Parliamentary Assembly
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COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Resolution 1509 (2006)[1]

Human rights of irregular migrants

Parliamentary Assembly

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 perish when seeking to enter Europe. For those that make it, many live in dangerous and inhumane conditions. A great number are exploited and many live in fear of being arrested and 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, regardless of 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, political, economic and social 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 the 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 No. 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers (1975), the European Convention on Human Rights (1950) (ETS No. 5), the European Social Charter (1961) (ETS No. 35), the revised European Social Charter (1996) (ETS No. 163) and the Council of Europe Convention on Action against Trafficking in Human Beings (2005) (CETS No. 197).

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1. Assembly debate on 27 June 2006 (18th Sitting) (see Doc. 10924, report of the Committee on Migration, Refugees and Population, rapporteur: Mr van Thijn). Text adopted by the Assembly on 27 June 2006 (18th Sitting).

10. The Assembly notes, however, that the large number of disparate instruments and the varying number 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 rights, on the one hand, and economic and social rights, on the other, to be applied by Council of Europe member states 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. A duty exists on the authorities to endeavour to save those whose life may be in danger in seeking to enter a country;

12.2. irregular migrants should be protected from torture and inhuman or degrading treatment or punishment. The return process of irregular migrants should be carried out respecting fully the right to dignity of returnees, taking into account, inter alia, their age, sex, state of health and eventual disabilities. 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;

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 separately from convicted prisoners. Children should only be detained as a measure of last resort and then for the shortest possible period of time. Detention or holding of other vulnerable persons (pregnant women, mothers with young children, the elderly, people with disabilities) should be avoided whenever possible. Suitable accommodation should be available to lodge families, 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 the 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 to enter a country is disputed should have the right to a hearing, with the assistance of an interpreter if necessary, 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 a 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 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 when 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. For example, information 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 doing so;

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 (ETS No. 177);

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, inter alia, should apply:

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

13.2. emergency health care should be available to irregular migrants and states should seek to provide more holistic health care, taking into account, in particular, the specific needs of vulnerable groups such as children, disabled persons, pregnant women and the elderly;

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 if expelled from the country, for example;

13.5. in relation to irregular migrants in work, they should be entitled to fair wages, reasonable working conditions, compensation for accidents, access to a court 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 of the member state;

13.6. all children have a right to education, extending to primary school and secondary school levels, 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 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 Protection of 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 No. 143 on Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of 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) (ETS No. 158), the revised European 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, political, economic and social 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 “Twenty 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.