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### **Human rights of irregular migrants**

Report

Committee on Migration, Refugees and Population

Rapporteur: Mr Ed van Thijn, Netherlands, Socialist Group

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#### *Summary*

The number of irregular migrants in Europe is unknown. Estimates from the International Organisation for Migration put the figure at approximately 3 million, certain NGO estimate the figure at 5 million or higher.

A large number of irregular migrants lose their life when seeking to enter Europe. Once in Europe, many live in a deplorable situation, work in dangerous conditions and are victims of exploitation.

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.

There are a host of international and European human rights instruments that offer some protection for irregular migrants, including the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Family (1990). These instruments are, however, not always ratified by many States and the diversity of different instruments contributes to a lack of clarity on the minimum rights applicable.

There is an urgent need to clarify the minimum rights of irregular migrants to be applied by member states of the Council of Europe. The Committee of Ministers has a role to provide this guidance, possibly through a recommendation or guidelines on the rights of irregular migrants. There is also a need for mechanisms such as the individual application system of the European Convention on Human Rights and the collective complaints mechanism of the European Social Charter to be used to their fullest to safeguard the rights and dignity of irregular migrants.

#### **A. Draft Resolution**

1. The Parliamentary Assembly is deeply concerned by the ever growing number of irregular migrants in Europe.
2. It is the right of each Council of Europe member state to regulate the entry of foreign nationals and to return irregular migrants to their country of origin in accordance with international human rights law.
3. A large number of irregular migrants lose their life when seeking to enter Europe. For those that make it, many live in dangerous and inhumane conditions. A great number are

subjected to exploitation and many live in fear of apprehension and being sent back to their country of origin.

4. It must be recognised that there will always be a number of irregular migrants present in Europe, no matter the policies adopted by Governments to prevent their entry or to return them speedily.

5. The Assembly considers that as a starting point, international human rights instruments are applicable to all persons regardless of their nationality or status. Irregular migrants, as they are often in a vulnerable situation, have a particular need for the protection of their human rights, including basic civil and political rights and social and economic rights.

6. The Assembly considers that there is an urgent need to provide clarity on the issue of the rights of irregular migrants notwithstanding that it is both a difficult and sensitive issue for member states of the Council of Europe.

7. The Assembly prefers to use the term "irregular migrant" to other terms such as "illegal migrant" or "migrant without papers". This term is more neutral and does not carry, for example, the stigmatisation of the term "illegal". It is also the term increasingly favoured by international organisations working on migration issues.

8. There is no single instrument which deals with the rights of irregular migrants. The most relevant international instrument is the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). This has, however, only been ratified by three member states of the Council of Europe, namely Azerbaijan, Bosnia and Herzegovina and Turkey.

9. The Assembly notes that there are many other international and European instruments that have provisions which can be used to guarantee minimum rights of irregular migrants. Some of these 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), ILO Convention 143 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).

10. The Assembly notes, however, that the large number of disparate instruments and the varying degree of signatures and ratifications, leave a web of uncertainty as to the minimum rights to be applied to irregular migrants.

11. It should be possible to extract a number of minimum civil and political and economic and social and economic rights to be applied by member states of the Council of Europe in favour of irregular migrants.

12. In terms of civil and political rights, the Assembly considers that the European Convention 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. The following minimum rights merit highlighting:

12.1. the right to life should be enjoyed and respected. Unreasonable force should not be used to prevent the entry of non-nationals into a country and a duty exists on the authorities to endeavour to rescue those whose life may be in danger in seeking to enter a country;

12.2. irregular migrants should be protected from torture, inhuman or degrading treatment or punishment. The return process of irregular migrants should be carried out respecting fully the right of dignity of the returnee, taking into account, *inter alia*, the age, sex, health and disability of the returnee. Coercive measures during expulsion should be kept to an absolute minimum;

12.3. irregular migrants should be protected from slavery and forced labour and victims of trafficking should be granted specific rights in line with the Council of Europe Convention on Action against Trafficking in Human Beings (ETS 197);

12.4. detention of irregular migrants should be used only as a last resort and not for an excessive period of time. Where necessary, irregular migrants should be held in special detention facilities and not with convicted prisoners. Children should only be detained as a measure of last resort and then for the shortest appropriate period of time. Detention or holding of other vulnerable persons (pregnant women, mothers with young children, elderly, people with disabilities) should be avoided wherever possible. Suitable accommodation should be available to lodge families together but otherwise men and women should be housed separately. Detainees should have the right to contact anyone of their choice (lawyers, family members, NGOs, UNHCR, etc.), have access to adequate medical care and access to an interpreter and free legal aid where appropriate;

12.5. detention of irregular migrants must be judicially authorised. Independent judicial scrutiny of the legality and need for continued detention should be available. Those detained should be expressly informed, without delay and in a language they understand of their rights and procedures applicable to them. They should be entitled to take proceedings before a court to challenge speedily the lawfulness of their detention;

12.6. irregular migrants in detention also have the right to communicate with the consular posts of their country of origin and to be informed, by the authorities of the State where they are detained, of their rights under the 1963 Vienna Convention on Consular Relations.

12.7. those whose right of entry to a country is disputed should have the right to a hearing with the assistance of an interpreter in order to explain the reasons for entering the country and should be able to lodge an application for asylum if appropriate;

12.8. the right to asylum and *non refoulement* should be respected;

12.9. an irregular migrant being removed from the country should be entitled to an effective remedy before a competent independent and impartial authority. The remedy should have a suspensive effect when the returnee has an arguable claim that, if returned, he or she would be subjected to treatment contrary to his or her human rights. Interpretation and legal aid should be available;

12.10. an irregular migrant being removed from the country has the right to an effective access to the European Court of Human Rights by lodging an individual application with the Court under Article 34 of the European Convention on Human Rights.

12.11. collective expulsion of aliens, including irregular migrants, is prohibited;

12.12. the right to respect for private and family life should be observed. Removal should not take place when the irregular person concerned has particularly strong family or social ties with the country seeking to remove him or her and that the removal is likely to lead to the conclusion that expulsion would violate the right to private and/or family life of the person concerned;

12.13. the right to confidential treatment of information concerning irregular migrants should be respected. Information, for example relating to an asylum application, should not be made available by the host country to the authorities of the country of origin;

12.14. 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;

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

12.16. 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;

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

12.18. 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.

13. In terms of economic and social rights, the Assembly considers that the following minimum rights should, *inter alia*, apply:

13.1. adequate housing and shelter guaranteeing human dignity should be afforded to irregular migrants;

13.2. emergency healthcare 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;

13.3. 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;

13.4. 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;

13.5. 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;

13.6. 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;

13.7. 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.

14. Consequently, the Parliamentary Assembly invites the governments of member states of the Council of Europe to:

14.1. sign and ratify, where not already done, and implement the relevant human rights instruments contributing to the protection of the rights of irregular migrants, including, *inter alia*, the UN International Convention on the Rights of All Migrant Workers and Members of their Families (1990), 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), ILO Convention 143 on Migrant Workers (1975), the European Convention on Human Rights (1950), the European Social Charter (1961), including its additional Protocol providing for a System of Collective Complaints (1995), and Revised Social Charter (1996) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005).

15. On the basis of the principles contained in the international human rights instruments relevant to irregular migrants, the Assembly invites the governments of member states of the Council of Europe to guarantee the minimum civil and political and social and economic rights outlined in this Resolution.

16. The Parliamentary Assembly also invites the governments of member states of the Council of Europe to assure that irregular migrants are able to enjoy their minimum rights in practice, including by:

16.1. raising awareness of the rights of irregular migrants;

16.2. raising awareness of the situation in which irregular migrants live and the difficulties and exploitation they face;

16.3. refraining from criminalising humanitarian assistance for irregular migrants by civil society actors;

16.4. dispensing with the duty of certain authorities (for example school authorities, doctors and medical authorities) to inform on the illegal status of migrants so as to avoid the situation where irregular migrants do not claim their rights through fear of identification as irregular migrants and fear of expulsion;

16.5. considering all relevant means for regularising the situation of irregular migrants where there are reasons why irregular migrants can not or should not be returned to their country of origin;

16.6. supporting voluntary return programmes for irregular migrants and carrying out forcible returns only as a last resort and in accordance with the 20 guidelines on Forced Return adopted by the Committee of Ministers in May 2005.

16.7. ensuring the availability of non-judicial human rights protection, including by national or local ombudsmen, or other such authorities, alongside judicial protection.

17. The Assembly also invites member states of the Council of Europe to support the United Nations Special Rapporteur on the human rights of migrants in his work.

18. The Assembly furthermore invites the Council of Europe Commissioner for Human Rights to take up the issue of rights of irregular migrants in his contacts with states and with national ombudsmen, and invites him to give priority to the rights of irregular migrants in both his individual country reports and thematic reports.

## **B. Draft Recommendation**

1. The Parliamentary Assembly refers to its Resolution ....(2006) on human rights of irregular migrants.

2. The Assembly is convinced that there is a need to clarify the minimum rights applying to irregular migrants. The Assembly recognises that a legal instrument specifically devoted to the rights of irregular migrants is unlikely to receive support from member states of the Council of Europe but notes that there are other ways in which to codify and clarify the minimum rights of irregular migrants.

