with access to some form of education.

<sup>15</sup> At the hearing in Brussels on 15 March 2011, the committee heard from Ms Tine Deboscher (Kruispunt Migratie-Integratie) on what it means for the school gates to be open in law in Belgium, and once inside what the obstacles are.

<sup>16</sup> For a fuller picture of the obstacles, see *Undocumented Children in Europe* (PICUM), op. cit., pp. 23 to 39.

<sup>17</sup> In the United Kingdom, there is evidence that some schools have not accepted these children as their results/test scores would be likely to bring down the overall statistics of the school. See *Undocumented Children in Europe* (PICUM), op. cit., p. 26.

<sup>18</sup> See, for example, ECRI’s report on Austria (2010) para 47 and Belgium (2008) para 62, respectively.

<sup>19</sup> This is a fear expressed generally across Europe. In practice, this rarely happens, although there are instances where it has happened. For example, in France in 2006 police were sent to French schools to detect families of irregular migrants at school pick up times in order to meet the Government proposed 25 000 deportations each year. For more information on this, see *Undocumented Children in Europe* (PICUM), op. cit., p. 27.

due to their status. This raises issues of discrimination and may end up being strongly demotivating for the child.<sup>20</sup>

23. Pre- and post-compulsory schooling: As these periods (pre-school and kindergarten and 16 to 18) are not compulsory in many countries, it has been argued that there is no obligation on schools to take undocumented migrant children during these ages. Furthermore, for older children there may be barriers to internships which form part of this education. The above matters all raise issues of discrimination,<sup>21</sup> bearing in mind the public service nature of this education and its general availability to all other children.<sup>22</sup>

## 2.2. *The way forward*

24. Taking into account the different barriers that exist, a range of recommendations can be made by the rapporteur to make the enjoyment of this right more effective:

25. Clear and unequivocal legislation expressing the right to education is a good starting point. This legislation has to be applied and it has to be made known through policy documents, education circulars or other methods to ensure implementation.

26. Registration and attendance at school must be dissociated from any reporting based on status and must not be used for entrapment, in or outside the school, or through use of information relating to the child or his or her family.

27. Administrative obstacles, such as lack of a fixed address, lack of documentation, etc. should not prejudice either the child or the school, and this will require administrative guidelines and flexibility. Furthermore, in this respect, schools should not be punished, directly or indirectly, for taking undocumented migrant children and they should be adequately funded for their additional responsibilities

28. Steps have to be taken to encourage integration of undocumented migrant children. Linguistic support for learning the host language is an essential starting point and teachers require training to handle these children from different cultural backgrounds, with complex needs arising from their past and current situation.

29. The dangers of discrimination at the point of registration and whilst at school need to be tackled. In this respect, solidarity between schools is also necessary to avoid discrimination and also to avoid the creation of "ghetto schools".

30. Civil society plays a strong role at all stages, whether in making irregular migrants aware of the right to education, as well as the obligation of schooling, assisting with formalities, or even assisting with some of the financial burdens. The role of civil society is essential and requires support from the authorities, but it should not absolve governments of their own responsibilities.

## 3. **Health care**

31. A child's right to health care should not be a contentious issue. Broadly speaking, it is not, at least when dealing with emergency health care, which is generally available, even for adults. Full health care, however, is much more problematic, and it is provided much less widely.

32. At the 8th Conference of European Health Ministers of the Council of Europe in Bratislava 22-23 November 2007, the Ministers, in their Declaration, stated that "The member states will ensure that irregular migrants are able to access health care service in accordance with international treaties as may be in force at the time and national laws and practice". The Ministers also made it clear that member states should work towards removing all practical obstacles and barriers to the enjoyment of access to health care including for those in an irregular situation as far as emergency health care is concerned. Ministers also highlighted the need for children to receive particular protection. This provides an unequivocal message, at least concerning emergency health care, from the Committee of Ministers.

33. A recent report on Policies on Health Care for Undocumented Migrants in the EU27: Towards a Comparative Framework (July 2010) has broken down into three groups the classification of right to health care in the EU 27 for undocumented migrants. The first group of countries are effectively classified as

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<sup>20</sup> See Undocumented Children in Europe (PICUM), op. cit., p. 35.

<sup>21</sup> Including discrimination against age which is contrary to the Convention on the Rights of the Child, Article 2 in conjunction with Article 28.