3. Therefore, the Assembly recommends that the Committee of Ministers:

3.1. instruct the relevant intergovernmental committees to establish a list of minimum rights for irregular migrants, including civil and political and social and economic rights, with a view to preparing a recommendation or guiding principles for adoption by the Committee of Ministers. These minimum rights should use as a starting point those rights identified in the above mentioned Resolution .... (2006) on human rights of irregular migrants.

3.2. keep under review the effectiveness of the human rights instruments relevant to the protection of the rights of irregular migrants, in particular the European Social Charter and Revised Social Charter, with a view to examining whether there is a need to strengthen the human rights instruments in order to protect more effectively the rights of irregular migrants.

## **C. Explanatory memorandum by Mr van Thijn**

## I. Introduction

1. The number of irregular migrants in Europe is unknown. Because of the clandestine nature of irregular migration it is only possible to provide a best guess of the numbers. The World Migration Report 2000 of the International Organization for Migration advanced a maximum figure of three million irregular migrants in Europe in 1998. This figure will have increased significantly in recent years. One leading NGO working on rights of irregular migrants has, for example, put forward a figure of five million irregular migrants in Europe<sup>1</sup> and more recent estimates have been given of 5 to 8 million irregular migrants in the European Union alone.

2. It has been estimated that the number of irregular migrants entering the European Union each year is in the region of 800,000<sup>2</sup>. To give some country examples, in Spain a recent regularisation programme has affected 700,000 irregular migrants, in the United Kingdom the number of irregular migrant has been put at 430,000<sup>3</sup>. In Switzerland the estimates range widely from 80,000 to 300,000. In many countries such as the Netherlands it is impossible to give a figure on the number of irregular migrants.

3. The IOM has put forward a number of statistics in its World Migration 2003 report<sup>4</sup>. The German Police Trade Union believes that some 100,000 irregular migrants are smuggled into Germany each year. It is calculated that some 95,000 Albanians, Romanians and Iraqis are illegally entering Greece each year. It is estimated that there are some 500,000 irregular migrants in France and 60,000 in Portugal. As a final example Belgium's anti-racism centre has estimated the number of irregular migrants at around 90,000.

4. These irregular migrants often face great dangers in seeking to enter Europe. As an example 8,000 to 10,000 immigrants died or disappeared as they tried to enter Spain via Morocco from 1989 to 2002<sup>5</sup>. Once in Europe, due to their status, they often live in an extremely precarious situation with little protection, whether in terms of their housing, social assistance, health care, employment or other rights. They live in a climate of fear of return and many have to deal with a voluntary or forcible return process at the end of their irregular period of stay.

5. The desperate situation in which many irregular migrants live has not gone unnoticed by European Ministers responsible for migration issues. In the Final Declaration of the 7<sup>th</sup> Conference of Ministers Responsible for Migration Affairs, Helsinki, 16-17 September 2002<sup>6</sup>, specific concern was raised to find "flexible and humane solutions respecting the human dignity of irregular migrants" and the need to "look into issues affecting human dignity, including those issues relating to the effective enjoyment of minimum rights for persons in need". It is in trying to address these concerns that your Rapporteur has prepared his report.

### *i. Breaking the chain of reasoning*

6. The chain of reasoning that is often put forward is that irregular migrants have no right to remain in the country and therefore have no right of access to many of the rights linked to their stay. This applies, for example, to employment, social security, accommodation, education, access to the courts, legal aid or other day to day means of existence.

7. Another element of the chain of reasoning is that those in an irregular situation will need to return to their country of origin. In reality this may not happen for a large proportion of those who find themselves in an irregular situation.

8. Many long term irregular migrants are tolerated by the authorities and their contribution to the economy may be essential. This is the case not just for Mediterranean countries whose agriculture has been largely reliant on the contribution of irregular migrant workers, but also for a number of other countries whose economic competitiveness and economic growth have been dependent on a strong irregular migrant work-force.

9. A further element of the chain of reasoning is the perception that irregular migrants are a drain on resources. This is in reality not the case as irregular migrants generally depend on working to survive and they are the least likely to claim benefits as they fear expulsion once they have brought themselves to the attention of the authorities. Denying them resources such as social benefits may also have other consequences, including in terms of public health and social cohesion.

10. It is important that this chain of reasoning is broken and that correct information about irregular migrants and their contribution to society is given. There will always be a significant number of irregular migrants in Europe made up of those who cannot be returned at all, or who can not be returned immediately, whether because of delays inherent in processing irregular migrants or as a result of ineffective policies or other reasons.

*ii. The notion of irregular migration*

11. Your Rapporteur notes that migration is itself a fundamental human right protected under Article 2 paragraph 2 of Protocol 4 to the European Convention on Human Rights. This states that "Everyone shall be free to leave any country, including his own".

12. There is however no right to be accepted into a particular country and every state has the right to regulate the entry of foreign nationals onto its own territory. The exception to this is for refugees and others in need of international protection who enjoy the well-established and universally accepted right not to be returned to a country where they face a well founded fear of persecution ("*non refoulement*"). A further exception to this is the right of a person, including an irregular migrant, not to be returned to a country where they will, for example, be subjected to torture or inhuman or degrading treatments or punishment, or where they risk, under certain circumstances, losing their life.

13. Irregular migration may take place in two circumstances. The first is when a foreigner enters a country in breach of regulations concerning entry, and the second is when a foreigner, having entered a country legally, overstays contrary to immigration regulations. There are many different situations that can cause an individual to become an irregular migrant. A person may, for example become an irregular migrant when their asylum application is turned down, when they are not granted family reunification, when they work without a permit, when a student loses his or her study permit, when a tourist overstays his or her tourist visa, etc.

14. "Irregular migrant" is the term preferred by your Rapporteur in this report to other possible terms such as "illegal" migrant or migrant "without papers". "Irregular migrant" is more neutral and does not carry the stigmatisation of the term "illegal". It is also a term which is increasingly used and accepted by those working in the field of migration, such as the ILO and the IOM. It is wide enough to cover all those in an irregular situation, whether tolerated or not tolerated by the authorities, whether they entered the country legally or illegally, whether they work or do not work, whether they are independent or dependent (children, aged), whether they are failed asylum seekers or persons who have failed to apply for asylum, etc.ii

*iii. Measures to control migration*

15. Your Rapporteur shares the conviction already expressed by the Parliamentary Assembly on a number of other occasions that draconian measures on the control of migration increase the likelihood of people entering or remaining in Europe illegally. By contrast lenient or inadequate enforcement of immigration regulations also encourage irregular migration. Both need to be addressed in order to reduce the number of irregular migrants in Europe.

*iv. Protection of the rights of irregular migrants at European and International level*

16. Your Rapporteur notes that as a starting point, all international human rights standards as well as international labour law standards apply to all persons regardless of their nationality and their status. Your Rapporteur is however concerned that there is no single instrument which deals with the rights of irregular migrants. The most relevant international instrument is the UN International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). This has however only been ratified by 3 member states of the Council of Europe (Azerbaijan, Bosnia and Herzegovina and Turkey).

17. Your Rapporteur notes that there are a large number of other international and European instruments which have provisions that can be used to guarantee the rights of irregular migrants. Your Rapporteur is however concerned that this large number of disparate instruments, their varying degree of signature and ratification, lead to a web of uncertainty as to the minimum rights to be applied to irregular migrants.

18. The European system for the protection of human rights prides itself on providing some of the highest standards for the protection of human rights in the world. It is therefore regrettable that in the protection of rights of irregular migrants, it lags behind the standards developed at the international level. To a certain extent a dynamic interpretation of the two main human rights treaties of the Council of Europe (the European Convention on Human Rights and the European Social Charter and Revised Charter) could allow Europe to fill the gap between the international and European standards.

19. Your Rapporteur also notes that there is no designated international agency to protect the rights of irregular migrants. It is true that the United Nations Special Rapporteur on the human rights of migrants has an important role to play on the international scene, but he lacks the necessary technical and political support to be able to fully implement his mandate in particular in relation to the rights of irregular migrants.

## **II. Approach to the report**

20. Your Rapporteur proposes to divide the report into four parts. The first part will look at the international and European standards applicable to the rights of irregular migrants. The second part will outline a number of minimum rights for irregular migrants. The third part will examine a number of ways in which the rights of irregular migrants may be realised in practice and the fourth and final part will contain conclusions and recommendations.

21. In the preparation of this Report your Rapporteur has been able to rely on four studies of exceptional depth and quality prepared for the Council of Europe. Your Rapporteur has drawn heavily on these four studies to identify a minimum set of rights for irregular migrants.

22. Two of these studies were commissioned by the Parliamentary Assembly for this report. The first concerns the European Social Charter and the protection of illegal migrants<sup>7</sup> and the second concerns the European Convention on Human Rights and the protection of irregular migrants<sup>8</sup>.

23. The third study was prepared for the European Committee on Migration (CDMG) and concerns the obstacles to effective access of irregular migrants to minimum social rights<sup>9</sup>. The fourth study was prepared for the European Committee for Social Cohesion (CDCS) on the Access to Social Protection for Illegal Labour Migrants<sup>10</sup>.

24. Your Rapporteur would like to draw attention to the fact that the European Committee on Migration has set up a Committee of Experts on the Minimum Rights of Irregular Migrants (MG-R-AD) with a mandate to examine access of irregular migrants to certain minimum social rights. Your Rapporteur wishes to acknowledge the close and valuable working co-operation with this group in the preparation and research for his own Report.