<sup>22</sup> For further information on the problem see Undocumented Children in Europe (PICUM), op. cit., pp. 36 to 39.



providing “no rights”. In these countries health care is restricted to such an extent that emergency health care is inaccessible. The second group of countries provide minimum rights, namely emergency care (or care referred to as immediate, urgent or similar) and the third group of countries are classified as providing rights going beyond emergency care, such as primary and secondary care.<sup>23</sup>

34. At the hearing organised by the Committee on Migration, Refugees and Population in Brussels a number of case studies were discussed which graphically put in context the problems and consequences of not guaranteeing the right to health care, beyond emergency health care. From these case studies the rapporteur has put together the following questions to put the issues in a practical day-to-day context: Do we accept to turn a child with a raging temperature away from medical treatment on the basis that the parents are in an irregular situation and the health care needed is not yet life-threatening? Does the child risk even greater sickness? If the sickness is not treated, is there a risk of emergency treatment and hospitalisation, and what is the cost (human and financial) of having not treated the initial symptoms? Could the child be potentially contagious and, if left untreated, threaten the health of the general public, including other school children?<sup>24</sup>

35. Under international law, the Convention on the Rights of the Child is clear on health care. Article 24 provides that “States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. State Parties shall strive to ensure that no child is deprived of his or her right to access to such health care services.” This applies to all children whether documented or undocumented.

36. There are many other provisions under international law.<sup>25</sup> The European Convention on Human Rights has linked denial of health care to Article 3 of the Convention and the European Committee on Social Rights has held in a Collective Complaint, *FIDH v. France*<sup>26</sup> that health care for undocumented migrant children “cannot be restricted to medical situations which involve a threat to life”.

37. While the position in national law should mirror international law, providing for a clear right to health care going beyond emergency health care, it does not. In PICUM’s report on Undocumented Children in Europe,<sup>27</sup> four different types of protection at national level were highlighted with some countries giving the right to all children (Spain was particularly commended on this), others distinguishing between separated and undocumented children (Belgium, France and Italy), a further group providing health care at the discretion of the local doctor (Netherlands and the United Kingdom) and a final group of countries providing no specific legislative support (Hungary, Malta and Poland).

38. What is clear is that there is great inconsistency across Europe. There are countries with and without specific legislative provisions, there are different levels of health care provided, high levels of discretion applied, as well as clear discrimination, not only between nationals, regular migrants and irregular migrants, but also between unaccompanied minors and accompanied undocumented migrant children.

39. It is, however, not just a question of legal access but also practical access to health care as the following statistics show. In a recent publication by Médecins du Monde European Observatory, entitled access to healthcare for undocumented migrants in 11 European countries,<sup>28</sup> it was found that 70% of people interviewed could theoretically benefit from access to a minimum form of health care, with variations ranging from 3% in Greece to 98% in Belgium. However, a quarter of persons concerned were unaware of this (with wide divergences between countries – for example in the United Kingdom 52% of persons affected

<sup>23</sup> Policies on Health Care for Undocumented Migrants in the EU27: Towards a Comparative Framework, Summary Report July 2010, Health Care in NOWHERELAND. In the report the countries listed with “no rights” were Finland, Ireland, Malta, Sweden, Bulgaria, Czech Republic, Latvia, Luxembourg and Romania. The countries listed with “minimum rights” were Cyprus, Denmark, United Kingdom, Austria, Belgium, Estonia, Germany, Greece, Hungary, Lithuania, Poland, Slovak Republic and Slovenia. The countries listed with “rights” were Italy, Spain, Portugal, France and the Netherlands. The report deals more generally with irregular migrants rather than specifically children of irregular migrants.

<sup>24</sup> These case studies were presented by Doctor Saphia Mokrane, General Practitioner, Brussels, Hearing on “Undocumented migrant children in an irregular situation: a real cause for concern”, 15 March 2011.

<sup>25</sup> Other international instruments also support this, including the Universal Declaration of Human Rights (Article 25), the International Covenant on Economic, Social and Cultural Rights (Article 12), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 5) and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Article 28).

<sup>26</sup> International Federation of Human Rights Leagues (FIDH) v. France, Collective complaint No. 14/2002.

<sup>27</sup> See Undocumented Children in Europe (PICUM), op. cit., p. 48.