## **PART 1: INTERNATIONAL AND EUROPEAN STANDARDS APPLICABLE TO THE RIGHTS OF IRREGULAR MIGRANTS**

### **I. International standards**

25. Underpinning rights at the international level is the Universal Declaration of Human Rights which applies to everyone without distinction of any kind (Article 2(1)). The International Covenant on Economic, Social and Cultural Rights generally follows the Universal Declaration in this respect<sup>11</sup> as does the International Covenant on Civil and Political Rights, which is more easily equated to applying to everyone because of the nature of the rights concerned.

26. The international instrument of the most direct relevance to irregular migrants is the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. This provides a list of human rights applicable to all migrant workers and members of their family, whether in a regular or irregular situation. It provides for other rights as well for those who are in a documented or in a regular situation. The rights applying to all migrants (including those in an irregular situation) include<sup>12</sup>:

- non-discrimination (Article 7)



- 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)
- the right of migrants deprived of their liberty to be treated with humanity (Article 17)
- 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)
- equality 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; and 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)

27. Other core United Nations Treaties are also fundamental for irregular migrants, including the International Convention on the Elimination of All Forms of Racial Discrimination<sup>13</sup> (1965) and the Convention on the Rights of the Child (1989).

28. In terms of ILO instruments it can be noted that with few exceptions these are applicable to all workers regardless of their nationality or legal status<sup>14</sup>. As an example, ILO Convention No 143 of 1975 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers states that Contracting Parties are obliged to

respect the “basic human rights of all migrant workers”. It also contains in its Article 9 (1) a more detailed provision guaranteeing equal treatment between regular and irregular migrant workers “in respect of rights arising out of past employment with regard to remuneration, social security and other benefits”. Part II of the Convention applying to equality of opportunity and treatment however only applies to migrant workers who are residing lawfully in the Contracting Party.

29. The position is somewhat summarised by the former United Nations Special Rapporteur on the rights of non-citizens. He has highlighted that “all persons would by virtue of their essential humanity enjoy all human rights unless exceptional distinctions, for example, between citizens and non-citizens, serve a legitimate State objective and are proportional to the achievement of that objective”<sup>15</sup>.

30. The situation of children in an irregular situation needs mentioning in view of their particular vulnerability. The UN Convention on the Rights of the Child (1989) clearly provides in Article 2 that the rights set forth in the Convention are applicable to all children regardless of their status.

31. A final example that your Rapporteur would like to give to demonstrate the increasing trend at an international level to recognise rights of irregular migrants, comes from the landmark Advisory Opinion of the Inter-American Court of Human Rights on the legal status and rights of undocumented migrants given in response to a request by Mexico. In this case the Court held that “the migratory status of a person can never be a justification for depriving him of the enjoyment and exercise of his human rights, including those related to employment”<sup>16</sup>.

## **II. Council of Europe standards**

32. The level of protection of irregular migrants at the European level lags behind that which is potentially offered at an international level. While the European Convention on Human Rights provides strong guarantees for irregular migrants, the European Social Charter would, at first sight, appear to have a limited application, although a dynamic interpretation of the provisions could remedy this situation. It should be noted that there is no equivalent convention at a European level to the UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families which benefits irregular as well as regular migrants.

33. *The European Convention on Human Rights* applies to everyone within the jurisdiction of the contracting parties (Article 1) although there may be some restrictions on the political activities of aliens (Article 16). There are two other provisions explicitly referring to aliens and they are the prohibition on collective expulsion of aliens in Protocol 4, Article 3 and certain procedural safeguards relating to the expulsion of aliens in Protocol 7, Article 1 which relate only to aliens lawfully resident. Alongside the civil and political rights protected by the Convention and its Protocols (right to life, prohibition of torture, prohibition of slavery and forced labour, etc.) are included two rights which are of an economic and social character, namely the right to property (Article 1 of Protocol 1 to the Convention) and the right to education (Article 2 of Protocol 1 to the Convention). The Convention therefore itself provides a broad canvas on which the European Court of Human Rights has developed, through its case-law, a more concrete understanding on the rights applicable to migrants in general and irregular migrants in particular<sup>17</sup>.

34. *The European Social Charter and the Revised Social Charter*, as mentioned, would, at first sight, appear to have only a limited application to migrants and irregular migrants. The Appendix to the Revised Charter stipulates that Articles 1 to 17 and 20 to 31 apply to foreigners “only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned”. Articles 18 and 19 do not have a requirement of lawful presence for all aspects of these rights although they do only apply to nationals of contracting parties. They concern the gainful occupation in the territory of other contracting parties and the right of migrant workers and their families to protection and assistance<sup>18</sup>.

35. The Charter’s most important contribution to protecting irregular migrants however comes from its case-law and one case in particular, namely the IFHR (International Federation of Human Rights) v. France<sup>19</sup>. In this case the Committee held “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”<sup>20</sup>. 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 can not 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 (§2).

36. *The European Convention on the Legal Status of Migrant Workers* (ETS 93) does not have a relevance for irregular migrants as it only applies to foreigners who are nationals of other Contracting Parties "lawfully resident and working regularly".

37. *The European Convention for the Prevention of torture and inhuman or degrading treatment or punishment* (ETS 126) is clearly of relevance for irregular migrants in terms of their detention on arrival, during their stay or in preparation for their expulsion from the country. The individual country visit reports and General Reports by the Committee for the Prevention of Torture provide emerging standards relevant for irregular migrants<sup>21</sup>.

38. *The Council of Europe Convention on Action against Trafficking in Human Beings* (ETS 197) makes an important contribution to the protection of a particularly vulnerable group of irregular migrants and provides measures to protect and promote the rights of victims, including in respect to their private life, providing them with assistance (subsistence, medical, counselling, legal, linguistic, safety and protection), recovery and reflection, residence, compensation and repatriation.

39. The Committee of Minister has itself laid the foundations for promoting further the rights of irregular migrants in *Recommendation No. R (2000) 3 to member states on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship*. In this Recommendation the Committee of Ministers recognises that certain rights should be open to all citizens and foreigners, whatever their status. Your Rapporteur considers that it is important to list the five principles laid out by the Committee of Ministers in this Recommendation as they are fundamental as a minimum starting point for the development of the rights of irregular migrants in the social field. The five principles are as follows:

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.
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.

40. Also developed by the Committee of Ministers are the *20 Guidelines on Forced Return*<sup>22</sup> which address all stages of the return process from the identification of an irregular situation to the return itself.

41. *The Parliamentary Assembly of the Council of Europe* has tackled a number of issues relevant to the protection of the rights of irregular migrants and reference in this respect can be made to its [Recommendation 1211 \(1993\)](#) on clandestine migration: traffickers and employers of clandestine migrants, [Recommendation 1325 \(1997\)](#) on trafficking in women and forced prostitution in Council of Europe member states, [Recommendation 1449 \(2000\)](#) on clandestine migration from the south of the Mediterranean into Europe, [Recommendation 1467 \(2000\)](#) on clandestine immigration and the fight against traffickers, [Recommendation 1504](#) on non expulsion of long term immigrants, [Recommendation 1545 \(2002\)](#) on a campaign against trafficking in women, [Recommendation 1547 \(2002\)](#) on expulsion procedures in conformity with human rights and enforced with respect for safety and dignity, [Recommendation 1577 \(2002\)](#) on creation of a charter of intent on clandestine migration, [Recommendation 1618 \(2003\)](#) on Migrants in irregular employment in the agricultural sector of southern European countries, [Recommendation 1645 \(2004\)](#) on access to assistance and protection for asylum-seekers at European seaports and coastal areas and [Recommendation 1695 \(2005\)](#) on the draft Council of Europe convention on action against trafficking in human beings.

42. *The European Commissioner for Human Rights* has taken a particular interest in the rights of irregular migrants in his country visit reports. He has also issued a recommendation on the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders which has a particular relevance for irregular migrants<sup>23</sup>.

43. The country by country work carried out by *ECRI (European Commission Against Racism and Intolerance)* in relation to combating hostility, intolerance, racism and discrimination, also has a particular relevance for irregular migrants who may face double discrimination as migrants and as persons in an irregular situation.

## **Part II: MINIMUM RIGHTS FOR IRREGULAR MIGRANTS**

44. Your Rapporteur is conscious of the large number of rights which could be discussed in the context of drawing up a list of minimum rights for irregular migrants. In his report he has decided to tackle first a number of social rights which merit a more in depth discussion as they are the rights that are perhaps the most contentious when applying minimum rights for irregular migrants. Your Rapporteur will then go on and examine some of the more well established civil and political rights taking into account how they have developed under the case-law of the European Court of Human Rights. Your Rapporteur would like to underline that in many instances irregular migrants should in principle be entitled to more than just minimum rights and that if existing international human rights were fully applied, greater protection would be offered.

45. Your Rapporteur intends to keep in mind that the minimum rights of irregular migrants need to be applied to migrants when entering the country, during their stay and during the course of their return.

### **I. Minimum social rights**

46. Your Rapporteur has chosen to identify a number of social rights<sup>24</sup> which he considers go to the heart of the protection of the rights of irregular migrants and where it may be necessary to provide clarification of the nature and scope of the rights concerned at a European level.

47. These rights include, housing and shelter guaranteeing human dignity, health care, social security, conditions of employment and education.

*i. Housing and shelter guaranteeing human dignity*

48. There is a very close link between the right to housing and shelter guaranteeing human dignity and the enjoyment of other civil and political and economic and social rights. As such, the right to housing is one of the most essential rights which needs to be protected in order to facilitate the enjoyment of many of the other rights in practice.