<sup>28</sup> While the statistics from this report primarily relate to irregular migrants in general, a part of the report was also dedicated to children of irregular migrants specifically.

were unaware of this while the figure for Spain was 6%). The study concluded that, in practice, 80% of people interviewed did not actually have real access to health coverage the last time they were ill.<sup>29</sup>

40. Other statistics indicate the extent of the problem revealed in this study. A total of 29% of persons concerned gave up seeking health care (primarily medical consultations and vaccinations) for their children at some point in the year monitored.<sup>30</sup> Further statistics indicate the dangers in term of communicable diseases. For example, only a third of persons concerned knew they were entitled to HIV tests free of charge, demonstrating a clear need for more information.<sup>31</sup>

### 3.1. *Barriers to accessing health care*

41. In the study by Médecins du Monde European Observatory,<sup>32</sup> the top five barriers in accessing health care are, in descending order: administrative problems, expense of medical consultations, complexity of the system, expense of the treatment and the fear of being reported. Other barriers also exist in terms of discretionary powers of health workers, discrimination, language barriers, etc. The most important barriers examined are as follows:

42. Administrative problems and complexity of the system: To give a country example, in France, to obtain “State Medical Assistance”, the authorities require an address, photos of the children and proof of residence for longer than three months. This needs renewing every year. This serves to dissuade many irregular migrants and their children.

43. Another example is Belgium, where undocumented migrant children are in theory entitled to medical aid (since 1996) on the same basis as nationals. Basically, the procedure requires a doctor to fill out a form, the patient to visit municipal social services to obtain access to the health care, social services then have to check to make sure nobody else is responsible, a health card or specific authorisation is then issued for a maximum of three months. This has to be repeated every three months.<sup>33</sup> As the rapporteur heard at the hearing in Brussels, medical professionals do not know the legislation, or the procedures. Even the name of the legislation is confusing, namely “Aide médicale urgente”, bearing in mind it covers both curative and preventative aid. Procedures are different depending on whether the patient is with or without papers or is a failed asylum seeker. Furthermore, during their stay in Belgium, persons might have successive administrative statuses (undocumented, with a temporary status, failed asylum seekers, etc. Each time a patient changes category or place of residence, a new procedure is required. The rapporteur heard that many health-care professionals simply do not want to get embroiled in the administrative complexities because of the weight of the procedures and their complexity.<sup>34</sup>

44. It can be said that often the procedures are so long that they are useless because examination, treatment and medication is generally required immediately.

45. Medical consultations and treatment are too expensive: This is a very real barrier for many. The rapporteur was provided with real life examples of how difficult the situation can be for families to raise sufficient funds to pay for consultations and then purchase the necessary medicines for treatment. One example highlighted the false economy of not providing free medical aid until the situation became life-threatening. A listless child with a very high temperature was taken to a doctor, the family having exhausted its money on seeing the doctor had no money to purchase the necessary medicines. The child steadily got worse until the parents had to take the child to a hospital emergency department, which had no option but to admit the child to hospital. Even if the hospital could have prescribed the necessary home treatment, the parents of the child could not have afforded it. Therefore there was no other option than for the public purse to carry the vast comparative cost of hospitalisation of the child for several days.

46. Because of the costs involved and the difficulties involved in accessing treatment it is not unheard of that where health care is made available, it is accepted regardless of whether or not it is needed. As the rapporteur heard at the hearing in Brussels, one of the few things generally available are vaccinations. As a result, there are examples of children being inoculated over and over again as the families move around

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<sup>29</sup> See 2008 Survey Report Access to healthcare for undocumented migrants in 11 European Countries, Médecins du Monde European Observatory on access to health care, p. 10.

<sup>30</sup> *Ibid.*, p. 105.

<sup>31</sup> *Ibid.*, p. 88.

<sup>32</sup> *Ibid.*, p. 93.

<sup>33</sup> For more information on these country examples and for further examples see *Undocumented Children in Europe (PICUM)*, *op. cit.*, pp. 48 to 53.

<sup>34</sup> Doctor Saphia Mokrane, General Practitioner, Brussels, Hearing on “Undocumented migrant children in an irregular situation: a real cause for concern”, 15 March 2011.

Europe. They have no medical card registering this, and as it is the only thing offered free they take it, to be on the safe side. This is far from being “on the safe side” and represents a poor use of resources.

47. A practical solution would be to introduce a Europe-wide travelling medical card which would help irregular migrants and their children keep track of vaccinations and treatment, and also help medical workers along the chain.

48. Fear of being reported or arrested: While this fear may be more imagined than real, it remains an important psychological hurdle to be overcome by families of irregular migrants. There does not appear to be evidence of arrests taking place in hospitals, surgeries or following doctors' consultations. Notwithstanding this, it should be made clear to the authorities and to irregular migrants that there should be no reporting requirements by medical professionals to the authorities of persons in an irregular situation.

49. Discretion and discrimination: Discretion and goodwill appear to play an important role in a number of countries. This discretion can however be problematic as it can also lead to discrimination. Health care should not be left to discretion, in the same way as it should not be left to civil society to fill the gaps left by the lack of health care. To provide a country example, in the United Kingdom, undocumented migrant children are, in principle, only entitled to health care which is considered “urgent” and “immediately necessary”, with parents being liable for charges for secondary care. Notwithstanding this, local doctors (General Practitioners) have a discretionary power to register persons with the National Health Service System even if they are from excluded groups.<sup>35</sup>

50. The rapporteur notes the challenge of providing health services in an increasingly multicultural society and this brings a whole range of challenges to member states when organising these services. The situation of undocumented migrant children is just one aspect that needs to be taken into account, and member states are encouraged to take this group into account. This should particularly be the case when implementing Committee of Ministers Recommendation Rec(2006)18 on health services in a multicultural society. The rapporteur notes that the Committee of Ministers is in the process of adopting a Recommendation on mobility, migration and access to health care, and looks forward to the text being finalised.

### 3.2. *The way forward*

51. The way forward becomes less complicated if we take into account that a sick child is simply a sick child in need of medical care and attention regardless of status.

52. As a starting point there needs to be a clear legislative basis dissociating access to health care for undocumented migrant children from status. Health care should be provided which goes beyond emergency health care, covering all health care on a non discriminatory basis with other children.

53. In the context of national non-discrimination legislation and its implementation, discrimination in access to health care for undocumented migrant children should be monitored as a priority.

54. It is also essential that administrative requirements are kept to a minimum and that the system remains as simple as possible, both for the benefit of patients and for health workers.

55. The information flow to health workers needs to be improved, so that they are aware of their legal obligations and how to deal with the relevant formalities. The information flow also needs to be improved for patients and their families to ensure that they are aware of their rights.

56. The medical costs of consultations and treatment should not be dissuasive, so as to allow those in need of medical assistance to obtain this without recourse to emergency measures which may end being more costly for the authorities.

57. There should be no reporting instructions to the authorities for health workers, and this should be made known to health workers and their patients.

58. In view of the language barriers that exist, adequate interpretation has to be made available, whether this is through telephone interpretation services or other means.

59. Each child should have an individual medical dossier which travels with his or her family.

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<sup>35</sup> See Undocumented Children in Europe (PICUM), op. cit., p. 51.

60. The World Health Organisation should be encouraged to examine the problematic of health care of undocumented migrant children with a view to monitoring the situation and making further recommendations.

61. Finally, member states should take into account, when implementing Committee of Ministers Recommendation Rec(2006)18 on health services in a multicultural society, the specific needs of undocumented migrant children.

#### 4. Housing<sup>36</sup>

62. Access to housing is one of the most difficult issues to grapple with. Irregular migrants are at the very edge of society without, for the most part, any safety net to protect families and children from falling into total poverty. They rarely have access to public housing and are rejected by a large part of the private housing market. This may be due to racism and discrimination, it may also be due to their status or simply because of their financial instability. They are open to exploitation and often find accommodation only in the unregulated housing market and end up living in dirty, dangerous, unsanitary and overcrowded conditions.

63. In the survey by Médecins du Monde European Observatory,<sup>37</sup> only 46% of the persons interviewed had access to stable accommodation. Of those in insecure accommodation, 78% lived with family or friends and 14% of persons stayed in a property without a lease or legal contract. 86% of persons lived in overcrowded accommodation with children.

64. One should not underestimate the effect that this overcrowding can have on children in terms of their lack of privacy and the lack of their own space, separated from adults, for example with nowhere to play alone or with other children and nowhere to do homework or other activities.

65. International conventions cover the right to an adequate standard of living, which includes housing.<sup>38</sup> Article 27.3 of the Convention on the Rights of the Child provides: "States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programs, particularly with regard to nutrition, clothing and housing."