49. Included within the right to an adequate standard of living is the right to housing. This is reflected in the Universal Declaration of Human Rights (Article 25 (1)) and the International Covenant on Economic, Social and Cultural Rights (Article 11 (1)). It is in principle applicable to all persons regardless of nationality or legal status<sup>25</sup>.

50. The Revised European Social Charter provides for the right to housing under Article 31. For it to extend to irregular migrants one would need to argue the significance of the right for the preservation of human dignity, along the lines argued in the case of IFHR (International Federation of Human Rights) v. France<sup>26</sup>. Articles 3 (freedom from degrading treatment or punishment) and 8 (right to private and family life, home and correspondence) of the European Convention on Human Rights might also be invoked in the event of there being "intolerable living conditions"<sup>27</sup>.

51. Your Rapporteur is aware of problems arising in a number of countries where asylum seekers or failed asylum seekers have been denied access to housing. In the United Kingdom, Section 55 of the Nationality, Immigration and Asylum Act 2002 deprived, until its suspension, asylum seekers of all support if they had not made their applications for asylum as soon as reasonably practicable after arrival in the country. EU Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers has a similar provision under Article 16.2 which has been much criticised. In the Netherlands, failed asylum seekers have to leave their accommodation within 28 days and thereafter have no access to official shelter or other reception provisions<sup>28</sup>.

52. Your Rapporteur considers that irregular migrants should have at least a minimum right to housing and shelter guaranteeing a minimum level of dignity, particularly in view of the importance of the right for the enjoyment of other civil, political and economic rights.

*ii. Health care*

53. The 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".

54. Article 28 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families provides for the right, including for irregular migrants, to receive any medical care that is urgently required for the preservation of life or avoidance of irreparable harm to health.

55. The European Convention on Human Rights under Article 3 may in certain exceptional circumstances protect those denied health care if they may as a consequence suffer inhuman or degrading treatment or punishment<sup>29</sup>. In the case of *Pretty v. the United Kingdom*, the Court held that "the suffering which flows from naturally occurring illness, physical or mental, may be covered by Article 3, where it is or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible"<sup>30</sup>.

56. The European Committee on Social Rights, in the collective complaint of the IFHR (*International Federation of Human Rights v. France* (see above)) held 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". The Committee thus found that Articles 13 (right to social and medical assistance) and 17 (right of children to protection) of the Charter applied to irregular migrants. In the case in question the Committee did not find a violation of Article 13 but only of Article 17.

57. Your Rapporteur notes that a bottom line appears to have been drawn in which access to emergency health care is a minimum standard to be applied. This would also appear to be in line with the right to life protected under Article 2 of the European Convention on Human Rights. There does not, however, appear to be a common understanding as to what urgent or emergency health care entails. A shift however can be noted from a strict interpretation of

urgent care (essential treatment, which cannot reasonably be delayed) to a more flexible one evolving towards "necessary care" on the basis of which doctors consider regular follow-ups and vaccinations also to be part of "urgent treatment"<sup>31</sup>. This is in keeping with a more integrated concept of health care and in line with the conclusions of the United Nations Committee on Economic Social and Cultural Rights which has stated that "States are under the obligation to respect the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including ..... asylum seekers and illegal immigrants, to preventive, curative and palliative health services ...."<sup>32</sup>

58. The level of health care may also depend on whether the person concerned is a member of a particularly vulnerable group. In this respect recognition needs to be made of the particular situation and needs of children, the elderly, pregnant women and the disabled.

59. Notwithstanding that access to emergency health care is generally available, your Rapporteur is aware that access to this health care may in fact be problematic. This may be because of an obligation on doctors to report irregular migrants to the police (such as in Germany), or because of the lack of information about health care. In Belgium, for example, hospitals are often uncertain how to deal with migrants, whether lawful or unlawful, and GPs will frequently refuse to treat irregular migrants and refer them to a specific hospital where such treatment is normally available, but with the consequence of delaying the time taken for the treatment<sup>33</sup>.

60. Your Rapporteur concludes that as a minimum, irregular migrants should have the right to emergency healthcare clearly recognised in domestic law so as to ensure that there are no practical obstacles to the enjoyment of the right.

61. Furthermore, your Rapporteur considers that States should seek to provide more holistic health care, taking into account, in particular, the particular needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly.

### *iii. Right to social security*

62. Social security may encompass both social assistance and social insurance. Social assistance can include a range of different types of support, including cash payments, assistance in kind, emergency assistance, family benefits, etc. Social insurance is concerned with contributory benefits and repayment of those contributions<sup>34</sup> and a strong argument can be put forward that those who make contributions should be entitled to benefit from those payments or at least be repaid the sums contributed<sup>35</sup>.

63. International human rights standards are unfortunately not always explicit in dealing with irregular migrants and their right to social security<sup>36</sup> and it is difficult to identify a common thread through the different instruments. Some instruments do cover irregular migrants and the reference to "all persons" contained in many treaties is wide enough to cover both regular and irregular migrants. One example of a treaty which covers irregular migrants is Article 9(1) of ILO Convention No. 143 which guarantees equal treatment between irregular and regular migrant workers in respect of rights arising out of past employment as regards remuneration, social security and other benefits. It is however the case that there are other treaties which do not cover irregular migrants, or remain unclear as to their scope of application.

64. Returning again to the European Social Charter and protection of irregular migrants<sup>37</sup> there are various provisions which could be relevant if the argument of preservation of human dignity is raised based on the findings of the European Committee on Social Rights in the case of IFHR (International Federation of Human Rights) v. France<sup>38</sup> (see above). The right to social and medical assistance in Article 13, the right of children to protection in Articles 7 and 17, the right of elderly persons to social protection in Article 23 and the right to protection against poverty and social exclusion in Article 30 could all be relevant in this respect.

65. An examination of national practices reveals differing approaches to the question of access to social assistance. Some countries deny any access to social assistance benefits, but most countries follow a mid-way approach providing certain benefits. These may include non-pecuniary benefits in kind (food, clothing, housing) and sometimes these may include assistance benefits for children and minors which may be left to the discretion of local municipalities<sup>39</sup>.

66. In the opinion of your Rapporteur there are a number of basic elements of the right to social security which can be distilled in favour of irregular migrants<sup>40</sup>.

67. Social protection through social security should not be denied where it is necessary to alleviate poverty and preserve human dignity.

68. Children are in a particularly vulnerable situation and they should be put on the same footing as national children in the enjoyment of social and other protection.

69. With regard to the specific category of irregular migrants in work, they should receive equal protection to that of nationals, including in respect of compensation for work accidents.

70. Concerning those who make social security contributions, they should be able to benefit from these contributions or be reimbursed, for example in the event that they are expelled from the country. In the event that persons are regularised, their contributions should be validated for the period that they have contributed to the social insurance system.

*iv. Conditions of employment*

71. Irregular migrants work as they need to find a way of providing for themselves and their families. Taking this undeniable fact into account one needs to ensure that irregular migrants enjoy certain basic rights so as not to be exploited and to ensure that they enjoy certain rights linked to fair conditions of employment. These include the right to fair wages, reasonable working conditions, compensation for accidents, access to the courts to defend their rights and also freedom to join a trade union.

72. Some of the worst forms of exploitation take place in the agriculture industry, and in particular in the growing and picking of fruit and vegetables. The regular reports from El Ejido in Spain are particularly concerning, but exploitation is widespread across all of Europe and can take many different forms and can have serious consequences. The death of 18 cockle pickers trapped by rising tides in Morecambe Bay in the United Kingdom is an extreme example of where irregular migrants have recently lost their lives. Another extreme example was brought before the European Court of Human Rights and concerned a minor of Togolese nationality who worked for three years in continuous service without remuneration in France<sup>41</sup>. Recent concerns have also been raised about the conditions of North Korean workers in the Gdansk shipyard in Poland and the minimal payments made to these workers by a private subcontractor.

73. International human rights instruments guarantee the principle of equal treatment in respect of fair employment conditions between nationals and non nationals irrespective of legal status<sup>42</sup>. As an example, the International Covenant on Economic, Social and Cultural Rights recognises in Article 7 "the right of everyone to the enjoyment of just and favourable conditions of work...". Support is given to this notion in ILO international labour standards, which elaborate on this right in considerably more detail, as well as under the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families<sup>43</sup>. The European Convention on Human Rights specifically covers, for example, prohibition of slavery and forced labour (Article 4) and freedom of assembly and freedom of association (Article 11) including the right to form or join a trade union.

74. As has been indicated in the report on the European Social Charter and protection of illegal migrants<sup>44</sup>, the right to work, in so far as this prohibits forced labour (Article 1 paragraph 2) and the right to dignity at work (Article 26) are issues in which the human dignity of irregular migrants may be affected.

75. Your Rapporteur is therefore of the view that certain minimum rights in relation to conditions of employment should be respected. These include the right to fair wages, reasonable working conditions, compensation for accidents, access to the courts to defend their rights and also freedom to form and join a trade union.

76. It is important that these rights be enjoyed in practice. Your Rapporteur considers for example that legal aid should be available, where necessary, and that the threat of expulsion should not outweigh the incentive of bringing any action.

*v. Education*

77. The right to education under international human rights law is unequivocal. Article 26 of the Universal Declaration of Human Rights, for example, 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" and this is also reflected in Article 16 of the International Covenant on Economic, Social and Cultural Rights.