66. At a European level, under the European Convention on Human Rights, Article 8 (right to private and family life and home) and Article 3 (freedom from degrading treatment) are the most relevant articles.<sup>39</sup>

67. Under the European Social Charter the European Committee on Social Rights has taken an important stand on the issue. In *Defence for Children International (DCI) v. the Netherlands* (Complaint No. 7/2008) the Committee concluded that States Parties are required, under Article 17 and Article 31, paragraph 2, of the revised Charter, to provide adequate shelter to children unlawfully present on their territory for as long as they are in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children. Furthermore, it stated that alternatives to detention should be sought in order to respect the best interests of the child. In an interesting development in the Netherlands, later proposals by the authorities to separate the children and to place them in a welfare institution as an alternative, was considered by the Courts to be a violation of the right to family life.<sup>40</sup>

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<sup>36</sup> For the information contained in this part of the report, please see in particular *Undocumented Children in Europe* (PICUM), op. cit., pp. 71 to 84.

<sup>37</sup> See 2008 Survey Report *Access to healthcare*, op. cit., p. 59.

<sup>38</sup> See in this respect the Universal Declaration of Human Rights (Article 25), the International Convention on Economic, Social and Cultural Rights (Article 11), the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW), and the Convention on the Rights of the Child (Article 27.3).

<sup>39</sup> Some of the most relevant case law, albeit not directly concerning irregular migrants, includes, on housing issues, *Gillow v United Kingdom*, Application No. 9063/80, *Buckley v. United Kingdom*, Application No. 20348/92, *Chapman v. United Kingdom*, Application No. 27238/92, *Connors v. United Kingdom*, Application No. 66746/01. On family life issues, reference can be made to *Wallová and Walla v. Czech Republic*, Application No. 23848/04, *Saviny v. Ukraine*, Application No. 39948/06, *Havelka and others v. Czech Republic*, Application No. 23499/06 and *Moser v. Austria*, Application No. 12643/02.

<sup>40</sup> Hague Court Judgment of 11 January 2011, LJN:BO9924. An appeal has however been lodged by the Minister on this judgment and is pending.

#### 4.1. Problems in practice

68. The situation at international level is not mirrored at national level. As found in the study by PICUM, already referred to, there would appear to be no national legislation protecting or guaranteeing the right to decent housing for children of irregular migrants.<sup>41</sup>

69. In view of the lack of legislation, there is little in the way of practice let alone good practice in providing accommodation to children of irregular migrants. The exception is in relation to unaccompanied children where there is in general a duty of the authorities to house these children. This does, however, open up the issue of discrimination vis-à-vis undocumented migrant children and other children.

70. A separate problem exists, which is that if a family of irregular migrants contacts the authorities for housing and accommodation, the authorities are most likely to reject the family but may then be under a duty to take the children into care if the family cannot provide a home. This option of taking the children into care throws up a range of problems primarily in relation to the right to family life.

71. Mothers with young children may be able to obtain accommodation for a short period of time, but this accommodation is often inappropriate and in lodgings where there are also men. A group of children particularly vulnerable are unaccompanied children not in care. They may not be in care because the authorities are not aware of their existence or because they have left or fled care for one reason or another. They face all manner of problems and exploitation on the streets, including onward trafficking.

72. Rather than getting better, the situation appears to be getting worse. There has been a hardening of attitudes to irregular migrants in general and also a hardening of this type of assistance to families. In part this is political, but it is also economic, in view of the crisis. The net result is that the burden falls on civil society which has to play an ever increasing role in terms of providing shelter, advice and material and legal assistance. With increasing steps to criminalise irregular migrants, these organisations have to be careful not to fall foul of this and other legislation.

#### 4.2. The way forward

73. Legislation is needed to regulate the situation of undocumented migrant children in the area of housing and accommodation, in particular in the light of the decision of the European Committee on Social Rights in the collective complaint against the Netherlands.

74. Local authorities cannot ignore the plight of these children, but the solution cannot simply be to take them into care. Such a step would raise concerns, in particular the right to family life under the European Convention on Human Rights.

75. The authorities need to pay particular attention to the vulnerability of single parents with young children, as well as unaccompanied children who are not in care.

76. Civil society cannot be expected to provide all the solutions, but they can provide some with support from the authorities. Without relieving the authorities of their own responsibilities, much greater support has to be given to these civil society organisations to allow them to provide assistance for persons who would otherwise be destitute.

### 5. Detention

77. As has been stated by the Special Rapporteur on the human rights of migrants, detention is never in the best interests of the child.<sup>42</sup>

78. Under international law, and notably the Convention on the Rights of the Child, the best interests of the child should take primacy. It will rarely be in the best interests of the child to be in detention where the conditions often do not meet basic standards, where children cannot receive education, where activities are severely curtailed and where children may suffer all forms of psychological harm.

79. Under international law, there are three basic safeguards in relation to detention of irregular migrant children, in addition to the best interest safeguard. In the first place, deprivation of liberty should be a measure of last resort (in other words, all other alternatives must have been exhausted); in the second place,

<sup>41</sup> See Undocumented Children in Europe (PICUM), *op. cit.*, p. 71.

<sup>42</sup> A/HRC/11/7, paragraph 62.

detention should be for the shortest possible time (in practice this should not be for more than a few days); and thirdly, the child should only be detained if the conditions of detention are appropriate (in terms of safe accommodation, hygiene, access to activities, education, etc.). If these conditions are not met, then detention, which should always be subject to judicial review, should not be authorised.

80. Reference in this respect can be made to Article 37 of the Convention on the Rights of the Child (requiring that detention be a “measure of last resort” and “for the shortest appropriate period of time”. In a European context reference can be made to the Committee of Ministers’ 20 Guidelines on forced return, which refers not only to detention being a measure of last resort and having to be for the shortest appropriate time, but also provides an extensive list of requirements concerning detention conditions.

81. A large number of other references can be given both at the level of the Council of Europe and that of the European Union.<sup>43</sup>

82. At a national level, according to the European Union’s Fundamental Rights Agency, the majority of EU countries permit the detention of children of irregular migrants on immigration grounds with only three countries having provisions prohibiting detention of these children (Hungary, Ireland and Italy), although a number of other countries have policies not to detain these children, such as Belgium, Cyprus and Malta (although in the case of Malta, children can be kept in detention while age verification takes place, and in Cyprus there are examples of detention while preparing their removal<sup>44</sup>).

83. There appears to be a growing recognition among states that one should not detain undocumented migrant children, whether they are accompanied or not.<sup>45</sup> Both the Netherlands and the United Kingdom have recently changed their policies on this issue and refrain, wherever possible, from detaining children. The Netherlands, for example, had 300 minors in detention in 2009. On 10 March 2011 the Minister for Migration announced a new policy dispensing with detention except where age was in doubt, where children had previously disappeared, committed a crime or were due to be deported within 14 days.

#### *5.1. Problems in practice*

84. A number of problems arise in practice in applying the international standards at national level.

85. When should one apply the principle of best interest of the child when examining the question: “To be, or not to be, detained?”

86. At what stage to apply the best interest of the child: the problem with accompanied undocumented migrant children is that all too often the assessment concerning the best interest of the child is made after a decision has been taken to detain the parents. This then leads to a decision which does not allow for the best interest of the child. The decision then boils down to the lesser of two evils, whether to place the child in detention or to separate the child from his or her parents.

87. The rapporteur is of the view that before any decision is taken vis-à-vis a parent and any other member of the family, there should be a review of the situation, taking into account the best interests of the child.

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<sup>43</sup> An interesting analysis of this is contained in the Fundamental Rights Agency’s report on Detention of third-country nationals in return procedures (pp. 82-86) referring to the CPT’s 19th General Report, 1 August 2008–31 July 2009, paragraph 97, and Article 17 of the European Union Return Directive (2009). There are other references that can also be given, including Council of Europe recommendations, such as Committee of Ministers Recommendation Rec(2003)5 on measures of detention of asylum seekers and more recently under the Guidelines of the Committee of Ministers of the Council of Europe on child friendly Justice (17 November 2010) IV.A.6. Deprivation of Liberty, paragraph 19. Furthermore, reference can be made to the Council of Europe Commissioner for Human Rights’ position paper (25 June 2010) on the rights of minor migrants in an irregular situation, where these same points are made along with a reminder that, as with all detention decisions, they should be authorised by a judicial authority. Reference can also be made to his human rights comment “Migrant children should not be detained” (February 2011).

<sup>44</sup> Fundamental Rights Agency, Detention of third country nationals in return procedures, pp. 84 to 85.

<sup>45</sup> For a full examination of the issue of detention of unaccompanied minors see the report of the Fundamental Rights Agency, Detention of third country nationals in return procedures, pp. 88 to 93. Furthermore, see Assembly Resolution 1810 (2011) on Unaccompanied children in Europe: issues of arrival, stay and return, paragraph 5.9. “No detention of unaccompanied children on migration grounds should be allowed. Detention should be replaced with appropriate care arrangements, preferably foster care, with living conditions suitable for children’s needs and for the appropriate period of time. Where children are accommodated in centres, they must be separated from adults.”