78. This right provides for primary education free for all without distinction. Most Council of Europe member states also apply this right in respect of secondary school education because of compulsory schooling requirements<sup>45</sup>.

79. The European Convention on Human Rights follows this line in Article 2 of the First Protocol, which provides that "No person shall be denied the right to education". When linked with the non-discrimination provision in Article 14 this right clearly applies to nationals or non nationals whether in a regular or irregular situation. Article 17 paragraph 2 of the Revised European Social Charter calls on States "to provide to children and young persons a free primary and secondary education". However, for it to apply to irregular migrants a dynamic interpretation of the provision would be required by the European Committee on Social Rights.

80. Your Rapporteur considers that the position in international human rights law is clear, namely that children of irregular migrants have a right to education. This right extends as a minimum to free of charge education up to primary school level and also to secondary level in those countries where such schooling is compulsory.

81. While this position in international law is clear, your Rapporteur recognises that it can be difficult for children of irregular migrants to enjoy this right in practice. Some hurdles they may face include the fear that they be reported to the authorities as being irregular migrants if they attend school, the possibility that they be placed in separate schools (for example pending their return to their country of origin), the lack of recognition given to the studies of irregular migrants in certain countries where certificates are not issued for irregular migrant children, the lack of appropriate intercultural education, and the lack of appropriate language education and also the problem of recognition of education when they return to their country of origin.

## **II. Minimum civil and political rights**

82. Because of the nature of civil and political rights, applying in general to all persons, with the exception of certain restrictions placed on the political activities of aliens, it is difficult to define a minimum list with precision. Your Rapporteur however considers that the following minimum rights require highlighting:

### *i. Right to life*

83. The right to life of irregular migrants needs to be protected. In view of the number of tragic deaths which occur every year as people seek to enter Europe irregularly, the authorities should be under a duty to save as many lives as possible. Similarly the authorities should not use life threatening force to prevent irregular migrants entering Europe<sup>46</sup>.

### *ii. Prohibition of torture, inhuman or degrading treatment or punishment*

84. The general prohibition on torture, inhuman or degrading treatment or punishment applies also to irregular migrants. Particular concerns have been raised by the Committee for the Prevention of Torture (CPT)<sup>47</sup> and the Commissioner for Human Rights<sup>48</sup> about the conditions of detention of irregular migrants and their treatment when being returned to their home country.

85. Detention and return should respect the right to dignity and safety of irregular migrants. Your Rapporteur is concerned about some of the coercive measures used to expel irregular migrants, including beating, binding, gagging and the use of tranquillizers, incapacitating or irritant gas. Your Rapporteur is also concerned about the need to respect the dignity of children in the return process. Steps by the authorities, such as taking children from their classrooms to expel them, are not acceptable.

86. Your Rapporteur also notes that expulsion of an irregular migrant who has an illness which has attained an advanced or terminal stage and where there is no prospect of medical



care or family support in the country of origin, may amount to inhuman or degrading treatment<sup>49</sup>. Furthermore, persons should not be removed as long as they are medically unfit to travel<sup>50</sup>.

*iii. Prohibition of slavery and forced labour*

87. This right is linked to minimum rights in relation to conditions of employment. Your Rapporteur is also concerned about trafficking in human beings. Irregular migrants are particularly vulnerable to exploitation, which in its most extreme forms can be classified as slavery or forced labour. A situation in which migrants are held against their will and forced to work by private persons would be sufficient for them to be regarded as being subjected to at least forced labour and possibly also slavery<sup>51</sup>.

*iv. Liberty and security*

88. The right to liberty and to security applies to everyone (without distinction as to regularity or irregularity) and is guaranteed under Article 5 of the European Convention on Human Rights. Deprivation of liberty may only take place on one of five grounds listed in the Convention. Article 5 (1) (f) relates specifically to irregular migrants preventing them from "effecting an unauthorised entry into the country" or for taking action "with a view to deportation or extradition".

89. As a general rule detentions should be necessary and resorted to for irregular migrants only as a last resort. There may be instances where there is clearly no need to detain someone as there is no risk of absconding or there are alternative measures (guarantees, surety, etc.) that can be taken.

*v. Holding of irregular migrants*

90. Irregular migrants should be held, wherever possible, in special detention facilities for irregular migrants<sup>52</sup>. They should not be held in police stations or in prisons. Furthermore they should not be held with convicted prisoners and there should be effective screening to make sure that they are not exposed to risk of harm from others who are being held<sup>53</sup>.

91. Children should only be detained as a measure of last resort<sup>54</sup>. If they are detained, as provided by Article 37b of the Convention on the Rights of the Child, they should only be detained for "the shortest appropriate period of time". If they are detained it should be in suitable facilities with members of their family and education should be available. Detention or holding of other vulnerable persons (pregnant women, mothers with young children, elderly, people with disabilities) should be avoided wherever possible. Bearing in mind that a proportion of irregular migrants will be detained as families, accommodation suitable for lodging families should be available in order to respect the right to family life. Men and women should be separated.

*vi. Period of detention*

92. Detention should not be for an excessive period of time and should not continue beyond the period for which the State can provide appropriate justification. It should not, for example, extend beyond what is necessary to arrange for repatriation or to consider an application for asylum. The same principles apply to confinement in an international zone, for example at frontiers and airports<sup>55</sup>. If removal arrangements are not executed with due diligence then detention should cease<sup>56</sup>.

93. Your Rapporteur also considers that a maximum period of custody should be set by law and that it should in no cases be unlimited or excessive in length.

*vii. Contacts*

94. Detainees should have the right to contact anyone of their choice, including a lawyer, member of a family, non-governmental organisations, UNHCR, etc.<sup>57</sup>. Interpretation should be made available, and free legal aid should also be made available where necessary. Detainees should also have access to adequate medical care, particularly important for those who may

have suffered physically or mentally from their journey or from the results of persecution in their home country. Care should be taken to ensure that conditions of detention should not exacerbate a risk of suicide or self-harm<sup>58</sup>.

95. Irregular migrants in detention also have the right to communicate with the consular posts of their country of origin and to be informed by the authorities of the State where they are detained of their rights under the 1963 Vienna Convention on Consular Relations.

*viii. Deception*

96. Deception should not be used as a means of detaining irregular migrants. As was held in the case of *Conka v. Belgium* " a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the removal of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty, is not compatible with Article 5 (of the European Convention on Human Rights)<sup>59</sup> .

*ix. Independent judicial scrutiny of detention*

97. Independent judicial scrutiny of detention is of fundamental importance for both the protection of the physical liberty of individuals and the safeguarding of their personal security. This applies equally to irregular migrants.

98. Detention must be judicially authorised. The holding for example by border guards would not be compatible with the requirements of Article 5 as was found in the case of *Shamsa v Poland* (45355/99 and 45357/99) 27 November 2003 where the applicants were held by border guards in an airport transit zone for 14 days.

99. In accordance with Article 5 of the European Convention on Human Rights, individuals should be expressly informed, without delay and in a language they understand of all their rights and of the procedures applicable to them. They should also have access to a lawyer throughout the detention period<sup>60</sup>. They should be entitled to take proceedings by which the lawfulness of detention is decided speedily by a court.

*x. Right to a hearing*

100. Anyone whose right of entry is disputed should have the right to a hearing, with the assistance of an interpreter if necessary, on arrival, in order to be able to explain the reasons for entering the country and to be able to lodge an application for asylum if appropriate<sup>61</sup>.

101. When any decision is taken concerning entry or refusal to grant entry of an alien, or when a decision is taken to expel a person in an irregular situation, full account should be taken of the right to asylum, the right of *non-refoulement* and the rights flowing from the European Convention on Human Rights and in particular the right to life (Article 2), freedom from torture (Article 3) and the right to respect for private and family life (Article 8).

102. In the process leading to the removal order, the person concerned should be afforded an effective remedy before a competent authority, judicial in preference, which is impartial and enjoys the safeguards of independence. The time limits for exercising the remedy should not be unreasonably short, free legal aid and interpretation should be available, where necessary, and the remedy should have a suspensive effect when the returnee has an arguable claim that he or she would be subjected to treatment contrary to his or her human rights if returned<sup>62</sup>.

103. An irregular migrant being removed from the country also has the right to an effective access to the European Court of Human Rights by lodging an individual application with the Court under Article 34 of the European Convention on Human Rights.

*xi. Collective expulsion*

104. The collective expulsion of aliens is prohibited. A removal order should only be issued on the basis of a reasonable and objective examination of the particular case of each individual person concerned and it should take into account the circumstances specific to each case<sup>63</sup>.

*xii. Private and family life*

105. The enjoyment of the right to respect for private life and family life may be an issue of particular importance when a person is being removed from a country. Removal should not take place when the person concerned has particularly strong family or social ties with the country seeking to remove him or her and the lack of links with the country to which he or she will be removed are likely to lead to the conclusion that expulsion would violate the right to respect for family and/or private life of the person concerned<sup>64</sup>. In examining family unity, the ties of all persons in the family unit should be taken into account, in particular those of the child. Unreasonable ties or unreasonable expectations that someone should leave the country to live with the person seeking entry or being returned should not be required<sup>65</sup>.

106. While there is no right to citizenship or right to regularisation, there should be no arbitrary denial of citizenship / regularisation when this may impact on the private or family life of the individual<sup>66</sup>. In this respect it can be noted that the failure to regularise the status of an irregular migrant could result in a violation of the right to respect for private life in circumstances where the status of the person concerned became precarious after they had spent virtually all their life in the country and all their personal, social and economic ties were strong enough for them to be regarded as sufficiently integrated into society. Regularisation of their status could be regarded as essential for them to be able to lead a normal life irrespective of whether or not steps were being taken to remove them<sup>67</sup>.

107. Children have particular needs which include the right to a name and registration at birth and a nationality<sup>68</sup>.

108. Finally, your Rapporteur also notes the need for the confidential treatment of information (such as relating to an asylum application) concerning the reasons for which a person is being returned, in particular when this risks putting a person into danger following return<sup>69</sup>.

*xiii. Thought, conscience and religion, freedom of expression and freedom of assembly and association*

109. While certain restrictions can be placed on the political activities of aliens, whether they are in a regular or irregular situation, the restrictions on the rights to freedom of assembly, association and expression should not extend beyond the bounds of what is reasonably necessary.

110. For example, the mere fact that a gathering of persons is comprised of irregular migrants is an insufficient justification for an interference with the right to freedom of assembly<sup>70</sup>. Furthermore an irregular status should not be a sufficient justification to prevent an irregular migrant becoming a member of a trade union<sup>71</sup>.

*xiv. Right to marry*

111. Total barriers should not be put in place preventing irregular migrants from marrying. Irregular migrants, like other aliens may find that their foreignness and or status may provide obstacles to their marrying in the country in which they are living. These should however never be such as to prevent the marriage from occurring at all<sup>72</sup>. In practice where an option and a possibility for the irregular migrant to marry and lead a married life in his or her country of origin exists, this may satisfy the requirement of the right to marry.

*xv. Protection of property*

112. Irregular migrants should be entitled to the protection of their property, which includes protection from the risk of it being damaged, destroyed or being illegally taken. They should be able to manage or dispose of it, including through banking facilities allowing for the transfer of earnings and savings. Protection of property may be particularly important if irregular migrants are detained, expelled or not granted the right of entry or re-entry<sup>73</sup>.

*xvi. Discrimination*

113. Irregular migrants are entitled to the same rights of non-discrimination as laid down in Article 14 of the European Convention on Human Rights and Protocol No. 12 to the Convention.

114. There should be no discrimination on grounds of race or ethnicity in granting or refusing admission or in expulsion of an irregular migrant. The same applies for procedures of regularisation where it can also be noted that differences in treatment between various categories of irregular migrants could be problematic. For example an amnesty for immigrants who have entered illegally but not for those who have entered lawfully but then overstayed, could be problematic<sup>74</sup>.

*xvii. Protection against trafficking*

115. The Anti Trafficking Convention of the Council of Europe provides a minimum level of rights for victims of trafficking including measures to protect and promote the rights of victims, including in respect to their private life, providing them with assistance (subsistence, medical, counselling, legal, linguistic, safety and protection), recovery and reflection, residence, compensation and repatriation.

116. States need to be encouraged to guarantee these rights in practice and ratify this Convention.

**III. Realisation of the rights of irregular migrants<sup>75</sup>**

117. Even with an advanced legal system protecting the rights of irregular migrants there may be problems in accessing rights in practice, in particular for irregular migrant workers. Obstacles may include matters such as lack of knowledge of rights, fear of being reported and expelled, fear of losing a job, language barriers, costs, etc.

118. *Knowledge of rights* is essential. Local authorities, trade unions, civil society, government offices all have a role in ensuring that irregular migrants are made aware of their rights and ensuring that irregular migrants are able to come forward and claim their rights.

119. Judicial enforcement is not the only way of securing the rights in practice. *Non-judicial enforcement* may be a particularly effective way of guaranteeing the rights of irregular migrants in practice, for example through the work of national ombudsmen with general mandates or specific mandates dealing with migrants.

120. *Unionisation* of undocumented migrants is an important way to guarantee the rights of irregular migrants in the workforce and *working with employers* to prevent exploitation is another. Mediation and collective action involving trade unions and employers may indeed be more effective and more attractive to irregular migrants who may fear being expelled if they follow a legal channel<sup>76</sup>.

121. Another option includes *working with Governmental agencies* (labour inspectorates and the police, for example). This may however have draw-backs in terms of risks of reporting back to the authorities and it can be noted that certain authorities have a reputation for not giving assistance to irregular migrants<sup>77</sup>.

*i. Fear of reporting and expulsion*

122. Your Rapporteur is particularly sensitive to the real fear of irregular migrants that if they claim their rights they will bring themselves to the attention of the authorities which could then lead to their possible expulsion.

123. There needs to be some form of de-linkage between claiming rights on the one hand and the processing of personal information as to status on the other. The obligation put on certain authorities in certain countries to denounce those in an irregular situation needs to be re-examined if irregular migrants are to enjoy certain rights in practice. No agency with a mandate to uphold rights should be obliged to denounce irregular migrants.

*ii. Criminalisation of assistance*

124. Your Rapporteur is concerned about the use of criminal sanctions against those who provide assistance to migrants in an irregular situation. While such sanctions are rarely applied, your Rapporteur has grave concerns about the threat of such sanctions on civil society actors and individuals providing what can be considered as primary essential assistance to avoid persons becoming destitute.

125. Your Rapporteur recognises that legislation is necessary to criminalise smugglers and traffickers of persons and also those who exploit irregular migrants for profit. A balance however needs to be assured so as not to criminalise those, whether organisations (public or private) or individuals, who provide humanitarian assistance. Domestic legislation should allow for such a distinction.

*iii. Public awareness concerning the situation of irregular migrants*

126. Public awareness raising is needed if the debate concerning rights of irregular migrants is to progress. There is all too often negative stereotyping of irregular migrants in the press where they are represented as a burden on society, criminals, etc. The public need to be aware of the difficult situation in which many irregular migrants live, the level of exploitation that takes place, their contribution to society, etc. The public also has to be aware that there may be a number of actions which need to be taken together to deal with irregular migrants. One action may be to regularise the situation of certain irregular migrants, another action, which is an obligation, is to provide irregular migrants with basic human rights and a third action may be to implement a return procedure to the countries of origin of some of the irregular migrants. All these actions will need to be explained to the public.

*iv. Regularisation programmes for irregular migrants*

127. Your Rapporteur is well aware of legitimate concerns that periodic regularisation programmes risk undermining the credibility of regular migration policy and encourage further irregular migration. Any regularisation process should be considered as part of a comprehensive strategy of migration management and not as a measure of last resort when all other measures have failed.

128. Regularisation of irregular migrants may however be one of the most effective ways in which to guarantee the rights and human dignity of a large number of irregular migrants.

129. In reality, it is almost impossible for States to return a large number of irregular migrants. This may be for legal reasons, such as the lack of readmission agreements, or for practical reasons, such as the inability to identify those living in an irregular situation, or for humanitarian reasons, taking into account the high level of integration that has taken place of irregular migrants and their families.

130. The phenomena of irregular migration is unlikely to change in the near future. Europe will continue to attract migrants because of the opportunities it offers. It will also continue to create a demand for irregular migration throughout Europe, with jobs left empty in certain sectors, such as in agriculture, construction, catering, domestic care, etc., or with gaps left by an ageing population with a falling birth rate.

131. States need to have policies and mechanisms to regulate the situation of those in an irregular situation going beyond the coercive measure of return. These policies and mechanisms may take different forms depending on the country concerned but need to take account not only those who are currently in an irregular situation, but also those who are likely to find themselves in an irregular situation in the future. States also need to take steps to reduce the informal labour market, which is made up of both nationals and migrants and which serves as a pull factor for irregular migration.

132. The IOM and the Organization for Economic Cooperation and Development (OECD) estimated<sup>78</sup> that in 5 countries of Europe during the 1990s that about 1.5 million people were regularised. Italy regularised 716,000 irregular migrants in three waves; Greece accepted 370,000 people in 1997 -1998, mainly from the Balkans and Eastern Europe; Spain effectively regularised 260,000 immigrants mainly from Africa and Latin America; Portugal legalised 61,000 migrants.

133. To these examples can be given some more recent examples. Spain has in 2005 adopted a large-scale regularisation programme to which approximately 700,000 irregular migrants have applied. Greece in 2001 introduced a regularisation programme which affected 228,000 persons, Italy regularised 634,700 persons in 2002 and Portugal in 2001 regularised 170,000 persons<sup>79</sup>. Switzerland under a programme entitled "Humanitarian Action 2000" granted provisional admission to approximately 16,000 persons. The United Kingdom, which had to deal with a backlog of asylum applications, has in two exercises (backlog clearance exercise and family indefinite leave exercise) granted leave to remain to a significant number of persons.

134. One type of regularisation which deserves further attention, notwithstanding some controversy over its use, is the system of individual "earned" regularisation where irregular migrants might be able to "earn" the right to remain through proof of integration, work, etc.

135. Your Rapporteur is of the view that regularisation programmes in general merit further analysis as a means of regularising the situation of irregular migrants throughout Europe and that further analysis is needed of the effects of such programmes including on social cohesion and the economy. Your Rapporteur is aware of the political sensitivity of regularisation programmes and considers that a more comprehensive examination, discussion and analysis of such programmes could pave the way for a more efficient migration management strategy which is both transparent and fair, in particular in relation to irregular migrants.