88. Decisions to separate a child from a parent: in the context of detention this poses a particular problem in view of the clash of rights, namely the right not to be detained and the right to family life and not be separated (see, for example, the right to family life under Article 8 of the European Convention on Human Rights, and the right not to be separated from a parent specifically guaranteed under Article 9.1 of the Convention on the Rights of the Child).

89. In the Fundamental Rights Agency's study on detention,<sup>46</sup> it is noted that Sweden is the only country which explicitly prohibits the separation of a parent from a child, highlighting also the different state practices. Some countries such as France, Latvia and Portugal prefer to keep the child with the parents, while countries which refrain from detaining children will in general separate the children, although they will often foresee exceptions to this. Another option, which is a form of hedging of bets, carried out in some countries, is to detain the father but allow for the rest of the family to be released from detention or placed elsewhere.

90. Both detention and separation of undocumented migrant children should be avoided. It is thus imperative to examine all alternatives to detention before a decision is made to detain any member of the family. Any decision will need to take into account the best interest and the wishes of the child.

91. Conditions of detention: there is plenty of evidence to show that in reality the conditions of detention in many member states should not allow for detention of irregular migrant children. Reference in this respect can be made to the work and monitoring of the CPT, the Commissioner for Human Rights and also the Parliamentary Assembly itself.

92. The rapporteur highlights the requirement in the Committee of Ministers' 20 Guidelines on forced return, Guideline 11, which states not just that detention should be a last resort and for the shortest period, but that children need to have separate accommodation and privacy. They have a right to education (depending on the length of their stay) and leisure. Furthermore, the personnel and facilities need to be adapted to the age of the child.

93. The European Court of Human Rights has also developed case law on this. In one case *Muskhadzhiyeva and others v. Belgium*<sup>47</sup> the Court found that the detention of Chechen children pending their removal was unlawful and their conditions of detention unacceptable. In another case *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,<sup>48</sup> the court found violations of Articles 3 and 8 of the Convention concerning the detention and deportation of the child. The child was held in facilities for adults for nearly two months with no counselling or educational assistance and was not quickly reunited with her mother.

94. The age of the child: a particular problem arises in assessing the age of the child with a view to deciding whether or not detention is appropriate. There can be large margins of error (for example up to two years for wrist x-rays) and the benefit of the doubt should always be given to the child. The Assembly has already given guidance on this issue in Resolution 1810 (2011) on Unaccompanied children in Europe: issues of arrival, stay and return, where it said, in paragraph 5.10, "Age assessment should only be carried out if there are reasonable doubts about a person being underage. The assessment should be based on the presumption of minority, involve a multidisciplinary evaluation by an independent authority over a period of time and not be based exclusively on medical assessment. Examinations should only be carried out with the consent of the child and his or her guardian. They should not be intrusive and should comply with medical ethical standards. The margin of error of medical and other examinations should be clearly indicated and taken into account. If doubts remain that the person may be underage, he or she should be granted the benefit of the doubt. Assessment decisions should be subject to administrative or judicial appeal."<sup>49</sup>

## 5.2. The way forward

95. The Assembly has already indicated in a number of recent texts its concerns about detention of undocumented migrant children, including unaccompanied minor children.

96. The rapporteur, however, would like to highlight the following principles in relation to the detention of undocumented migrant children, which should be reflected both in law and in practice:

<sup>46</sup> Ibid., pp. 86 to 88.

<sup>47</sup> See *Muskhadzhiyeva and others v. Belgium*, Application No. 41442/07, judgment of 19 January 2010.

<sup>48</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, Application No. 13178/03, judgment of 12 October 2006.

<sup>49</sup> See also the protection of separated or unaccompanied minors by national human rights structures, 20-22 October 2009 Padua (Italy) Workshop debriefing paper, p. 29, and the recommendations made by Save the Children.

97. The starting point should be the best interest of the child and that alternatives to detention should be sought.
98. Where, exceptionally, detention is necessary, it should be provided for by law, with all relevant protection and effective judicial review remedies.
99. If a child is placed in detention, it must not be for too long and the facilities must be suitable in terms of the age of the child, and also in terms of the activities and educational support available.
100. If detention does take place, it must be in separate facilities to those of adults and the child should not be separated from a parent, except in exceptional circumstances.
101. It should also be recalled that no child should be deprived of his or her liberty solely because of his or her migration status, and never as a punitive measure.
102. Where a doubt exists as to the age of the child, the benefit of the doubt should be given to the child.