#### **IV. Conclusions**

136. Europe has a large number of irregular migrants estimated at between 3 million and 5 million persons although some estimates are even higher. While steps are being taken by states across Europe to reduce the number of irregular migrants, such as through tightening of borders, promoting voluntary and forced returns and regularising the situation of many in an irregular situation, there will always be a significant number of irregular migrants in Europe, who for one reason or another cannot be returned or regularised.

137. For these people, a minimum level of rights should be guaranteed in law and in practice to allow them to live in dignity and to avoid their exploitation.

138. Notwithstanding that there are already a large number of different human rights instruments which can be applied for the benefit of irregular migrants, there remains a lack of clarity of the exact nature and scope of the rights available to irregular migrants, in particular in the area of economic and social rights.

139. At a European level, the European Convention on Human Rights has, through the individual petition system, been able to develop a wider picture of the civil and political rights that irregular migrants can enjoy. The European Social Charter and the Revised Social Charter would at first sight appear to offer only limited scope for the protection of the rights of irregular migrants. That said, the European Committee on Social Rights in the collective complaint of IFHR (International Federation of Human Rights) v. France<sup>80</sup> has been ready to apply the principle of human dignity to irregular migrants and their entitlement to medical assistance, thus opening up the possibilities for using the Charter for the benefit of irregular migrants in a number of situations where the human dignity of irregular migrants may be called into question.

140. The European Committee for the Prevention of Torture (CPT) and the Council of Europe Commissioner for Human Rights have both been active in dealing with issues relevant to the rights of irregular migrants in different settings. The Council of Europe Convention on Action against Trafficking, provides a number of safeguards for victims of trafficking and offers scope for protecting further the rights of irregular migrants.

141. The Committee of Ministers should be commended for laying the foundations for promoting further the rights of irregular migrants in Recommendation No. R (2000) 3 to member states on the Right to the Satisfaction of Basic Material Needs of Persons in Situations of Extreme Hardship. The work of its expert committees should also be highlighted as being extremely important for clarifying further the rights of irregular migrants. Reference in this respect is made to the European Committee on Social Cohesion (CDCS) and its work on access to social protection for illegal labour migrants, and to the Committee of Experts on the Minimum Rights of Irregular Migrants (MG-R-AD) which is examining access of irregular migrants to certain minimum social rights.

142. Notwithstanding this different work at a European level, further steps are needed.
143. The first is to ensure that member states sign and ratify the different human rights instruments relevant to the protection of irregular migrants.
144. The second is to ensure that member states take into account the minimum rights outlined in this report.
145. The third is to ensure that the relevant expert committees of the Committee of Ministers, as a priority, clarify the minimum rights to be enjoyed by irregular migrants, with a view to the Committee of Ministers preparing a recommendation or guidelines on the matter.
146. The fourth is to encourage full use of the mechanisms available within the Council of Europe, namely the individual petition system under the European Court of Human Rights and the Collective Complaints System under the European Social Charter and the Revised Social Charter, in order to clarify further the rights under these instruments.
147. As a final point, developments in the case-law of the European Court of Human Rights and the European Committee on Social Rights should be monitored so as to analyse the effectiveness of these instruments in protecting the rights of irregular migrants. Gaps in these instruments should be addressed, as necessary, in the light of future interpretations given to these treaties.

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*Reporting committee:* Committee on Migration, Refugees and Population

*Reference to committee:* [Doc. 10109 rev.](#), Ref. 2947 (26.4.2004)

*Draft resolution* adopted by the Committee with one vote against, *draft recommendation* adopted with one vote against by the Committee, on 11 April 2006.

*Members of the Committee:* Mr Mevlüt Çavuşoğlu (Chairperson), Mrs Tana de Zulueta (1<sup>st</sup> Vice-Chairperson), Mr Doros **Christodoulides** 2<sup>nd</sup> Vice-Chairperson), Mr Jean-Guy **Branger** (3<sup>rd</sup> Vice-Chairperson), Mr Pedro Agramunt, Mr Küllö Arjakas, Mr Hüseyin-Kenan **Aydin**, Mr Ryszard **Bender**, Mr Akhmed Bilalov, Mrs Mimount Bousakla (alternate: Mr Paul **Wille**), Mr Ivan **Brajović**, Mr Márton Braun, Lord Burlison (alternate: Mr Bill **Etherington**), Mr Christopher **Chope**, Mr Boriss **Cilevičs**, Mrs Minodora **Cliveti**, Mrs Elvira Cortajarena (alternate: Mr Joan **Puig Cordón**), Mr Franco Danieli, Mr Joseph Debono Grech, Mr Taulant **Dedja**, Mr Nikolaos **Dendias**, Mr Abilio **Dias Fernandes**, Mr Karl **Donabauer**, Mr Mats **Einarsson**, Mrs Lydie Err, Mr Valeriy **Fedorov**, Mrs Daniela Filipiová, Mrs Margrét Frimannsdóttir (alternate: Mrs Gudrún **Ögmundsdóttir**), Mrs Gunn Karin Gjøl, Mrs Angelika **Graf**, Mr John **Greenway**, Mr Andrzej **Grzyb**, Mr Ali Riza **Gülçiçek**, Mr Michael Hagberg, Mr Holger **Haibach**, Ms Gultakin Hajiyeva, Mr Doug Henderson (alternate: Mr Michael **Hancock**), Mr Jürgen Herrmann, Mr Ilie **Ilaşcu**, Mr Tadeusz **Iwiński**, Mrs Corien W.A. Jonker (alternate: Mr Ed **van Thijn**), Mr Oleksandr Karpov, Mrs Eleonora Katseli, Mr Tibor Kékesi, Mr Dimitrij **Kovačič**, Mr Petr Lachnit (alternate: Mr Tomáš **Jirsa**), Mr Geert Lambert, Mr Jean-Marie Le Guen (alternate: Mr Denis **Jacquat**), Mr Younal Loutfi, Mr Jean-Pierre Masseret (alternate: Mr Rudy **Salles**), Mrs Ana Catarina **Mendonça**, Mr Morten **Messerschmidt**, Mr Paschal **Mooney**, Mr Giuseppe Naro, Mr Xhevdet Nasufi, Mr Gebhard **Negele**, Mr Pasquale Nessa, Mrs Annette Nijs, Mr Kalevi **Olin**, Mr İbrahim **Özal**, Mr Cezar Florin **Preda**, Mr Alojz Pridal, Mr Gabino Puche (alternate: Mr Adolfo **Fernández Aguilar**), Mr Milorad Pupovac, Mr Martin Raguž, Mr Anatolij Rakhansky, Mr Marc **Reymann**, Mr Branko Ružić, Mr Samad Seyidov (alternate: Mr Mr Aydin **Mirzazada**), Mr Luzi Stamm (alternate: Mrs Rosmarie **Zapfl-Helbling**), Mr Sergiu Stati, Mrs Terezija **Stoisits**, Mrs Elene Tevdoradze, Mr Tigran **Torosyan**, Mrs Ruth-Gaby **Vermot-Mangold**, Mrs Iliana Yotova, Mr Akhmar Zavgayev, Mr Vladimir Zhirinovskiy, Mr Serhiy Zhyzhko, Mr Emanuelis Zingeris.

N.B. The names of the members who took part in the meeting are printed in bold.

Secretaries of the Committee: Mr Halvor Lervik, Mr Mark Neville, Ms Dana Karanjac

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<sup>1</sup> PICUM (Platform for NGOs for International Cooperation on Undocumented Migrants) Pieter Muller, PICUM Chairman, Working paper on undocumented migrants in Europe for the Steering Committee meeting of the minorities and multiculturalism interest group, European Foundation Centre, Stockholm, May 2001.

<sup>2</sup> The Economist, October 8<sup>th</sup> 2005, Decapitating the snakeheads.

<sup>3</sup> Sizing the unauthorised (illegal) migrant population in the United Kingdom in 2001, Home Office Online Report 29/05.

<sup>4</sup> World Migration 2003. Managing Migration, Challenges and responses for people on the move Page 253.

<sup>5</sup> PICUM Newsletter November 2005 citing a study by the Consorcio Euromediterráneo para la Investigación Aplicada sobre Inmigración Internacional (CARIM).

<sup>6</sup> 7<sup>th</sup> Conference of Ministers Responsible for Migration Affairs, Helsinki, 16 – 17 September 2002, Final Declaration, MMG-7 (2002) 1, paras. 31 (d) and 36.

<sup>7</sup> Jean-François Akandji-Kombe, the European Social Charter and protection of illegal immigrants (AS/Mig/Inf (2005) 17)

<sup>8</sup> Jeremy McBride, the European Convention on Human Rights and protection of irregular migrants (AS/Mig/Inf (2005) 21)

<sup>9</sup> Ryszard Cholewinski, Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights (CDMG (2004) 29), also published by Council of Europe Publishing , December 2005, ISBN 92-871-5878-9

<sup>10</sup> Dr. Paul Schoukens and Prof. Dr. Danny Pieters, Exploratory Report on the Access to Social Protection for Illegal Labour Migrants, CDCS (2004) 55

<sup>11</sup> See Ryszard Cholewinski, Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights, CDMG (2004) 29, Page 14

<sup>12</sup> Summary of rights taken from the Final report on the rights of non-citizens, David Weissbrodt, U.N. Doc. E/CN.4/Sub.2/2003/23 (2003)

<sup>13</sup> The Committee on the Elimination of Racial Discrimination (CERD) in its General Recommendation No. 30 on discrimination against non-citizens has recently removed any doubts as to the application of this Convention to non-citizens.

<sup>14</sup> Further clarification on the rights of migrant workers, including irregular migrants, is provided in the Draft ILO Multilateral Framework on Labour Migration which provides non-binding principles and guidelines for a rights-based approach to labour migration. This document is scheduled to be adopted in 2006.

<sup>15</sup> Doc. E/CN.4/Sub.2/2003/23 (26 May 2003), Executive summary.

<sup>16</sup> Advisory Opinion OC-18/03 of 17 September 2003 requested by the United Mexican States, Juridical Condition and Rights of the Undocumented Migrants, Series A No. 18, paras 133-134

<sup>17</sup> See Irregular migrants and the European Convention on Human Rights, Jeremy McBride, AS/Mig/Inf 21

<sup>18</sup> In relation to gainful occupation (where there is no direct exclusion of irregular migrants) under Article 18, states must:

- apply existing regulations in a spirit of liberality



- simplify existing formalities and reduce or abolish charges payable by foreign workers or their employers
- liberalise the regulations governing the employment of foreign workers
- recognise the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other contracting party

In relation to migrant workers' and their families' right to protection (where there is also no direct exclusion of irregular migrants) under Article 19, states must:

- organise free services for migrant workers and combat misleading anti-immigration propaganda;
- facilitate the departure, journey and reception of migrant workers
- promote co-operation between social services in countries of origin and host countries
- permit the transfer of migrant workers' earnings and savings
- promote and facilitate the teaching of the national language of the receiving state
- promote and facilitate the teaching of migrant workers' mother tongue to the children

See J.F Akandji-Kombe, *The European Social Charter and protection of illegal migrants*, AS/Mig/Inf (2005) 17, page 8

<sup>19</sup> Complaint No. 14/2003, decision of 8 September 2004

<sup>20</sup> Complaint No. 14/2003, decision of 8 September 2004, para 32.

<sup>21</sup> See for example *Foreign nationals detained under aliens legislation*, 7<sup>th</sup> General Report (CPT/Inf (97) 10) and *Deportation of foreign nationals by air*, 13<sup>th</sup> General Report (CPT/Inf (2003) 35)

<sup>22</sup> Forced return. 20 guidelines adopted by the Committee of Ministers, Strasbourg, 4 May 2005

<sup>23</sup> Recommendation of the Commissioner for Human Rights, Strasbourg, 19 September 2001, CommDH/Rec(2001)1.

<sup>24</sup> In selecting these rights, the Rapporteur has drawn heavily on the Recommendations contained in the Study on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights prepared for the European Committee on Migration (CDMG), CDMG (2004) 29.

<sup>25</sup> Ryszard Cholewinski (CDMG (2004) 29, page 19.

<sup>26</sup> Complaint No. 14/2003, decision of 8 September 2004

<sup>27</sup> Ryszard Cholewinski (CDMG (2004) 29, page 21. See in particular *Guzzardi v. Italy*, App. No. 7367/76, Commission Report, Eur.Ct.H.R.1995, (ser. B, No.35) (1978)

<sup>28</sup> Ryszard Cholewinski (CDMG (2004) 29, page 23, citing Pluymen "Undocumented Migrants in the Netherlands" in Platform for International Cooperation on Undocumented Migrants (PICUM), *Book of Solidarity. Providing Assistance to Undocumented Migrants in Belgium, Germany, the Netherlands and the UK*, Vol. 1 (Brussels: PICUM, December 2002) 35 at p.37

<sup>29</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, paras 46 to 47

<sup>30</sup> Pretty v. United Kingdom, Eur. Court of Human Rights, judgment of 29 April 2002 (Application No. 2346/02), para. 52

<sup>31</sup> Exploratory Report on the Access to Social Protection for Illegal Labour Migrants, Prof. Dr. Paul Schoukens and Prof. Dr. Danny Pieters, European Committee for Social Cohesion (CDCC), CDCC (2004)55, page 12

<sup>32</sup> See UN, ESCOR, ESC Committee, 22nd Session, Geneva, 25 April – 12 May 2000, General Comment No. 14 (2000). The right to the highest attainable standards of health, UN Doc. E/C.12/2000/4 (11 August 2000), para 34.

<sup>33</sup> Ryszard Cholewinski (CDMG (2004) 29, page 42

<sup>34</sup> Ryszard Cholewinski (CDMG (2004) 29, page 29 referring to the study of Prof. Dr. Paul Schoukens and Prof. Dr. Danny Pieters, CDCC (2004) 55

<sup>35</sup> Ryszard Cholewinski (CDMG (2004) 29, page 29 referring to the study of Prof. Dr. Paul Schoukens and Prof. Dr. Danny Pieters, CDCC (2004) 55

<sup>36</sup> See in this respect Prof. Dr. Paul Schoukens and Prof. Dr. Danny Pieters, CDCC (2004) 55 page 5 and Ryszard Cholewinski (CDMG (2004) 29, page 30

<sup>37</sup> J.F Akandji-Kombe, The European Social Charter and protection of illegal migrants, AS/Mig/Inf (2005) 17, page 9

<sup>38</sup> Complaint No. 14/2003, decision of 8 September 2004

<sup>39</sup> Prof. Dr. Paul Schoukens and Prof. Dr. Danny Pieters, CDCC (2004) 55 p. 12

<sup>40</sup> These reflect the conclusions in the studies on Obstacles to Effective Access of Irregular Migrants to Minimum Social Rights and the Exploratory Report on the Access to Social Protection for Illegal Labour Migrants. See Ryszard Cholewinski CDMG (2004) 29, and Prof. Dr. Paul Schoukens and Prof. Dr. Danny Pieters, CDCC (2004) 55

<sup>41</sup> See European Court of Human Rights, Siliadin v. France (73316/01, 26 July 2005)

<sup>42</sup> Ryszard Cholewinski (CDMG (2004) 29, p. 45

<sup>43</sup> Ryszard Cholewinski (CDMG (2004) 29, p. 45

<sup>44</sup> J.F Akandji-Kombe, The European Social Charter and protection of illegal migrants, AS/Mig/Inf (2005) 17, page 9

<sup>45</sup> Ryszard Cholewinski (CDMG (2004) 29, p. 24

<sup>46</sup> Jeremy McBride, Irregular migrants and the European Convention on Human Rights, AS.Mig/Inf (2005) 21, paras 19, 23 and 24

<sup>47</sup> See for example CPT General Reports: Foreign nationals detained under aliens legislation, 7<sup>th</sup> General Report (CPT/Inf (97) 10) and Deportation of foreign nationals by air, 13<sup>th</sup> General Report (CPT/Inf (2003) 35)

<sup>48</sup> Recommendation of the Commissioner for Human Rights on the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, Strasbourg, 19 September 2001, CommDH/Rec(2001)1

<sup>49</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, paras 126 and 127

<sup>50</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 16

- <sup>51</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 48
- <sup>52</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 10. CPT, Extracts from the 7<sup>th</sup> General Report (CPT/Inf (97) 10), para 29
- <sup>53</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, paras 82 and 88
- <sup>54</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 11
- <sup>55</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 56
- <sup>56</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 7
- <sup>57</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 10
- <sup>58</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 85
- <sup>59</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 64, *Conka v Belgium* (51564/99), 5 February 2002
- <sup>60</sup> CPT, Extracts from the 7<sup>th</sup> General Report (CPT/Inf (97) 10), paras 30 and 31
- <sup>61</sup> Recommendation of the Commissioner for Human Rights on the rights of aliens wishing to enter a Council of Europe member State and the enforcement of expulsion orders, Strasbourg, 19 September 2001, CommDH/Rec(2001)1, para 2.
- <sup>62</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 5.
- <sup>63</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 3
- <sup>64</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, paras 115 to 125
- <sup>65</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, paras 14 to 18
- <sup>66</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 31
- <sup>67</sup> See European Court of Human Rights, *Sisojeva and others v Latvia* (60654/00), 16 June 2005). Jeremy McBride, AS/Mig/Inf(2005)21, para 45
- <sup>68</sup> See International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Article 29. Furthermore see *Yean and Bosico v. Dominican Republic* (Inter-American Court of Human Rights, judgment of 8 September 2005, Series C No. 130) in which the Court issued a landmark decision upholding the international prohibition on racial discrimination in access to nationality.
- <sup>69</sup> Forced return. 20 Guidelines adopted by the Committee of Ministers, Guideline 12
- <sup>70</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 27
- <sup>71</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 28
- <sup>72</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, paras 41 to 43
- <sup>73</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, paras 98 and 128 to 131
- <sup>74</sup> See Jeremy McBride, AS/Mig/Inf(2005)21, para 125

<sup>75</sup> For a fuller examination on how to realise the rights of irregular migrants see Platform for International Cooperation on Undocumented Migrants (PICUM) Ten Ways to Protect Undocumented Migrant Workers available at [www.picum.org](http://www.picum.org).

<sup>76</sup> Platform for International Cooperation on Undocumented Migrants (PICUM) Ten Ways to Protect Undocumented Migrant Workers, page 73

<sup>77</sup> Platform for International Cooperation on Undocumented Migrants (PICUM) Ten Ways to Protect Undocumented Migrant Workers, pages 91-98

<sup>78</sup> IOM World Migration 2003 Managing Migration Challenges and responses for people on the move. Page 254.

<sup>79</sup> The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies, Amanda Levinson, Centre on Migration, Policy and Society, University of Oxford, 2005

<sup>80</sup> Complaint No. 14/2003, decision of 8 September 2004