## **6. Labour exploitation**

103. The rapporteur is aware that the Assembly will be preparing a report on trafficking of migrant workers for forced labour: time for a closer look (see Doc. 12411), in which the issue will be expanded upon. Notwithstanding this, the rapporteur would like to highlight a number of concerns which apply to undocumented migrant children. In view of the precarity of these children and their families, there is a risk that a number of these children end up begging, pickpocketing and shoplifting, being used to work in hazardous conditions, carrying out illegal work, or being sexually exploited. While this is a particular problem for unaccompanied children, who are often trafficked particularly for these and sexual purposes, the problem is not limited to them.

104. These children should be at school and should be protected. They should not be on the streets, in sweatshops or other work places. The rapporteur notes that there is a strong interlinkage between the different rights examined in this report and labour exploitation; there is thus a need to have a holistic approach to the issue of rights of irregular migrant children.

105. To give some examples of labour exploitation in Europe, the rapporteur refers to a report by UNICEF UK which highlights the problems of economic and sexual exploitation of child beggars from Albania in Greece, children from Romania brought into France, Italy and elsewhere to take part in criminal activities, Eastern European children forced into prostitution and West African children brought into the United Kingdom and France to work as live-in domestic workers.<sup>50</sup>

106. Begging and stealing by street gangs is becoming an increasing problem across Europe, with children being used because of their speed and agility. It is therefore difficult to arrest and hold them, even when they are placed in care. According to certain reports, the profits involved can be substantial, making it even more attractive for criminal gangs and networks.<sup>51</sup>

107. The rapporteur understands that some countries have sought to tackle the problem by proposing begging bans as a means of dealing with the problem. This has, however, led to criminalisation both of certain groups and of children, and human rights concerns about this criminalisation have been raised by a number of human rights groups.<sup>52</sup>

108. The issue is one which needs looking into further by the Assembly. This could be done in the context of the forthcoming report on trafficking of migrant workers for forced labour, or in the context of a more general report on the issue of labour exploitation of children in Europe.

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<sup>50</sup> UNICEF UK End Child Exploitation, child labour today, p. 32.

<sup>51</sup> In a BBC report, the Italian police were recorded as saying that one child could earn €12 000 a month and some gangs had as many as 50 children working for them. <http://news.bbc.co.uk/2/hi/8226580.stm>: How Gypsy gangs use child thieves, 2 September 2009. BBC News.

<sup>52</sup> The Commissioner for Human Rights has been concerned, more generally about the issue of Criminalisation of Migration. See CommDH/IssuePaper(2010)1, Criminalisation of Migration in Europe: Human Rights Implications.



### 6.1. *The way forward*

109. There is a need for more information, including on the different forms of exploitation, their prevalence, the persons primarily at risk and the persons or groups carrying out the exploitation.

110. The particular issues of sexual exploitation, the use of children for begging and carrying out criminal acts, domestic workers and sweatshop and other labour exploitation all require further examination.

111. The issue of begging is also a matter that requires further analysis, both from the angle of exploitation and trafficking, but also from the angle of discrimination and criminalisation.

## 7. **Conclusions**

112. "A child is a child, is a child." This is perhaps the most telling statement to make before looking further at the issue of undocumented migrant children. A child is not responsible for his or her migration status, a child has all the rights recognised by the United Nations Convention on the Rights of the Child, which includes as a starting point "the best interest of the child". Furthermore a child should not be discriminated against because of his or her status.

113. With this as the starting point, member states need to re-examine their legislation and practice to ensure that these children enjoy the rights and protection afforded to them under international law. The issue should not be treated from a migration context but from the angle of the child. Migration concerns remain relevant but they should be secondary.

114. The rapporteur recognises and welcomes that in many instances, the laws of member states recognise the need to protect the rights of these children, particularly in relation to education and emergency health care. However legislative protection across Europe is far from harmonised, creating a regrettable difference in treatment from one country to another. When it comes to application of the law and the rights in practice the situation is more alarming.

115. The Assembly, and the Council of Europe as a whole, has an important role to play in safeguarding this vulnerable group of children. The Council of Europe has the human rights and legal instruments to strengthen the rights of these children, and it has, through its campaigns and co-operation activities, the tools to ensure, in practice, that this is done. The rapporteur believes the Council of Europe and its Assembly can and should rise to this challenge.